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THE
SOUTHWESTERN REPORTER,
VOLUME 3,

CONTAINING

ALL THE CURRENT DECISIONS

OF THE

SUPREME COURTS OF MISSOURI, ARKANSAS, AND TENNESSEE,
COURT OF APPEALS OF KENTUCKY, AND SUPREME
COURT AND COURT OF APPEALS (CRIMINAL CASES) OF TEXAS.

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THE
Southwestern Reporter.
VOLUME III.

GROSS and others *v.* EDDINGER and others.

SAME *v.* CONRAD, Surviving Partner, etc..

(*Court of Appeals of Kentucky.* February 5, 1887.)

FRAUDULENT CONVEYANCES—HUSBAND CONDUCTING BUSINESS AS WIFE'S AGENT—LAND BOUGHT WITH PROFITS.

Where a husband, being indebted at the time, had his wife empowered to trade as a *feme sole*, and thereafter transferred his business to her, conducting it afterwards as her agent, but she has nothing to do with the management, buys no supplies, makes no sales, the entire management and control being left to him, and out of the profits a lot is bought, which is conveyed to her, *held*, his creditors may set aside his conveyance to the wife as in fraud of their rights, and subject the land to their debts.

Appeal from Louisville chancery court.

M. A. & D. A. Sachs, for appellants. *Lane & Burnett*, for appellees.

LEWIS, J. Appellees instituted their respective actions in the Louisville chancery court, for the purpose of setting aside a conveyance of a house and lot to appellant M. E. Gross, the wife, and subjecting it to the satisfaction of their debts against George S. Gross, the husband; and, the two cases having been tried together, judgment was rendered in favor of each of the plaintiffs for a sale of the property, as prayed for in their petitions.

The action of appellees Eddinger & Bro. was upon a judgment rendered in their favor against George S. Gross, in October, 1880, for \$216.83, with interest from that date, upon which an execution was duly issued and returned by the proper officer, with an indorsement thereon, "No property found." The action of appellees Plaffenger & Co., now standing in the name of Conrad, surviving partner, was upon an open account against him extending from March, 1879, to March, 1880, the balance claimed being \$188.16.

In the first-named action it is stated that, subsequent to the issuing and return of the execution mentioned, George S. Gross purchased the property; and, in order to cheat, hinder, and delay his creditors, fraudulently caused the deed therefor, of date September, 1883, to be made to his wife, M. E. Gross, notwithstanding he is the real owner of and paid for the property and improvements thereon. In the other action substantially the same allegation of fraud is made, and an attachment was asked, issued, and levied on the house and lot.

It appears from the evidence that, in 1879, George S. Gross was the owner of a coffee-house on Water street, in the city of Louisville. But in October, 1880, a license to carry on a tavern, with the privilege to retail liquor at the corner of Twelfth and Main streets for one year from July, 1880, was issued to "Geo. Gross, Agent." In July, 1881, by judgment of court, M. E. Gross

was empowered to act as a *feme sole*, as provided by statute; and on the twenty-third of that month a license was issued to her to keep a tavern at the same place for one year, the bond required in such cases being signed "M. E. Gross, by GEO. GROSS, Agent." From that place they removed to Market, between Third and Fourth streets, where the same business was continued in her name about four months, when the business and property were sold, according to the deposition of George Gross, for a profit of \$1,000; and with that, and the profits on the sales at the bar, the lot was purchased, and the improvements put on it, the whole costing about \$2,000. In addition there was enough to recommence the same business at another stand, on Market street, where they now are.

M. E. Gross had no means of her own at the time the business was commenced at the corner of Twelfth and Main, except such as may have been given to her by her husband, which was very little, if anything. There is no satisfactory reason given by either of them for the sudden transfer of the ownership of what little capital he may have had to her, and the assumption by him of the position as agent, instead of principal, in the business. She is not shown to be at all qualified or adapted for the business of retailing liquors, nor does she appear to have had any discretion, or to have given any attention to the management of it. Though asked to state, she could not tell from whom the bar-room at Twelfth and Main streets was purchased or leased, nor how much was paid or agreed to be paid for it. She does not state how much money she had of her own when they went to that place, nor that she had any except that given by her husband. She bought no supplies, made no sales, handled none of the money; but admits, in her deposition, that her time was taken up in attending to household duties, and caring for her children. She did not handle or control the \$1,800 for which the business on Market, between Fourth and Fifth streets, was sold, being ignorant of the bank it was deposited in. She does not appear to have had anything to do with the negotiation for the lot in question, nor could she, in her deposition, state how much was paid for it, or for the improvements put on it. The entire management and control of the business now claimed to belong to the wife was left to the husband, without question or knowledge on her part of the manner in which he was carrying it on; and the only explanation he undertakes to give for this extraordinary abandonment by him of the ownership of the business and transfer to his wife, who was totally unfit for it, and without means of her own to carry it on, is that he, for a short time, had rheumatism,—how long does not appear. Though by his skill and industry alone—for she contributed nothing—enough was realized out of the business, in about two years after she was invested with the rights of a *feme sole*, to buy and improve the lot at a cost of about \$2,000, besides furnishing stock for the new stand on Market, between First and Second streets, he claimed neither compensation nor share in the profits; but, when asked what he was to receive for his services, said: "I got all I wanted to eat, clothes to wear, and a good bed to sleep on."

It seems to us that, as this record stands, it would be contrary to common experience and common sense to attribute the conduct of the husband and wife to any other purpose than a fraudulent device to cheat, hinder, and delay his creditors; and as the condition of the parties was not such as authorized the judgment making her a *feme sole*, in the meaning of the statute, it is a reasonable supposition that it was sought by them in order to further his fraudulent purpose. As, therefore, the transfer by him to her of his capital and business was fraudulent as to his creditors, the lot in question, purchased with the proceeds, is liable for the debts of appellees which existed when the transfer was made; for she contributed neither capital, labor, nor skill in the purchase of the lot. Wherefore the judgment in both cases is affirmed.

REIDHAR v. PFEIFFER.

(Court of Appeals of Kentucky. February 5, 1887.)

BANKRUPTCY—PLEADING DISCHARGE.

In pleading a discharge in bankruptcy as a bar to an action of debt, it is not necessary to allege that the court granting such discharge had jurisdiction, or to state facts showing that it had such jurisdiction.

Appeal from common pleas court, Jefferson county.

Goodloe & Roberts, for appellant. *Elliott & Hemingray*, for appellee.

LEWIS, J. The only question in this case is whether, when a discharge in bankruptcy is pleaded and relied on as a defense to an action of debt, it is indispensable to state that the court granting such discharge had jurisdiction, or to state facts showing it had jurisdiction. The same question was considered by this court and determined in the case of *Laidley v. Cummings*, 7 Ky. Law Rep. 616. There it was held that the requirement of the Civil Code in this respect, as to judgments rendered by courts of other states, does not apply to United States courts; for the jurisdiction of the latter is regulated by laws of congress, of which all state courts take judicial notice.

As the answer in this case contains a sufficient statement of facts to constitute a defense to the action as to appellee, Peter Pfeiffer, the lower court did not err in rendering judgment in his favor, and it is affirmed.

KINCHELOE v. MCCAIN'S EX'RS.

(Court of Appeals of Kentucky. February 8, 1887.)

1. EXECUTION—SALE—AGREEMENT TO STAY—RIGHT TO REDEEM.

Judgment being entered for the sale of land to satisfy a mortgage upon it, it was agreed between the parties that no sale should be made for a year, if the defendant should, within 30 days, assign to the plaintiff a certain other mortgage. The defendant failing to comply with this agreement, *held*, a sale of the land might be ordered, and the court's commissioner was vested with no power to reserve the defendant's right to redeem the land after the sale had been made.

2. SAME—APPRAISER'S ESTIMATE OF VALUE OF LAND, ERROR IN.

Error or mistake of judgment on the part of appraisers, appointed to fix the value of land to be sold at judicial sale, is no ground for setting aside the sale.

Appeal from circuit court, Marshall county.

This action was brought by R. McCain against appellant to enforce payment of notes, and foreclose a mortgage upon land, executed by appellant. A judgment was rendered for appellee for amount claimed, and a lien given on the land. By consent of parties the judgment was not to be executed for one year, upon condition that the defendant did certain things as equivalent to a satisfaction of the judgment. These conditions not being complied with, the judgment was executed.

W. G. Bullitt, for appellant. *Gilbert & Reed*, for appellee.

LEWIS, J. By the judgment rendered December 18, 1880, the land mortgaged was directed to be sold to satisfy the plaintiff's debt therein mentioned. But it was provided by consent of the parties that no sale should take place for 30 days from the date of the judgment, and if, within that time, the defendants, Waller Kincheloe and Elias Kincheloe, should, in writing, assign and transfer to the plaintiff the full benefit of a mortgage from Waller to Elias Kincheloe, of certain property which the plaintiff had in his petition attacked as fraudulent, in order to further secure the plaintiff the full payment of his judgment debts, then no sale should take place for one year. It was further provided that, in the event the defendant Waller Kincheloe failed to pay the plaintiff's judgment in full within the period of one year, then the

plaintiff had the right to a sale of the land for whatever might remain unpaid. It appears that the judgment was not executed until November, 1883, when the land was sold at the price of \$735, and purchased by the plaintiff; and the only question presented by this appeal is as to the exceptions to the report of sale, which were overruled.

One of the grounds of exception is that the land was appraised at less than its value, because the appraisers were not acquainted with it. The appraisal was regularly and legally made, and a mere error or mistake in the judgment of the appraisers as to the value of the land appraised, even if it was established by proof,—which is not done in this case,—would not be sufficient grounds for setting aside the sale. There is no proof that the plaintiff promised to permit the defendant to redeem the land. There was no judicial discretion given to the commissioner, as contended by counsel, but it was simply provided in the judgment that if, within a prescribed period of time, certain things were done, which were intended by the parties as the equivalent of satisfying the judgment, no sale should take place; and, after the expiration of that time, the commissioner had no discretion but to sell the property as directed. This record does not show that the appellant complied, or attempted to comply, with any of the terms upon which the sale was to be suspended, or even offered to redeem the land, and he has no right, therefore, to complain that the sale was made, particularly as it was delayed by the plaintiff nearly three years, instead of one. Judgment affirmed.

DAVIS v. BUFORD'S Ex'rs.

(Court of Appeals of Kentucky. February 8, 1887.)

WILL.—PERPETUITIES.

A devise to A. for life, and, after A.'s death, to B., and, if B. should die without children, then to four other named kinsmen, or to their children if the parent should be dead, and, if no children, to the survivors of the four devisees, is not a perpetuity, such as is prohibited by Gen. St. Ky. c. 63, art. 1, § 27, providing, "The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, 21 years and 10 months thereafter."

Appeal from circuit court, Montgomery county.

Peters & Tyler, for appellant. *C. Brock*, for appellee.

PRYOR, C. J. The testator devised his entire estate to his executors in trust, with directions to apply the income, or so much as might be necessary, to the support of his sister Mary during her life; and, after the death of his sister, he then devises one-half of his estate to his niece Mary Davis, for her sole and separate use, with the proviso that, if Mrs. Davis should die without children, her portion is to go to four others of his kindred, naming them, then living; and, if any of them should be dead leaving children, their portion to go to their children, and, if no children, to the survivor or survivors of the four devisees. We perceive no such devise in this case as would create a perpetuity, and thereby render the devise void, or vest the title in the first devisee. It may be that all of the four kindred designated to take at the death of Mrs. Davis may die before she does, without leaving a child or children, and thereby prevent the estate from passing under the will, but the estate would then pass to the heirs of the testator by descent. All of these devisees were living, and the estate held in trust by the executors for the benefit of those entitled.

The power of alienation is not suspended so as to bring this case within the twenty-seventh section of article 1, c. 63, Gen. St. The contingency may happen by which the title will not vest in those living at the time the devise was made, and who would be entitled if they should survive the life-tenant.

The creation of two life-estates in the same property does not destroy the devise, first to his sister Mary Buford for life, then to Mrs. Davis, at the death of the devisor's sister, for life, and then to his other four kindred, at the death of Mrs. Davis, or to their children if the parent should be dead,—if no children, to the survivor of the four last-named devisees. See *Moore's Trustees v. Howe's Heirs*, 4 Mon. 199.

Judgment affirmed.

HARPER v. HARPER and others.

(Court of Appeals of Kentucky. February 3, 1887.)

EQUITY—UNDUE INFLUENCE—PARTIES IN DELICTO, BUT NOT IN PARI DELICTO, RELIEF MAY BE GRANTED.

Where a woman conveys her property to her grandchildren, reserving not enough for a support for herself, *held*, the evidence showed she was induced to do so by the false representations of her son (the father of the grantees) that she was about to be sued for slander, and might, in that way, prevent the enforcement of any judgment obtained against her; and although she was thus attempting to evade the law, and was *in delicto*, yet she was not *in pari delicto* with her son, in the sense that she could not have the deed set aside, or other relief. The maxim *in pari delicto potior est conditio defendentis* does not apply.

Appeal from Louisville chancery court.

This action was by Harriet Harper to set aside conveyances made by her to her son, appellee Charles Harper. Court below dismissed her petition. She appeals, and this court reverses the judgment.

F. T. Fox, Jr., for appellant. *J. T. O'Neal* and *W. L. Jackson, Jr.*, for appellees.

HOLT, J. When the conveyances now in question were executed, the appellant, Harriet Harper, was a widow, and 73 years of age. She then had three living children, two of whom resided in distant states, while her son, the appellee Charles Harper, who was then thirty-five years old, lived near her, and in whom at that time she appears to have had implicit confidence. She was the owner of three houses and lots in the city of Louisville. On February 21, 1881, she had her vendor convey one of them, subject to a life-estate in her, to Sallie Harper, the daughter of her son Charles Harper, with the further condition that, in the event of the granddaughter's death without lawful issue, it should pass to a grandson, Arthur Harper, the son of Charles Harper. On September 27, 1881, she conveyed the other two lots to Charles Harper in trust, to be conveyed by him to his two children, Sallie and Arthur, when they became of age; but, if either died before that time, then the survivor was to have them; or, if both so died, then they were to pass to Charles Harper. She retained no estate of any character in these two lots, or any interest in the revenue arising therefrom. Upon the contrary, the deed provided that the profits thereof were to go—*First*, to pay taxes, insurance, and necessary repairs upon the property; *second*, for the support and education of the two children; and any residue remaining was to be invested until their majority, for their benefit. This left her with but little, if any, estate, save her life-interest in the lot conveyed by the first-named deed, and upon which there is a small house in which she is now residing. In fact, she is now, in her old age, in destitute circumstances, while her son Charles and his family are living upon the rents arising from the property covered by the trust deed.

She asks that both deeds be set aside, upon the ground that their execution was procured by false representations made to her by her son Charles Harper. The petition also substantially states, but not in express words, that they were obtained by undue influence upon his part over her; and the answer makes this issue by expressly denying it. She avers that a considerable sum of money was stolen from her; that she accused a certain person of the offense,

upon information given to her by her son, the appellee Charles Harper; that he falsely and fraudulently represented to her, and induced her to believe, that the accused party was about to sue her for slander; that it would result in the loss of all of her property, and reduce her to poverty; and thus procured her to execute the deeds, ostensibly to protect her, but in fact to obtain the estate for himself. The testimony of the appellant supports this version of the transaction, but is in direct conflict with that of her son. The wife of the latter also contradicts the appellant to some extent; but, of course, the representations might have been made without her knowledge. The attorney, who prepared the trust deed testifies that it was done by the direction of the appellant, and that she understood it. But two other witnesses testify in the case. They are disinterested. The one says that he heard the appellant say that she intended to give her property to Charles Harper's children. The other testifies that the appellee, Charles Harper, told him that his mother had charged the party with the theft; that he was afraid she would be sued for it; that he wanted to fix her property so that, in that event, a judgment could not be collected, and that this was the object of the trust deed.

This is substantially all the testimony in the case. It appears, however, that the money was not lost until July 11, 1881; and the attack upon the deed of February 21, 1881, appears to have been abandoned during the progress of the case. In fact, the appellant in her testimony does not seem to question it, nor is it now assailed in argument. No further notice will therefore be taken of it.

It is impossible to be entirely sure of the true state of case, owing to the contradictory character of the testimony. The probabilities must therefore be thrown in the scale; the surrounding circumstances must be considered. They favor her claim. It is difficult to suppose that the appellant would have deeded away nearly all of her property, reserving not even a life-estate in it, or any of the income arising from it, and leaving her without any means of support, unless there had been some motive or impelling power, driving her from competency to poverty, stronger than her affection for her grandchildren. It occurred too soon after the loss of her money. No cause, sufficient in our opinion to account for it, is even hinted at in this record, save the fear of a suit for slander, and the possible consequent loss of her property. There is no testimony in the case tending to show that this belief was created in her mind in any other way than through the talk of her son to her. If it existed, as we think it did, then its creation is unaccounted for save in this way. No suit was ever brought, and it is not shown that the party ever intended to bring any. Indeed, it was utterly unheard of, so far as this record discloses, save from the tongue of Charles Harper; but yet the old lady's mind was filled with this belief. In her imagination, poverty in her old age stared her in the face, grim want was at her door; and in this supposed emergency she had no one at hand to trust, or upon whose judgment she could rely, save that son, in whom not only her confidence was reposed, but an undoubting faith that he would do right by his mother.

It is urged, however, that, if this be so, yet she must be turned out of court because it was an effort to defeat the law, to which she was a party,—*inter partes in pari delicto, potior est conditio defendentis*. It is true that in cases of executed contracts, if the parties be *in pari delicto*, they will be left where they have placed themselves. They do not come into court with clean hands. If, however, one party is but an instrument in the hands of the other, then they are not *in pari delicto*. Judge STORY says: "One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of 'his associate in the offense.'" In such a case they are perhaps *in delicto*, but not *in pari delicto*. The act may, indeed, be substantially that of the one party. Thus the law forbids the payment of

usury; but, if the borrower seeks for relief, it will be afforded, or, if he has paid it, he may recover it back. The rule *particeps criminis* does not apply. He is not *in pari delicto*. He is the slave of the lender,—is *in vinculis*, and must submit to his necessities. A court of equity will interpose and set aside an instrument, as between the parties to it, although it was intended to defeat the law, if the parties did not stand upon an equal footing, and if the one influenced and controlled the conduct of the other; and, when a relation of trust and confidence exists, the party in whom it is reposed, and who has obtained a benefit, should show an undoubted right to it. The *onus* is upon him to make it appear that the transaction was fair and proper, and relief will not be denied to the one least in fault, if he has been led into it in violation of confidence, and by exciting false alarms or fear of legal consequences. If the mind of one of the participants in the transaction exercises an undue influence over that of the other, whether by imposition or threats upon the one side, and confidence or weakness upon the other, equity will grant relief to the latter. Even if the party had sufficient capacity to contract, yet if, through trusting confidence, the other has led him into the illegal act, and then imposed upon him, such relief will not be refused.

In *Osborne v. Williams*, 18 Ves. 382, a father and son entered into a contract in violation of a statute. It had been executed by the son, and the father had derived a benefit therefrom. Both parties having died, the representatives of the son sued those of the father for an account, and relief was granted, upon the ground that, while the parties were *in delicto*, yet they were not *in pari delicto*.

In *Pinckston v. Brown*, 3 Jones, Eq. 494, a mother, upon the advice of her son, executed a deed of trust for the payment of her debts, but which left out one of her creditors, and secured several fictitious notes executed to the son, in whom she had implicit confidence. She having paid all of the *bona fide* indebtedness, the deed of trust was vacated at her instance; the court saying that "the mother and son were *in delicto*, but not *in pari delicto*." See, also, the cases of *Boyd v. De La Montagne*, 73 N. Y. 498; *Barnes v. Brown*, 32 Mich. 146; *O'Conner v. Ward*, 60 Miss. 1025; *Freelove v. Cole*, 41 Barb. 318; and *Anderson v. Meredith*, 82 Ky. 564,—where it is held that, if the mind of one of the actors in a fraud exercises an undue dominion over that of the other, by reason either of physical or intellectual weakness, or from a confidence admitting of imposition, then the general rule that equity will not aid either party to it does not apply.

In the case now presented the parties did not stand upon equal footing. They were not dealing at arms-length. The son had the confidence of his widowed mother. Such a relation existed as gave him special power over her; but the filial love due to her seems to have cringed to self-interest, and he is found practicing on the weakness and confidence of his aged mother. She was not in debt. No creditor was to be defrauded; and, under the circumstances, the deed must be regarded as the creature of the false alarm of legal consequences in her mind, but of which he was the author; and is therefore his act, rather than that of the mother.

Judgment reversed, with directions to render a judgment annulling the deed of September 27, 1881, and directing a reconveyance to the appellant of the property described in it, and for further proceedings in harmony with this opinion.

SHELburn v. COMMONWEALTH.

(Court of Appeals of Kentucky. February 8, 1887.)

EMBEZZLEMENT—AGENT FAILING TO PAY OVER COLLECTION.

Gen. St. Ky. c. 29, art. 12, § 2, punishing any person who, being intrusted with money or other property (which might be the subject of larceny) to be delivered to

another, embezzles or fraudulently converts it to his own use, does not apply to the act of an agent in converting money collected by him for his principal. And therefore, where a church appoints one as its agent to solicit and collect subscriptions for repairing the church, and the agent collects money from various persons which he fails to pay over to the church, *held*, he cannot be indicted, under the statute, for embezzlement. The money could not be considered as paid to one to be delivered to another, but payment to the agent was equivalent to payment directly to the church.

Appeal from circuit court, Spencer county.

Indictment for embezzlement.

J. G. Offutt, for appellant. *P. W. Hardin*, for appellee.

BENNETT, J. The indictment under which the appellant was tried and convicted of the crime of embezzlement charges, in substance, that the appellant was employed for and by the officers and members of the Colored Baptist Church at Taylorsville, Kentucky, for the purpose of soliciting and collecting sums of money, to be contributed by divers persons, for the purpose of paying for the plastering of the said church; that the appellant, as such soliciting and collecting agent and employe, did collect sums of money, aggregating seven dollars, from various persons, who contributed the same for said purpose, and which was to be paid over by appellant to the officers and members of said church; that appellant failed and refused to pay over the money thus collected to the officers and members of the church, but fraudulently converted the same to his own use.

Section 2, art. 12, c. 29, Gen. St., provides, in substance—*First*, that if any carrier, porter, or other person to whom money, or other property or thing which may be the subject of larceny, may be delivered to be carried for hire, shall embezzle or fraudulently convert to his own use, or secret with intent to do so, any such property, either in mass or otherwise, before delivery thereof to the person or at the place to whom the same was to be delivered, shall be confined in the penitentiary not less than one nor more than five years; or, *second*, if any other person, who may be intrusted with money or property, or other thing which may be the subject of larceny, to be delivered to another person, or at a particular place for the purpose of being delivered to another person, shall embezzle or fraudulently convert to his own use such property, or any part of it, or secret it with intent so to do, before delivery thereof to the person to whom it was to be delivered, or at the place it was to be delivered, for the purpose of delivery to another person, shall be confined in the penitentiary not less than one nor more than five years.

The first part of the statute relates to carriers, porters, or other persons who undertake for hire to carry and deliver money, or other property or thing which may be the subject of larceny, from one person to another, or at some place to be delivered to another person. The latter part of the statute relates to any other person who may be intrusted with money, or other property or thing which may be the subject of larceny, by a person to be delivered to another person, or at some place to be delivered to another person. The person intrusting the money or property to the other, to be delivered by that person, must have some interest in its delivery as agreed.

This view of the statute is sustained by the case of *Barclay v. Breckinridge*, 4 Metc. (Ky.) 378; also the case of *Com. v. Ball*, 5 Ky. Law Rep. 605, (MS. opinion, delivered in 1884.)

It was certainly not intended by the framers of the statute to make the clerk, business manager, or agent, authorized to collect money for his principal or employer, guilty of embezzlement because of his conversion of it to his own use of money collected by him by the authority of his principal or employer.

The appellant, as is charged in the indictment, and as the proof clearly shows, was employed by the officers and members of the church to solicit and

collect the contributions from well-disposed persons, for the purpose of raising funds with which to plaster the church. As soon as these contributions were collected, they became the property of the officers and members of the church, and the contributors parted with their title to them and interest in them. The payment of the contributions to the appellant as agent of the church was a payment to the church, and the church had no further claim upon the contributors. If the agent failed to pay over the contributions, the loss fell upon the church, and not the contributors. Therefore it cannot be said that appellant was soliciting and collecting on behalf of the subscribers to the fund. He did not undertake to receive the subscriptions from the subscribers, and deliver them to the officers of the church on behalf of the subscribers, but acted in soliciting and collecting solely on behalf of the church, as its agent. In this he stood precisely in the same light as any private clerk or business manager collecting for his principal by the principal's authority. Therefore his wrongful conversion of the money collected did not make him liable, under the statute, for embezzlement.

The case is reversed, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

WHITTAKER v. LINDLEY.

(*Court of Appeals of Kentucky.* February 3, 1887.)

DOWER—IN MINES.

A widow is entitled to work mines on the dower tract, already opened, and may take out enough coal to furnish the farm with fuel, and sell enough besides to keep up fences; and, being denied entrance to the mine by the regular opening on a neighbor's tract, she may make a new opening to the mine on the dower tract.

Appeal from circuit court, McLean county.

Appellee, Lindley, applied for an injunction against appellant, Whittaker, restraining her from trespassing on his land by coming on it for the purpose of gaining entrance to a coal mine lying under land assigned her as dower, it appearing the mine had no other entrance than that opening on appellee's land. Court granted perpetual injunction, not only restraining appellant from entering appellee's land, but from working the mine. Whittaker appeals.

Chas. Eaves, for appellant. *Jep. C. Jonson*, for appellee.

PRYOR, C. J. This case has been heretofore in this court, and the judgment below reversed by reason of the dissolution of the injunction. The appellant in the present case was assigned, as dower in the lands of her husband, a tract of 165 acres of land, described by metes and bounds. The entire tract contained about 500 acres. On that part of the land assigned to the widow as dower is a valuable coal mine that had been worked prior to the death of her husband, and the entrance to this mine is upon the land of the appellee. The widow, in order to obtain the coal, had to pass over the adjoining land of the appellee to reach this entrance by means of which the mine was operated. This she continued to do, from time to time, by those in her employment, digging and selling the coal for profit, as well as for her own use as fuel. At the former hearing a reversal was had for the reason that, by the dissolution of the injunction, the appellant (the widow) was permitted to go upon the land of the appellee, with those in her employ, with their hands and teams, for the purpose of mining the coal, and to reach the entrance to this mine. There was no reservation in the assignment of dower of any such right on the part of the widow, and the continued and constant trespasses, by those in her service engaged in digging the coal, authorized the injunction. On the return of the case, the injunction has been made perpetual, and its effect is not only to prevent the trespasses on the land in the possession of the

appellee, but the widow is prevented from using or digging the coal within the dower tract for her own use as fuel, and from selling so much as may be necessary to enable her to keep the dower land in repair.

It is alleged, and not denied, that there is no timber or wood upon the land to enable her to build fences, and the principal value of the land is the coal beneath the surface. The fact that the mine had already been opened, and the coal taken from under the surface of the dower tract, gave to the widow the right to use so much of the coal as was necessary for fuel, and to sell so much as might be required to keep the dower tract in repair, when not injuring the inheritance. All the widow asks is to be allowed to operate the mine for this purpose, and no other. While the widow may not be entitled to dower in mines that have not been opened,—a question we do not decide,—it is well settled that, as to mines that have been opened, she is entitled to dower. In this case the mine was not valued as a coal mine in allotting dower, or in the division, but the widow given the land under which was operated the coal mine with the entrance on the land of the appellee. It seems to us, under such circumstances, although she will not be allowed to go upon the land of the appellee to reach the entrance, that she may operate the mine by making an entrance on the dower tract, and take therefrom so much of the coal as may be necessary for the use of the farm as fuel, and sell so much as may be required to keep up the fencing on the dower tract. Mines held in fee are liable to dower. *Bainb. Mines*. A tenant for life will be entitled to take minerals on the land, for purposes of husbandry and repairs. *Id. c. 8, § 2*.

While the entrance is not upon the land of the life-tenant, the mine is underneath its surface, and the coal extracted therefrom; and, the owner of the land adjoining denying to the widow the right of entry on his land to reach the coal, it is but equitable that she should be allowed to make the entrance on her own land, or that of which she is possessed. *Kier v. Peterson*, 41 Pa. St. 361, and cases cited, note; *Bainb. Mines*, 50.

The judgment is therefore reversed, with directions to perpetuate the injunction in so far as the appellant claims the right to go upon the land of the appellee for the purpose of obtaining coal. The judgment of \$40, the value of the coal taken, is also reversed, as the appellant was entitled to it. The judgment below will be at the cost of the appellant.

LOUISVILLE & N. R. Co. v. SIMMON.

(*Court of Appeals of Kentucky*. February 3, 1887.)

1. RAILROADS—LIABILITY OF OWNER OF STOCK KILLED—WRECKING OF TRAIN.

Where stock trespassing on a railroad track are killed by a passing train, which is also wrecked, the railroad company cannot recover of the owner of the stock damages sustained by the wrecking of the train, as a counter-claim, in an action by the owner of the stock to recover damages.

2. SAME—STOCK BREAKING DOWN FENCE.

Gen. St. Ky. c. 57, § 4, making railroads liable for stock killed by negligence of passing trains, *held*, if stock are killed by such negligence, it is immaterial that the railroad track was inclosed by a lawful fence, which the stock broke through; the railroad is liable.

3. ANIMALS—TRESPASSING ON INCLOSED GROUND.

Gen. St. Ky. c. 55, art. 1, § 2, providing that, if cattle trespass on grounds inclosed by a lawful fence, the owner of the cattle shall be liable for damages done by them, *held* it is immaterial that the owner of the stock did not keep them in a fenced inclosure; the question on which his liability depends is whether the land on which the trespass was committed was fenced.

Appeal from circuit court, Bullitt county.

W. R. Thompson and *Wm. Lindsay*, for appellant. *Richards & Hines*, for appellee.

PRYOR, C. J. The appellee instituted this action in the court below, against the railroad company, for negligently killing two mules that belonged to him, that were run over by a freight train in charge of its employees. The appellant filed its answer, making the third paragraph a counter-claim against the appellee, asking indemnity for damages sustained by reason of the appellee suffering his mules to stray on its track; alleging negligence in this regard; and that the train was wrecked thereby, causing great damage to the company, and for which they asked a judgment. The negligence of appellee consisted in not having a good and lawful fence, such as would keep the mules within his own inclosure. A demurrer was sustained to this counter-claim, and hence this appeal.

The rule of the common law is asked to be enforced in this case, and the owner made liable for the trespass of his stock caused by his failure to keep them on his own land, or using reasonable precaution for that purpose. At the common law the mere fact that the stock of the owner trespassed on the land of his neighbor did not authorize the latter to kill and destroy the stock. He might sue for the unlawful entry, and the destruction of his crops and grass, but had no right to run over and kill the stock with his vehicles and horses for the reason that they had broken his close. If, in doing so, he injured his vehicle, or destroyed that which he used in taking the life of the animals, such an injury would not, at the common law, have been estimated as a part of the damages sustained by the trespass on his premises. In this case, under instructions that were unobjectionable, the jury, by their verdict, have said that the mules were destroyed by the negligence of the appellant, or those in its employ, and that negligence not only caused the loss of the mules to the plaintiff, but wrecked the train of the defendant, for which it is now asking damages of the plaintiff. It could not, under such circumstances, have recovered at common law, and therefore the counter-claim, if a good defense, could not have availed in this case.

The demurrer, however, was properly sustained. The railroad track is the private property of the company, and no one has the right to use it as a private passway, or as pasture for stock; yet where stock stray upon it, even from the uninclosed lands of the owner, there is no remedy for the trespass unless the road of the company is within a lawful inclosure. There has been no intentional wrong shown on the part of the plaintiff in this case. He did not place his mules on the track of appellant that they might wreck the train, or prevent its passage. The animals had escaped from his premises, and were found on the track of the road; and whether their leaving the premises of the owner was or not by reason of insecure fencing is an immaterial inquiry. The right of recovery by the owner of land for the trespass upon it by the stock of others is made to depend upon the question as to whether or not the owner of the land had it inclosed by a lawful fence. If he had a lawful fence, the right of recovery exists, and for every subsequent breach double damages may be recovered. Gen. St. c. 55, art. 1, § 2. By article 4 of the same chapter the right is modified to this extent. If the owner of the stock have a lawful fence, and his stock break through it, and trespass on the premises of another not inclosed by a lawful fence, the owner is not liable for the first trespass, but is liable for the damages by reason of all subsequent trespasses. This section or article was framed doubtless on the idea that, in breaking the lawful fence of the owner of the stock, the latter was then notified of the vicious propensities of the animals, and that they could not be kept in even a lawful inclosure; and, a lawful fence affording no protection to the crops of your neighbors, you must keep your stock at home, or be made liable for every trespass but the first. Here the railroad company had no inclosure to prevent the trespass of animals upon it, and both the company and the appellee are claiming the possession and use of land around which there is no inclosure. Neither can maintain trespass by reason of the mere entry of stock upon

such a possession. The right of recovery is denied by the statute, and the counter-claim was not a defense to the action; nor would the fact of the company having its road inclosed have protected it from answering in damages for the injury to the stock, if caused by the negligence of the company. The statute makes the killing of stock under such circumstances *prima facie* evidence of negligence, and the burden is on the company of showing that the killing was the result of an accident that could not have been avoided, under the circumstances, by the exercise of ordinary care and diligence. Gen. St. c. 57, § 4.

The judgment below is affirmed.

FIRST NAT. BANK OF CINCINNATI v. THOMAS.

(Court of Appeals of Kentucky. February 3, 1887.)

1. STATUTE OF LIMITATIONS—DEBT BEING BARRED, MORTGAGE IS BARRED ALSO.

The mortgage is a mere incident to the debt, or security for its payment; so that, when the right of recovery as to the debt itself is barred by limitation, the mortgage to secure it is barred also.¹

2. SAME—ACTION BETWEEN NON-RESIDENTS ON CLAIM ACCRUING IN ANOTHER STATE.

Where an action is brought in Kentucky, and both parties are non-residents, the statute of limitations of this state applies, and the burden of proof is on the party relying on Gen. St. c. 71, art. 4, § 19, (providing that where a cause of action arises in another state between residents of such state, and by the laws of that state an action cannot be maintained thereon, no action can be maintained in this state,) of showing that the cause of action accrued in another state between citizens of that state, and the statute there was no obstacle to recovery.²

Appeal from circuit court, Logan county.

Robt. Rodes and Thos. B. Blakey, for appellant. *Browder & Edwards*, for appellee.

PRYOR, C. J. On the twentieth of December, 1876, the appellee executed to the appellant a mortgage to secure it in the payment of three bills of exchange, aggregating in amount over \$9,000. The bills were all dated prior to the mortgage. The appellee, being the drawer of each bill, brought his action in equity, alleging that the bills had been discharged or satisfied, and asking that the incumbrance be removed. The appellant filed an answer denying that the bills had been paid by the drawees, Burbank and Nash, and asked a foreclosure of the mortgage, to which a reply was filed by the appellee, (the drawer,) in which was pleaded the statute of limitation of five years.

"An action upon a bill of exchange shall be commenced within five years next after the cause of action accrued." Gen. St. c. 71, art. 3, § 2.

Five years had elapsed from the maturity of each bill before any action was instituted, and we see no reason why the statute is not a bar to the right to coerce payment. The mortgage was a mere incident to the debt, and given to secure its payment; and, when the right of recovery as to the debt itself is gone, the lien to secure it necessarily goes with it. The stipulations of the mortgage are not independent covenants upon which a recovery can be had regardless of the debt, to secure the payment of which the mortgage was given. The liability of appellee is on the original paper as the drawer; and, when that liability ceases, the covenants in the mortgage, having created no new right except the lien, cannot be looked to as extending the liability from five to fifteen years. *Prewitt v. Wortham*, 79 Ky. 287; *Vandiver v. Hodge*, 4 Bush, 539; *Yeates v. Weeden*, 6 Bush, 438.

It is claimed that both of these parties are residents of the state of Ohio, and that the cause of action accrued in that state, and therefore the statute of that state must prevail. Whether Thomas is or not a resident of Ohio does

¹ See note at end of case, part 1.

² See note at end of case, part 2.

not appear; and if he is, this action having been brought in Kentucky to enforce the lien, the statute of limitation of this state is well pleaded; and to avoid its effect the burden was on the appellant of showing that the cause of action accrued in Ohio, between these parties who are citizens of that state, and that the law of limitation in that state was no obstacle to the recovery. *Labatt v. Smith*, 7 Ky. Law Rep. 631.

The judgment below must be affirmed.

NOTE.

1. STATUTE OF LIMITATIONS. A MORTGAGE is a mere incident to the debt. *Teal v. Walker*, 4 Sup. Ct. Rep. 420, 5 Fed. Rep. 420; *Allen v. O'Donald*, 28 Fed. Rep. 346, Id. 17.

In *Kentucky* there is no statute of limitations as to liens. If the claim becomes barred; the lien dies with it, *County of McCracken v. Mercantile Trust Co.*, 1 S. W. Rep. 585. In *Arkansas* the same rule is applied to equitable liens, *Millington v. Hill*, 1 S. W. Rep. 547; *Dismukes v. Halpern*, Id. 554; but the right to foreclose a mortgage is not barred until after adverse possession by the mortgagor or his grantees for the period within which actions for the recovery of real property may be brought, *Smith v. Woolfolk*, 5 Sup. Ct. Rep. 1177; nor is it in *Missouri*, *Lewis v. Schwenn*, 2 S. W. Rep. 391.

In *Arkansas* such possession is not adverse until some act is done or claim made notoriously adverse to the rights of the mortgagee. *Smith v. Woolfolk*, 5 Sup. Ct. Rep. 1177. In *Missouri* it is not adverse so long as payments of principal or interest are made, or the relation of mortgagor and mortgagee is recognized by both parties. *Lewis v. Schwenn*, 2 S. W. Rep. 391.

As to the effect of the statute of limitations in other states, see *Lewis v. Schwenn*, 2 S. W. Rep. note. 393.

2. CAUSE OF ACTION ACCRUING IN ANOTHER STATE. Where a cause of action arising in another state or country is completely barred by its laws at the time of the debtor's arrival in *Illinois*, it cannot be enforced in that state, *Osgood v. Artt*, 10 Fed. Rep. 365; nor in *Indiana*, *Wood v. Bissell*, 9 N. E. Rep. 425; in *Iowa*, *Goodnow v. Stryker*, 14 N. W. Rep. 345; *Ross v. Rees*, 7 N. W. Rep. 611. In *Kentucky* it was held that the *lex fori* governs. *Farmers' & Traders' Nat. Bank v. Lovell*, 1 S. W. Rep. 426.

JESSAMINE CO. v. SWIGERT'S ADM'R.

SAME v. NEWCOMB and others.

(Court of Appeals of Kentucky. February 5, 1887.)

MUNICIPAL CORPORATIONS—SUBSCRIPTIONS TO STOCK—ULTRA VIRES—CREDITOR'S RIGHT TO ENFORCE SUBSCRIPTION.

The Kentucky act of 1865 incorporating Kentucky River Navigation Company, (2 Acts 1866, p. 97, § 2,) providing that the business of the company shall be the improvement of the navigation of the river by building additional locks and dams, a county subscribed to stock, being interested in securing such additional improvements; but the work of making the new locks and dams was soon abandoned, and the company undertook to maintain and repair the old ones, which were not in any way beneficial to the county. Held, the subscription could not be enforced, either by the corporation or by creditors, (the corporation being insolvent,) one of whose debts had been contracted for repairing the old locks, and both debts after the abandonment of the original purpose of building new locks.

Appeal from Louisville law and equity court.

Wm. Lindsay and James S. Ray, for appellant. *Brown, Humphrey & Davie and Goodloe & Roberts*, for appellee.

PRYOR, C. J. The county of Jessamine is contesting the validity of a subscription alleged to have been made by that county to a corporation known as the "Kentucky River Navigation Company," and also its liability, on other grounds, for the payment of the judgments below against the navigation company,—the one in favor of Swigert's administrator, and the other in favor of Newcomb, Buchanan & Co., amounting in the aggregate to \$16,000, exclusive of interest and costs.

The appellees, Swigert's administrator and Newcomb, Buchanan & Co., having claims against the Kentucky River Navigation Company, reduced

these claims to judgments, and on a return of *nulla bona* Swigert's administrator filed a petition in the nature of a bill of discovery in the Louisville law and equity court against the company and Jessamine county; and by an amended petition set forth the subscription made by the county, and presented, if the facts alleged are true, a cause of action by the company against the county for the stock subscription to the corporation, and which they allege was unpaid.

Newcomb, Buchanan & Co. instituted actions against the company on notes of the company assigned to them by one Harper, and obtained an attachment on the ground of a want of property sufficient to pay their debt, and that the same would be endangered by delay in its collection before judgment. The answer of the county of Jessamine not being satisfactory to the plaintiffs, they amended their petition, as in the *Case of Swigert's Administrator*, setting forth a cause of action by the corporation against the county by reason of its subscription and the non-payment of its stock. Jessamine county was required to make defense, and did so by denying its liability. Whether, after failing to disclose any indebtedness as garnishee, the county could have been proceeded against in the Louisville law and equity court by the service in Jessamine county, in a regular form of action for the recovery of the stock, is a question not made by the record.

There was no demurrer to the jurisdiction, but an answer filed; the court having first overruled a general demurrer that questioned alone the sufficiency of the petition. The petition was good, and the demurrer properly overruled. If Jessamine county was liable to pay these debts out of the stock subscribed, then the judgment was proper.

A creditors' bill to settle the affairs of the corporation, it being insolvent, might have been maintained; but the creditors in the present actions were only interested in making their money out of the corporation; and if the company was insolvent, or there existed other creditors of or debtors to the corporation, the defendants should have asked for a settlement, and an equitable distribution of the assets. As said by the supreme court in the case of *Hatch v. Dana*, 101 U. S. 205: "The bill was not a bill asking to wind up the company. It simply sought payment of a debt out of the unpaid stock subscription." See, also, *Ogilvie v. Knox Ins. Co.*, 22 How. 380.

All the appellees are after in this case is the payment of their debts, and nothing more. As there is no attempt to wind up the company, or by the stockholders to require a general settlement of the accounts of the corporation, the only inquiry is as to the liability of the stockholder to this corporation, or to its creditors, for the payment of these debts.

There was originally a large subscription of stock to the Kentucky River Navigation Company, that was nearly all declared invalid, leaving as stockholders of the company Jessamine county, if it is to be regarded as a stockholder, and the firm of Bisset & McMahon. These two subscriptions, with some small sums by individuals, constituted the stock for the construction of locks and dams on the Kentucky river, that required, if the enterprise had been successfully carried out, a large expenditure of money. The business of the company was "the improvement of the navigation of the Kentucky river and its tributaries, by building locks and dams." Section 2 of company's charter, (page 97, 2 Acts 1865.)

The county of Jessamine, as the appellees contend, had subscribed \$100,000, and Bisset & McMahon \$100,000. Other counties had subscribed about \$800,000, and those subscriptions were never collected, but held to be invalid. The company had commenced work upon one or more additional locks, but abandoned the enterprise by reason of the release of the several counties from their attempted subscriptions, and in the fall of 1870 was hopelessly insolvent, and never after that time, so far as appears from this record, attempted to carry out the object of the corporation. The act of incorporation was obtained

in March, 1865, and the enterprise abandoned in the year 1870. The money, or the most of it, that had been expended in the improvement of the river by the work upon the new locks Nos. 6 and 7 had come or was collected from the county of Jessamine. After the abandonment of the work, and the utter inability of the corporation to proceed with the improvement, the organization of the company was kept up, and the old locks and dams taken possession of by the company under a lease from the state made in the year 1869. The county of Jessamine took no part in the organization after the fall of 1870, and in fact claimed to be released from all obligation to pay after the attempt to collect stock by the company from the other counties had been successfully resisted. The claims of these appellees originated long after the year 1870, and the notes of the appellees Newcomb, Buchanan & Co. were executed for work and labor done on the old locks and dams in the year 1878; and the judgment in favor of Swigert's administrator bears interest from the year 1877, and the presumption is that it was not for money expended in the attempt to make the new locks in and prior to the year 1870.

The question, then, arises as to the inducement for the county of Jessamine to make the subscription, and the terms upon which that subscription was made. If the business of the corporation was to improve the navigation of the Kentucky river, and to keep in repair the old locks and dams, as well as to extend slack-water navigation, with the right to expend these county subscriptions for any character of improvement as in their discretion seemed best and necessary to accomplish the object in view, then, with a valid subscription, there is no reason why the stockholders should not be responsible for these debts.

It is apparent from the testimony that no benefits could result to the county of Jessamine by expending its money in repairing the old locks and dams; and that the inducement for the subscription was the construction of additional locks and dams is plain, because, without additional locks, the county could derive no greater advantages than it already had in the way of navigation. The inducement, however, is not the contract; and, if there is no limitation as to the power of the directors to appropriate the money arising from the subscription in making these improvements, then the money should be paid. The powers of a corporation are derived solely from the legislative grant, and the exercise of the powers must be confined to those conferred by the charter.

It is certain that after the abandonment of the construction of the locks and dams, and the insolvency of the corporation, the corporation could not have coerced payment from the county of Jessamine for any part of the subscription except for the purpose of paying debts previously contracted in the execution of the enterprise. The company could not have used or applied the money thus subscribed to repairing the old locks, or in removing obstructions from the river, because that was not the business of the company. For what purpose, then, was the subscription made, and in what manner was the company, when the subscription was made, compelled to apply it? When the company was organized, the county courts of the counties bordering on the river were authorized to subscribe stock in the company, and the object to be accomplished *was the building of new locks and dams*. Such was the contract between the corporation and the stockholders by the express provision of its charter.

By the second section of the act it is provided: "The business of said company shall be the improvement of the navigation of the Kentucky river, and its tributaries, by building additional locks and dams." By the sixth section of the act it is provided that, as soon as the company shall have completed two locks and dams, it had the right to lease the locks and dams already built for the period of 50 years at a stipulated rent, to be payable semi-annually.

This sixth section of the company's charter was never made effectual, be-

cause there were no additional locks built, and there was no power in the corporation to apply the moneys collected from these counties to the ordinary improvement of the river. The company might as well have used the means thus collected in removing snags from the bed of the river, from its source to its mouth, as to have used it in making more secure the old locks and dams, the property of the state, to the entire disregard of the agreement by which this stock subscription was made. If such had been the letter of the grant, or its true spirit and meaning, conferring upon the corporation the right to abandon the building of additional locks and dams, and apply the subscriptions made by these counties to the general improvement of the river, is it not evident that no subscriptions would have been made? Here such a power is not only absent from the charter, but, after the company becomes insolvent, and after the money of Jessamine county has been expended in the effort to build additional locks, that were abandoned, and the works utterly valueless, other indebtedness seems to have been created for other purposes than those contemplated by the charter, and for the payment of which the subscription was not made.

"In this country, all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred." 1 Dill. Corp. 117.

The authority to a corporation is delegated, and must be strictly pursued; and while the existence of certain powers may be implied, so that the exercise of an express power may be made effectual, we see no reason and find no authority for permitting the corporation to collect the money of its stockholders, and misapply it, in violation of the corporate agreement, although the creditor of the corporation may have believed, at the time the services were performed, that the stock subscription was liable. It cannot be maintained that the corporation, under the terms of such a subscription as was made by the county of Jessamine, could say to the county that it had the right to abandon the works on the new locks, and appropriate the money for other purposes, and therefore the company will coerce payment. Such, in our opinion, would be a palpable violation of the charter agreement; and when the creditor comes, and asks the same relief, he occupies no better position than the company does,—neither can recover.

The charter of the company should have been looked to by the creditor, and its powers as a corporation ascertained. Not only the inducement for these counties to subscribe could have been seen by the creditor, or those dealing with the corporation, but the agreement as to the application of the stock subscription was embodied in the charter. The money was subscribed, not to repair old locks and dams, or to improve the navigation of the river in any way the company might see proper, *but for the purpose of building additional locks and dams*; and now it is attempted to divert this fund, from the object sought to be accomplished, to the payment of the debts created long after the enterprise had failed, and to purposes for which no subscription was ever made.

If the corporation had no right to make such an appropriation, we cannot well see how the creditor, through the corporation, can accomplish what the corporation could not. A corporation with general power to contract debts for the improvement of the river, with a subscription that is not limited by the charter itself, would have the right to incur debts for such a purpose, and the creditor could compel payment of the stock subscription in satisfaction of his claim. Such is not the case we are considering. The purpose for which the subscription was made is clearly defined by the charter; and the debts sought to be collected from the county of Jessamine, if paid, would be a diversion of the fund to a purpose not contemplated by any of the parties to the articles of association. The lease of the old locks to the navigation company, in August, 1869, under a legislative enactment authorizing the

commissioners of the sinking fund to lease them out to the highest bidder, could not affect the contract between these stockholders, or their liability as to the corporation or the creditors of the corporation. With the construction of the two locks and dams, and an extension of slack-water navigation, the counties bordering on the river would have had an ample consideration in the way of benefits received for the subscription made. That consideration—the building of the two locks—they deemed an equivalent at least; and, when built, they, the stockholders, became entitled, as a matter of right, in the name of the corporation, to the use and control of the locks and dams already in existence, at a stipulated rental, for the period of 50 years.

The contract between the members of the corporation was the agreement to build additional locks and dams; and when we get two locks built, we then become entitled to lease the old locks and dams from the state upon the conditions expressed in the charter. The corporation, or its president and directors, say: "We have the right to lease the old locks and dams, and use your money in repairing them, without building any additional locks;" and this the stockholders maintain is a misappropriation of their subscriptions.

The company may have had the right to lease the old locks; but neither the directors of the company nor the legislature had the power to change the security afforded the stockholders for their investment, by appropriating the subscription to other investments on the river that would not only hazard the success of the enterprise, but leave the stockholder without any indemnity whatever, and in this case the money, if collected, expended in such a manner as that no benefits can possibly result to the stockholders.

The charter is the contract between the stockholders; and its terms cannot be varied by either a majority of the stockholders or the directors, "nor can the majority dispose of any part of the corporate funds except in pursuance of the original agreement of the stockholders." *Mor. Corp.* 22. "The powers conferred upon the directors of a corporation, however wide and absolute they may appear in terms, must be construed as subject to the implied conditions that they shall be exercised solely in pursuance of the company's charter purposes." *Id.* 242.

The company is not in the possession of the funds sought to be applied to the discharge of these debts, but is seeking to have them paid over by the stockholders, because of the general power of the corporation to expend money in constructing and in keeping in repair these internal improvements. The right would clearly exist but for the right of the stockholder to have his subscription applied in the manner agreed on when this voluntary association was formed, and the evidence of the agreement is the charter itself. It was not necessary that this condition should have been annexed to the subscription when made by the county court, for the reason that the terms and object of the subscription, when not otherwise expressed, were to be found in the charter, and that was to build additional locks and dams with the money subscribed; and, when attempting to use the fund for other purposes, the aid of the chancellor can be invoked for the protection of the stockholder.

This construction of the charter must have been that given it by the president and directors of the corporation. They made no effort to collect this fund from the county of Jessamine, although the subscription had been made some 12 or 14 years before these suits were instituted, and then the actions were instituted by creditors of the corporation. Nor could the creditors who became such after the failure of the company, with the stockholders or the most of them released, and the company unable to even improve or repair the old locks, have looked to the fund subscribed by the county of Jessamine as the means of reimbursing them for services rendered or money loaned. It is scarcely reasonable to suppose that this fund was still being relied on for the success of the original undertaking, or, if not, was being looked to by the president and directors and the creditors as the means of paying them for labor

and expenditures, from which no possible benefits could result to this county. There is nothing in this case showing, or conducing to show, that the consideration of either claim was for labor or material or money used by the corporation in the attempt to execute in good faith the agreement between the stockholders in building additional locks and dams; but, on the contrary, it is evident that neither claim is based on any such consideration.

It is unnecessary to determine the validity of the subscription by the county. The orders on its records, connected with the levy of the tax, and the payment in fact of part of the money, would indicate that the act of the court in making those orders was regarded as the subscription; and with the money expended in the manner required by the charter we would be inclined to adjudge that the stockholder, and not the creditor, of the company must suffer the loss.

The judgment of the lower court is reversed, and the cause remanded, with directions to dismiss each petition as against the county of Jessamine. The two cases have been considered together, and this opinion applies to each.

SHINE, Presiding Judge, etc., v. KENTUCKY CENT. R. Co.

(Court of Appeals of Kentucky. February 10, 1887.)

1. MANDAMUS—INFERIOR JUDICIAL TRIBUNAL.

A railroad applied to the county court for the condemnation of certain property, under 1 Acts Ky. 1881, p. 83, authorizing such proceedings where the property is necessary for the use of a railroad, and cannot be obtained by contract with the owner, and directing the appointment of commissioners to value the land, and that if exceptions are filed to their report, that "the court shall forthwith cause a jury to be impaneled to try the issues of fact." The defendant objected that the court had no jurisdiction, as the road was in the hands of a receiver appointed by the federal court, and the county court dismissed the petition on that ground, without submitting the case to the jury. The railroad thereupon applied to circuit court for a *mandamus* to compel the county court to proceed to impanel a jury, and submit the case to them. *Held*, that the dismissal of the petition by the county court was an exercise of its discretionary power over the case, and not a refusal altogether to act, and therefore the writ could not issue. The statute did not make it obligatory on the county judge to impanel a jury in every case, and defer judgment until after a verdict had been found.

2. SAME—COUNTY COURT IMPROPERLY DISMISSING PETITION WITHOUT JURY TRIAL—APPEAL.

An act authorizing condemnation proceedings in the county court at the instance of a railroad against the owner of the land, and providing for a jury trial and appeal to the circuit court, *held*, if the county court dismissed the railroad's petition without submitting the issue to the jury, the remedy was by appeal to the circuit court, and not by *mandamus* to compel the county court to proceed to a jury trial. *Mandamus* will not lie where the party has any other adequate remedy.

Appeal from Kenton circuit court.

Application for *mandamus* by appellee, Kentucky Central Railroad Company, against appellant, Shine, judge of Kenton county court, to compel him to impanel a jury and try the issue raised on the appellee's petition for the condemnation of certain property.

Collins & Fenley, for appellant. *Hallam & Myers*, for appellee.

HOLT, J. The appellee, the Kentucky Central Railroad Company, filed its petition in the Kenton county court against one Alonzo Graves under the law providing for the condemnation of land for railway purposes. 1 Acts 1881, p. 83. It provides that this may be done when the property is necessary for such use, and cannot be obtained by contract with the owner; also that commissioners shall be appointed to award to the owner the value of the land and damages, if any; and upon the filing of the report he is to be summoned to

show cause, if he have any, against its confirmation; and, if exceptions to it are filed, "the court shall forthwith cause a jury to be impaneled to try the issues of fact" made thereby.

In this instance the petition avers that the condemnation of the property is necessary for the extension of the railroad from its then terminus in the city of Covington to the Ohio river, and that it had endeavored to contract with Graves for it, but had been unable to do so. The answer puts all this in issue, save that no agreement of purchase has been made, and states affirmatively that the land could be obtained by contract at a fair price; also that the appellee had no right to maintain the proceeding, as its road had, by a decree of the federal court, been placed in the hands of a receiver. The necessary commissioners' report was filed, fixing the value of the property and the resulting damages; and, exceptions having been filed to it, the appellee moved the court to impanel a jury to try the issues thus formed, while Graves, who had filed an exhibit showing the appointment of the receiver, moved the court to dismiss the proceeding, upon the ground that the appellee had no right to sue. The first motion was overruled, and the last one sustained, the judgment allowing Graves his costs. This proceeding was then filed in the Kenton circuit court by the appellee against the appellant, the judge of the Kenton county court, to compel him by *mandamus* to impanel a jury, and try the case which he had dismissed.

It is urged, upon behalf of the appellee, that the dismissal was in effect a refusal to proceed further with the case; and that, as is true, there need not be a direct refusal to do so to authorize the writ, but that it is sufficient if such circumstances appear as satisfy the court that such was the intention. Various reasons were presented by the answer why the *mandamus* should not issue. We shall notice but two of them. Section 477 of the Civil Code provides: "The writ of *mandamus*, as treated of in this chapter, is an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law."

This provision relates only to the acts or omissions of ministerial officers vested with no discretion, and does not restrict the issuance of the writ to them. True, courts will not interfere with the exercise of discretionary power; but where an officer or inferior judicial tribunal vested with it refuses to exercise it at all, or act in any manner, they will by *mandamus* set him or it in motion, without, however, controlling the direction. The judgment in such a case must be left free to act, and reach such a result as it deems proper. Thus *mandamus* will lie to compel a judge to act upon a bill of exceptions, or to receive a verdict, or to try a cause, or to hold a court. If this were not so, a denial of justice would result. *Clark v. McKenzie*, 7 Bush, 523; *Com. v. Boone Co. Court*, 83 Ky. —.

In this instance, however, the writ should have been refused, for two reasons at least. Unquestionably the action of the county court was judicial. It did not refuse to act. It did act, as shown by the copy of its orders filed with the petition, and dismissed the proceeding upon the ground that the appellee could not maintain it owing to the appointment of the receiver. It is unnecessary to decide whether the ruling was correct or not. The right of the appellee to maintain the proceeding was a question presented to the county court, by the record, for its decision. It exercised its judgment, and dismissed it, because it was of the opinion that the appellee had no such power. It reached this conclusion in the exercise of its discretion; and, while *mandamus* will lie to set a court in motion, it cannot be used to control the result. It may compel the trial of an issue, but not how it shall be tried. High, Extr. Rem. § 24. If so, new trials could in effect be thus obtained; and this writ cannot be used for such a purpose. The inferior court must be left free to exercise its own judgment, and the opinion of another tribunal cannot be

substituted for it. *Goheen v. Myers*, 18 B. Mon. 426; *Clark v. McKenzie*, 7 Bush, 528.

The county court was not required to defer the exercise of its judgment, as to the right of the appellee to maintain the proceeding, until a jury had passed upon the issues raised by the exceptions. Indeed, it was proper that he should not do so. If this were required, it would often result in useless trouble and expense to the parties. Take the case of the condemnation of land for a road. The viewers file their report; and we will suppose that it is excepted to because they were not sworn, or were not qualified, or because the report does not describe the route. Certainly a writ of *ad quod damnum* should not issue until all such preliminary questions are settled. Again, a party has a right to demand a jury in certain cases; and as well might it be held that they must pass upon the issues of fact presented, although there may be many reasons, such as capacity to sue, etc., why the court must dismiss the action. It results that the demurrer to the petition should have been sustained for the reason above indicated.

There is another one, however, why *mandamus* will not lie in this instance. The appellee had a right to appeal. The sixth section of the act of April 11, 1882, (cited *supra*,) provides: "Either party may appeal to the circuit court, or other court of similar jurisdiction of the county, within thirty days, and the appeal shall be tried *de novo*." This right existed, whether a jury determined the issues of fact, or whether the court dismissed the proceeding upon a legal issue. An appeal is from the judgment of the court, and not the verdict of a jury. If an inferior court dismisses a warrant or an action without a trial upon the merits, or the intervention of a jury in a case where one is allowable, yet the party may appeal, and have the action tried *de novo*. Here the commissioners had filed their report as to the value of the land and the damages, and the record was complete for such a purpose.

Mr. High, in his work above cited, (section 177,) says: "In all cases where full and ample relief may be had, either by appeal, writ of error, or otherwise, from the judgment, decree, or order of the subordinate court, *mandamus* will not lie, since the courts will not permit the functions of an appeal or writ of error to be usurped by the writ of *mandamus*. Indeed, the interference in such cases would, if tolerated, speedily absorb the entire time of the appellate tribunals in revising and superintending the proceedings of inferior courts; and the embarrassment and delay of litigation would soon become insupportable were the jurisdiction by *mandamus* sustained in cases properly falling within its appellate powers of the higher courts. It may therefore be laid down as the universal rule prevailing in both England and America that the existence of another remedy adequate to correct the action of the inferior court will prevent the relief by *mandamus*." See, also, the case of *Goheen v. Myers*, *supra*.

It is too well settled to need the citation of further authority that *mandamus* will not lie where the party has any other adequate remedy, such as the right of appeal, to correct the supposed grievance.

The judgment is reversed, with directions to sustain the demurrer to the petition, and dismiss the action, with a judgment for the appellant's costs.

HARBISON and others v. SANFORD.

(*Supreme Court of Missouri. January 31, 1887.*)

EXECUTORS AND ADMINISTRATORS—SALE OF LAND AND DISTRIBUTION OF PROCEEDS—PARTIES—PROVING DEBTS.

In an action for the sale of real estate of a decedent, and the distribution of the proceeds among his heirs, it appearing that one of the heirs had mortgaged his interest, and the mortgagee was dead, *held*, his administrator was a necessary party; and a creditor who was a party, and not objecting to the failure to make the ad-

ministrator a party, or excepting to the decree directing the land to be sold, could not set up his debt for the first time by objecting to the order distributing the proceeds of sale among the heirs.

Appeal from circuit court, Cape Girardeau county.

This action was brought to partition the real estate of John C. Harbison, deceased, among his heirs. One of the heirs had conveyed his undivided interest to appellant, Linus Sanford, in trust to secure a debt due Nathan Van Horn. Van Horn was dead, but his administrator was not made a party to the action, though his heirs and Sanford, as trustee, were made parties. The court adjudged the land to be sold, and upon the filing of the report of sale ordered the interest of Van Horn to be paid over to his heirs. To the order of payment Sanford objected and excepted, claiming that by contract with Van Horn he was to have for his fee as attorney in securing and collecting the debt one-fourth of the amount, and that the entire interest of Van Horn should have been ordered paid over to him as trustee, as there was no administrator of Van Horn's estate. But the court overruled his exceptions, and Sanford appeals.

Marshall Arnold, for respondent. *Linus Sanford*, for appellant.

BLACK, J. This was a suit for the partition of real estate among the heirs of J. C. Harbison, and Linus Sanford, who had acquired the interest of Darwin Harbison. The interest of J. H. R. Harbison was incumbered by a deed of trust which he had made to Sanford as trustee to secure a debt to Nathan Van Horn. The heirs of Van Horn were made parties, and the proceeds of this deed of trust were ordered to be paid to them and their assignees, and of this order Sanford, who is the only appellant, complains on the ground that he was a creditor of the Van Horn estate.

The petition sets out the deed of trust, and alleges that Van Horn died leaving three heirs, two of whom had assigned their interests in the debt to one of the plaintiffs, and that all of the debts of that estate had been paid. Appellant, in his answer, refers to this deed of trust, and states that by contract with Van Horn he was to have for fees as attorney in securing and collecting the debt the one-fourth of the amount realized. The decree, in stating the interests of the parties, finds that John H. Harbison, one of the plaintiffs, is entitled to two-thirds of the debt, and that Mrs. Dickerson is entitled to the other one-third. There is a judgment that partition be made according to the interests of the parties as found, and to that end a sale of the premises is ordered. No exceptions whatever were made to the decree; but at a subsequent term, when the sheriff's report of sale came on for approval, appellant suggested that the estate of Van Horn was indebted to him, and objected to the disbursement of the avails of the deed of trust, which objections were overruled, and from that ruling he appealed.

The beneficiary in a deed of trust to secure the payment of a debt is a proper party to a suit for partition of the land. This conclusion was not stated in *Yates v. Johnson*, 87 Mo. 213, because not necessary to a disposition of that case, but it results from what is there said. As Van Horn was dead, his administrator, in a regular course of proceedings, should have been made a party to the suit. An administrator could have been appointed at the instance of the heirs, or the appellant, if he was a creditor; and, when appointed, could have been made a party to the suit at any time before final judgment. *Parkinson v. Caplinger*, 65 Mo. 292. The final judgment is the approval of the sale or report of the commissioner, as the case may be. *Murray v. Yates*, 73 Mo. 14. Had that been done, the court could and doubtless would have ordered the money paid to him. *Langham v. Darby*, 13 Mo. 556. But, instead of pursuing this course, or making any such suggestion to the court, the appellant made the specific issue that he was entitled by contract to the one-fourth of the proceeds realized. That issue was fairly adjudged against him, and of

that finding he does not complain. He chose the method in which he would test his right, and he ought to be held to abide the consequences.

Again, when he changed the form of his demand from a claim to a specific interest in the fund to a general indebtedness of the Van Horn estate to him, the court heard the evidence. The services were rendered some 12 or 13 years before the commencement of this suit, and the court evidently found that he had no subsisting demand against the estate, and with that finding we are satisfied. There is no claim that the estate is otherwise indebted, and substantial justice requires that this judgment should be affirmed; and it is so ordered.

(All concur.)

HUBBELL and others v. ALLEN and others.

(Supreme Court of Missouri. January 31, 1887.)

FRAUDULENT CONVEYANCE—MORTGAGOR RETAINING POSSESSION.

A stipulation in a chattel mortgage that the mortgagor shall remain in possession, with power to sell and apply the proceeds, *not for his own benefit*, but to pay off the mortgage debt, does not render the mortgage fraudulent or void.¹

Appeal from circuit court, Barry county.

A. H. Wear and W. C. Price, for respondents. N. Gibbs, Thos. N. Allen, and Alfred Gensel, for appellants.

BLACK, J. This was an action of replevin. The record discloses the following facts: John T. Horner owned two small drug-stores, one at Cassville, and the other at Exter, villages some four miles apart. He made two mortgages on the Cassville stock, fixtures, and furniture,—one to secure a debt due to the plaintiffs, Hubbell & Co., and the other to secure a debt to the defendant Amos Horner. The mortgage to Amos Horner was acknowledged and recorded on the sixteenth, and that to the plaintiffs on the twentieth January, 1882. About the same time he made two mortgages on the Exter store,—one in favor of defendant Pilant, and the other to defendant Rebstock. The mortgagor then removed the Cassville store to Exter, and there combined the two stocks. Shortly after this, the defendants, acting together, and with the consent of the mortgagor, took possession of the combined stocks, and were proceeding to make their debts, which are conceded to be just and unpaid, when the plaintiffs commenced this suit, and under the order of delivery got possession of all of the property, and for which they recovered judgment on a trial by the court without a jury.

It is clear the judgment must be reversed, for the plaintiffs do not claim the property save by virtue of their mortgage, and that covered no part of the Exter stock, furniture, or fixtures, and as to that property the defendants should have prevailed.

Amos Horner's mortgage upon the Cassville store was prior to the plaintiff's mortgage on the same property. Unless the Amos Horner mortgage was for some reason invalid in whole or part, the plaintiffs were not entitled to recover any part of that stock, furniture, or fixtures. We cannot see from the record before us that the validity of that mortgage was questioned in the trial court, and no such question is urged here. Indeed, the respondents make no appearance in this court. The defendants insist that the plaintiffs' mortgage is fraudulent on its face, and an instruction to that effect was refused. The mortgage contains this provision: "I, the said J. T. Horner, hereby bind myself, in consideration that I am to keep the possession of said drugs and medicines, fixtures and furniture, for the purpose of selling and paying said in-

¹ As to the validity of chattel mortgages providing that the mortgagor may remain in possession of the mortgaged property, see *Hisey v. Goodwin*, (Mo.) 2 S. W. Rep. 566, and note; *Fisher v. Syfers*, (Ind.) 10 N. E. Rep. —.

debtedness, to keep strict account of sales," etc. "If the two payments provided for are not made at the times stated, then the mortgagee has the right to take possession."

If it appears upon the face of a chattel mortgage that the mortgagor is to retain possession, and have the power to sell and dispose of the property in the course of his business for his own benefit, then it is fraudulent as to creditors and purchasers, because made to the use of the mortgagor, and the courts will so declare as a matter of law, without regard to the intention of the parties. *Bullene v. Barrett*, 87 Mo. 186; *White v. Graves*, 68 Mo. 218; *Weber v. Armstrong*, 70 Mo. 217; *Lodge v. Samuels*, 50 Mo. 204. But it was held in *Metzner v. Graham*, 57 Mo. 404, that a stipulation whereby the mortgagor was to remain in possession, with authority to sell, by applying the proceeds of sales to the payment of the secured debt, did not render the mortgage fraudulent on its face, for the power to sell was not for the use of the mortgagor. So here the authority to sell is expressed to be given for the purpose of paying the secured debt, and to that end a strict account of sales is to be kept. The present case does not come within the rule first stated, but is in all material respects like that last cited. The instruction was therefore properly refused.

The judgment is reversed, and the cause remanded for trial anew.
(All concur.)

ELLIS and another v. KYGER.

(*Supreme Court of Missouri. January 31, 1887.*)

1. DEED—CONDITION—CONSTRUCTION OF RAILROAD.

A conveyance of a tract of land to a railroad upon condition that if the railroad should not be constructed through the tract, and a station established thereon, the deed should be void, is a condition subsequent. As no time was fixed for the performance of the condition, a reasonable time will be allowed; and, the deed having been made in 1865, a reasonable time is held to have long since elapsed.

2. SAME—RE-ENTRY—DOWER—ESTOPPEL.

Where land is conveyed upon condition subsequent, mere non-performance of the condition does not divest the grantee's estate, or re-vest grantor with title, without re-entry or demand of possession. So where, in such case, the grantor dies after non-performance, but before re-entry, the widow is not entitled to dower. The right of entry descends to the heirs, and a subsequent grantee claiming under deeds from them is not estopped thereby to deny the widow's right of dower.

Appeal from circuit court, Johnson county.

W. W. Wood, for appellants. A. Comingo and Sparks & Campbell, for respondent.

BLACK, J. This is a suit for the assignment of dower. One of the plaintiffs, Polly Ellis, and her former husband, Isaac Jacobs, on the thirteenth November, 1859, conveyed to Frederick Billum, in trust for the Pacific Railroad, a parcel of land 1,267 feet in length, by an average width of 500 feet. The deed recites that it is made "upon the condition that if the Pacific Railroad Company shall not construct the said railroad through said tract, or if, when constructed, they shall not establish a freight and passenger station upon said tract, then the conveyance shall be null and void, but otherwise to remain in full force and effect." Isaac Jacobs died in 1863. The railroad was completed to a point beyond the tract of land in question in 1865. There was evidence, the bill of exceptions recites, tending to show that the company failed to perform the conditions in the deed, and evidence to the contrary effect. In 1869, Asa Whitehead procured deeds from some of the heirs of Jacobs, and in that year built a house upon the lots in question, which was destroyed by fire. Neither Jacobs in his life-time, nor his heirs, ever entered or made any effort to recover the property for condition broken. In 1878, Coventry, Cockrell, and Zoll, who had acquired the title of Whitehead and the

other heirs of Jacobs, quitclaimed a part of the premises described in the deed to the trustee, to the railroad company, and the company at the same time quitclaimed the residue to them, from whom defendant acquired his title. The trial court gave an instruction that upon the evidence the plaintiff could not recover.

That the conditions in the deed for the construction of the railroad through the land therein described, and the establishment of a freight and passenger depot thereon, were conditions subsequent, is too clear to call for the citation of authorities. The trustee became seized of the premises, though the estate in him continued defeasible until the conditions were performed, waived, released, or barred by the statute of limitations or by estoppel. As no time was fixed within which the conditions were to be performed, the law would allow the company a reasonable time. 2 Washb. Real Prop. (4th Ed.) 11. Since the railroad was completed to a point beyond the land in question in 1865, a reasonable time has long since elapsed; and we must assume, under the instructions given, that the company has failed to perform the stipulations in the deed to the trustee.

It is well settled that an action of ejectment may be maintained by the grantor or his heirs for condition broken, without any entry or demand of possession. *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Plumb v. Tubbs*, 41 N. Y. 442; *Cowell v. Springs Co.*, 100 U. S. 55. Our statute with respect to actions of ejectment leads to the same conclusion. Sections 2240, 2247, Rev. St. 1879. But it is equally well settled that non-performance of the condition alone does not divest the estate. Performance of the condition may be waived; and the estate continues in the grantee after the breach, until he who has a right to insist upon performance elects to declare a forfeiture. The estate continues, with its original incidents, until entry, or some act equivalent to it. 4 Kent, Comm. 127; 2 Washb. Real Prop. (4th Ed.) 12; 1 Smith, Lead. Cas. (8th Ed.) 130; *Memphis, etc., R. Co. v. Neighbors*, 51 Miss. 412; *Kenner v. American, etc., Co.*, 9 Bush, 202; *Knight v. Railroad Co.*, 70 Mo. 231.

The grantee in the deed of trust, therefore, continued to be the owner of the premises at and after the death of Jacobs, who was not seized at any time after the delivery of the deed. A widow is entitled to be endowed in all the lands of which her husband, or any person to his use, was seized of an estate of inheritance at any time during the marriage, to which she shall not have relinquished her dower. Section 2186, Rev. St. 1879. As the plaintiff here relinquished her dower by deed duly acknowledged, and her husband did not enter for condition broken, and was therefore not seized of the premises in dispute at any time after the delivery of the deed, it would seem to follow that the plaintiff is not entitled to dower. Washburn says: "It is enough that the husband had a seizin in law, with the right to an immediate corporal seizin. If it was not so, it might often be in the husband's power, by neglecting to take such seizin, to deprive his wife of her right to dower." 2 Washb. Real Prop. (4th Ed.) 215. But here the husband made no entry, nor was he seized in law. The same author, in the same connection, says: "If, at common law, the husband had not, during coverture, anything more than a mere right of entry, or of action to obtain seizin, it would not be sufficient to entitle his widow to dower." The mere right of entry upon lands was not sufficient to give dower. 1 Scrib. Dower, 243. If the husband dies before entry in a case of forfeiture for condition broken, his wife is not dowable, because he had no seizin, either in fact or law. 4 Kent, Comm. (13th Ed.) 38. In *Thompson v. Thompson*, 1 Jones, (N. C.) 431, the court said, by way of illustration: "So where one makes a feoffment upon condition, and dies after condition broken, but without revesting his estate by entry, and afterwards the heir enters and reverts the estate, the widow is not entitled to dower."

It results from what has been said, both upon principle and authority, that

the plaintiff is not entitled to dower in the premises in question. The result would be the same had the heirs of Isaac Jacobs, and not their grantees only, entered for breach of the condition in the deed to Billum.

It is further insisted by the appellants that the defendant is estopped from denying plaintiff's right to dower. This contention is based upon the fact that the defendant's grantors acquired possession and claim of title, at least, from Whitehead, who made claim and took possession alone under his deeds from the heirs of Isaac Jacobs. The authorities all show that the right to enter for condition broken descended to the heirs of Jacobs, the right not having been exercised by him in his life-time. But, though this be true, it does not follow that the widow would, for that reason, be entitled to dower. We have seen that she would not be entitled to dower because her husband was not seized either in fact or law. There is therefore nothing inconsistent between a claim under them, and the claim that the widow should not be endowed.

It is urged that the general common-law rule which confined the right to take advantage of the non-performance of a condition subsequent annexed to an estate in fee, has been modified by our statutes with respect to conveyances. We do not stop to consider this question, for it cannot affect the result before reached in this case. The judgment is therefore affirmed.

(All concur.)

OGDEN v. CITY OF ST. JOSEPH and others.

(*Supreme Court of Missouri. January 31, 1887.*)

1. TAXATION—STOCK IN NON-RESIDENT COMPANY.

Shares of stock in a cattle-raising company whose property consists of cattle and land located in another state, such stock being owned by a resident of a city, is liable to taxation by the city under Rev. St. Mo. § 4701, providing that the owner of stock in any corporation (except a bank or insurance company) shall list the stock for taxation; and section 4700 providing that all the property of corporations is liable to taxation except a corporation whose stockholders pay tax on their shares, the property of this corporation being outside the city, and therefore not assessable by it, shares of stock held by a resident of the city should be assessed.

2. SAME—SHARES OF STOCK—SITUS OF.

Rev. St. Mo. §§ 4694, 4696, making property, real and personal, "*in the city*," or "*within the city*," liable to taxation, includes intangible personal property, such as shares of stock owned by a resident of the city, as the *situs* of such property is the residence of the owner, when the contrary is not declared by statute.

Appeal from circuit court, Buchanan county.

Green & Burnes, for appellant. *Jas. Limbird*, for respondent.

BLACK, J. The defendant is a city of the second class under the general laws of this state. The plaintiff is a resident of the city of St. Joseph, and owns two shares of stock,—one in a corporation organized under the laws of this state, and the other under the laws of the state of Texas. Both corporations are such as are contemplated in article 8, c. 21, Rev. St. The further agreed facts are that the property of these corporations, consisting of cattle, horses, and real estate, is, and at all times has been, permanently located in the state of Texas, and there taxed by the laws of that state. The question is whether these two shares, certificates of which are in the possession of plaintiff, should be listed for taxation for city purposes for the year 1886.

The question is not free from difficulty, and it therefore becomes necessary to quote liberally from the statute with respect to cities of the second class. Section 4694 is as follows: "The common council shall have power to levy and collect a general tax of not exceeding one per centum for each fiscal year upon all property in the city liable to taxation for state purposes, and not by general law exempt from municipal taxation." Section 4700 makes it the duty of the assessor to return to the council a complete assessment of all prop-

erty except merchandise, "and excepting the property of corporations whose capital stock is liable to taxation, at the cash value of such property." By section 4701 owners of personal property subject to municipal taxation must deliver to the assessor a list thereof, with the cash value, stating in the list the property by classes, the sixth of which is: "The amount of stock or shares in any company or corporation not required by law to be otherwise listed." Section 4704 provides: "The property of all corporations and companies, except the personal property of incorporated banks, shall be assessed and taxed as the property of individuals is assessed and taxed. All shares of stock of incorporated banks, whether organized under the laws of this state or of the United States, shall be assessed at their actual cash value." The president of the bank is then required to deliver to the assessor a list of the shares, with the names of the owners and the cash value thereof, together with a list of the real estate belonging to the corporation. The bank is required to pay the tax as the agent of the owners, but may recover from the owner the amount paid, or deduct it from dividends.

From the section last cited it is clear that shares of stock in incorporated banks must be listed and taxed. Though they are listed by the president, they are taxed to and as the property of the owners thereof. It is equally clear that the property of all other corporations must be assessed against the corporations. This section is the same as section 6692 of the present general state and county revenue law, except that there insurance companies are included with banks. This method of taxing banks and insurance companies by assessing the shares of stock, and other corporations by assessing the property of the corporation, has been a part of our system of taxation for many years. 2 Wag. St. p. 1165, § 86. This court recently held, in *Valle v. Ziegler*, 84 Mo. 214, that shares of stock in a manufacturing corporation created under the laws of this state were not to be taxed for state and county purposes, but that the property of the corporation should be taxed. The ruling goes upon the ground that to tax both the entire property of the corporation and also the shares of stock would, in a sense, be double taxation; and that an intent to tax both must be clearly declared, or it will not be imputed to the legislature. It is true, the shares are personal property, and are distinct from the property of the corporation. It is doubtless within the power of the legislature to tax both the shares to the holders thereof, and the property of the corporation to it; but a statute will not be so construed unless required by express words or necessary implication. *Cooley, Tax'n*, (3d Ed.) 227-229. This principle is to be applied in the further consideration of these sections.

By section 4700 the assessor does not include in the assessment "the property of corporations whose capital stock is liable to taxation at its cash value." The words "capital stock" are evidently here used as meaning the shares of stock, and not the money paid or agreed to be paid in as the basis of business, or its equivalent,—the property in which such money has been invested; for the property excepted from the assessment roll must be the personal property of incorporated banks. The exception can have no other application. Thus far the two sections are entirely consistent.

Now, does the clause in section 4701 which requires the individual, when giving in his taxable property, to include "the amount of stock or shares in any company or corporation not required by law to be otherwise listed," require him to list his shares in these corporations, the property of which must be assessed as the property of individuals is assessed? If it does, then in these manufacturing and business companies the shares of stock, and all of the property of the corporation, must be taxed; whereas, in case of banks, the shares and real estate only are taxed. The reason for such a distinction is not readily seen. Especially is this so in view of the fact that it is the legislative policy of the state to allow these business corporations to be created for a great variety of purposes. Practically they have many of the characteristics

of partnerships, though corporations they are in contemplation of law. If the manufacturing or business corporation is located in the city, and the shareholders are all residents, and the shares are to be listed, then the property of the corporation would come within the exception of section 4700, and not be put upon the assessment roll; yet section 4704 says the property shall be assessed. To make this clause harmonize with the other provisions of the statute we must regard the shares as listed when the property of the corporation is required to be assessed and taxed as the property of individuals is assessed. Then, in case of corporations whose property is required to be assessed by section 4704, the shares need not be listed. But in the present case the entire property of both corporations is located permanently outside of and beyond the limits of the city, and is therefore not required to be assessed. The clause in question is to have some effect accorded to it if it can be done consistently with the other sections. It is agreed that the plaintiff is a resident of the city; and, as the property of these corporations cannot be assessed, there would seem to be no reason why the shares of stock should not be. We conclude it is this class of cases which the clause is designed to reach.

The objection made to this conclusion is that the power to levy a general tax of 1 per centum, and a tax sufficient to pay maturing bonds, is by sections 4694 and 4696 limited to property, real and personal, "within the city" or "in the city." These sections are not different from sections 31 and 32 of the act of 1885, (Acts 1885, p. 50.) The limitation can have full application to tangible personal property; but the *situs* of such tangible property as shares of stock is the residence of the owner, when the contrary is not declared by statute.

In *Cooley on Taxation* (page 22) it is said: "Shares in a corporation are also the shares of the stockholder, wherever he may have his domicile, and, if taxed to him as personal estate, are properly taxable by the jurisdiction to which his person is subject, whether the corporation be foreign or domestic." The same principle is asserted in *Inhabitants of Great Barrington v. Commissioners of Berkshire*, 16 Pick. 572, and *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490.

It is unquestionably within the power of the legislature to make shares of stock taxable to the owner at his place of residence; and this we are of the opinion this statute was designed to do and does do. Otherwise one of these corporations may be located at and all the stockholders reside in the city, and have the protection of the municipal government, and yet pay no share of the public burden on the aggregated wealth thus invested, because the property of the company is without the jurisdiction of the city. The fact that the property of the corporations is taxed in the state of Texas is of no consequence, if the law requires the shares to be assessed and taxed here at the residence of the owner. *Bradley v. Bauder*, 36 Ohio St. 28; *Sturges v. Carter*, 114 U. S. 521, 5 Sup. Ct. Rep. 1014.

The judgment of the circuit court holding that these shares should be listed for taxation is correct, and it is affirmed.

(All concur.)

BROWN and others v. HANAUER.

(*Supreme Court of Arkansas. January 29, 1887.*)

1. STATUTE OF LIMITATIONS—WHEN IT BEGINS TO RUN—CLAIM ALLOWED BY PROBATE COURT.

The probate allowance of a claim is a judgment within the meaning of the Arkansas statute fixing the period of limitation at 10 years; and, while the statute may not operate to bar such a judgment while the estate is in course of administration, yet, as to a cause of action which accrued upon the discharge of the administrator, the statute will run from that time, and bar the demand at the end of 10 years.

2. SAME—PLEA OF—BURDEN OF PROOF.

Where, in an action to subject lands to the payment of a probate judgment, the defense is set up that the cause of action did not accrue within 10 years of bringing suit, the burden is upon the plaintiff to show that he had commenced his suit within the statutory period.

3. EJECTMENT—ADVERSE POSSESSION—OCCUPATION—PAYMENT OF TAXES.

The payment of taxes, and a neighborhood designation of the lands as the property of the adverse claimant, cannot be held to be open and notorious possession of lands that are capable of cultivation, and have a rental value.

4. SAME—INTERRUPTION OF POSSESSION—TACKING.

When actual possession of land by an adverse claimant ceases, the constructive possession of the legal owners revives, and a renewed adverse possession will not receive aid from or be tacked to a former possession to piece out the time allotted by the statute for acquiring title by adverse possession.

5. VENDOR AND VENDEE—UNRECORDED DEED—NOTICE.

Where a person purchased land with actual knowledge of a prior, though unrecorded, conveyance thereof by his grantor to a third person, his claim of title is without merit.

Appeal from circuit court, Clay county.

J. C. Hawthorne, for Brown and others, appellants. *U. M. & G. B. Rose*, for Hanauer, appellee.

COCKRILL, C. J. Damages for the right of way over the lands in controversy were assessed and paid into the Clay circuit court by a railroad, and the several claimants for the lands were left to litigate the title, and settle among themselves the right to receive the fund. The appellants' action of ejectment for the possession of the fractional section, of which the condemned portion was a part, was consolidated with the proceeding to determine the right to the funds paid by the railroad, on motion of Hanauer, and the consolidated suit was at his instance transferred to equity, in order to enable him (1) to reform a mortgage through which he claimed title to the land; or (2) to enable him to subject it to the payment of a probated claim against the estate of the ancestor through whom the appellants claim title.

1. The first question is as to the title of the land. Hanauer's only claim of title under the proof is by virtue of his adverse holding. He alleged in his cross-complaint that he supposed the lands in dispute had been included, along with other lands, in a mortgage which Hiram Brown, the appellants' father, had executed to him in 1860; that he became the purchaser, under a decree of foreclosure, of all the lands in the mortgage in 1867, and these, as he supposed, among them; but that afterwards he ascertained to his surprise that the lands in suit had been inadvertently omitted by the draughtsman from the mortgage. There is not a line of proof to sustain the allegation about the alleged mistake in the mortgage. On the contrary it was shown that the mortgagor did not acquire title to the lands until two years after the mortgage was executed, and could not have entertained the intention to convey them. Seven or eight acres of the land, it seems, were cleared and fenced in Hiram Brown's life-time. He died in 1864, seized in fee and in possession, leaving the appellants, his infant children, his heirs at law. They were soon after removed to Kentucky, and have since resided there. In 1867, Hanauer put his tenants in possession of the land. They remained there until 1879, and during this period the land became known in the neighborhood as Hanauer's land. In the year last mentioned the fence around the improved land was burned, Hanauer's tenants abandoned the occupation, and no one was in actual occupancy again until about 1881, when the building of the railroad had rendered the land of considerable value. About that time a small house was erected on the land, but whether in subordination to Hanauer's title is not quite clear. No effort was made to show any other act of ownership or control over or claim to the land by Hanauer after 1873, except the loss of the tax receipts showing payment of taxes upon them by his agent.

Seven years' continuous adverse possession by Hanauer is not established

by the proof. His possession from 1867 to 1873 cannot be stretched into that period, and did not divest the plaintiff's title. After that time we are not left to inference or conjecture as to the occupancy. Hanauer's actual possession was abandoned. It had been wrongful from the outset, without even color of title to sustain it; and while it might have ripened into title if he had continued his possession, or had maintained such open and notorious show of ownership for the statutory period as to operate as notice to all the world that he was in under a claim of title, still it is the settled policy of the law not to extend a possession that is without color of right by construction or implication. No presumptions are indulged to favor it; it must be proved. When Hanauer's actual possession ceased, the constructive possession of the plaintiffs, who were the legal owners, was revived; and a new possession by Hanauer, if satisfactorily proved, would start the statute afresh from its inauguration, but it could not receive aid from or be tacked to his former possession to piece out the time allotted by the statute. The payment of taxes, and a neighborhood designation of the lands as Hanauer's, born only of his former wrongful holding, cannot be held to be open and notorious possession of lands that were capable of cultivation, and had a rental value.

John W. Leach obtained the patent to this land from the state, and afterwards conveyed it by deed to Hiram Brown. Brown's dwelling was burned during the war, and the deed was destroyed with it, without having been recorded. J. J. Smithwick, who was a party to these proceedings, obtained a conveyance from Leach a short time before the ejectment suit was instituted, and got possession of a part of the land. The proof shows, however, that he purchased with knowledge of the prior conveyance to Brown, and his claim of title is without merit. The court decreed against him, and he prosecuted a cross-appeal, but he has failed to follow it up, and is deemed to have abandoned it. See rule 10, 44 Ark. 12.

2. It remains to consider Hanauer's effort to subject the lands to the payment of his probate judgment. The allowance had been made in his favor by the probate court in 1867, and he alleged in his cross-complaint that the administration had been closed, and the administrator discharged, without paying the allowance; that the lands were assets in the administrator's hands, and were now held by the appellants as heirs of the decedent, against whose estate the claim was allowed. This laid the foundation for subjecting them to the payment of his claim according to the ruling in *Wilson v. Harris*, 13 Ark. 559. See *Hall v. Brewer*, 40 Ark. 433. But the appellants, who were defendants to the cross-complaint, answered that the cause of action did not accrue within 10 years of bringing suit. Under this issue the burden was upon Hanauer, the plaintiff in the cross-complaint, to show that he had commenced his suit within the statutory period. *Ouachita Co. v. Tufts*, 43 Ark. 186. The probate allowance is a judgment, within the meaning of our statute fixing the period of limitation at 10 years, (*Brearily v. Norris*, 23 Ark. 169;) and while the statute may not operate to bar such a judgment while the estate is in course of administration, as was ruled in *Mays v. Rogers*, 37 Ark. 155, yet, as Hanauer's cause of action accrued upon the discharge of the administrator, the statute would run against him from that time, and bar his demand at the end of 10 years, (*Wilson v. Harris*, *supra*.) His complaint was filed 17 years after the allowance of his demand. It was alleged that the administrator had been discharged, and it was not denied; but there was nothing shown that the discharge was within the 10 years, and the claim must fail.

In the case of *State Bank v. Williams*, 6 Ark. 156, it was held that, after a lapse of 14 years, the presumption arose that the claims against the estate were paid, although the executor in that case had not been discharged. See, too, *Mays v. Rogers*, *supra*; *Stewart v. Smiley*, 46 Ark. 373; *Graves v. Pinchback*, 47 Ark. 470, 1 S. W. Rep. 682.

The decree against Smithwick is affirmed. So much of it as is favorable to Hanauer is reversed, and a decree will be entered here for the appellants upon the whole case. The costs will be adjudged against Smithwick and Hanauer in equal parts.

TOWN OF MONTICELLO v. COHN and others.

(*Supreme Court of Arkansas.* January 29, 1887.)

1. MUNICIPAL CORPORATIONS—POWERS—ULTRA VIRES—PUBLIC WEAIGHER—ESTOPPEL.
In an action by a municipal corporation on the bond of a public weigher, conditioned for the payment of money by him for the exclusive privilege of weighing cotton on the public scales, the plea of *ultra vires* is not available to the sureties; the contract being executed, and the weigher having got the benefit he contracted for.
2. BONDS—PUBLIC WEAIGHER—DISCHARGE OF SURETIES—NOTICE TO SUE PRINCIPAL.
A bond given to secure a municipal corporation the amount of money to be paid by one appointed public weigher is a bond single for the payment of money, within the meaning of Mansf. Dig. § 6400, and a surety on such an obligation will be free from his liability, as provided in Mansf. Dig. §§ 6398, 6399, on the failure of the obligee to begin action against the principal for the amount within 30 days after the service on him of notice so to do.

Appeal from circuit court, Drew county.

C. D. Wood, for Town of Monticello, appellant. Wells & Williamson, for Cohn and others, appellees.

SMITH, J. The incorporated town of Monticello sued Moss and his sureties before a justice of the peace to recover a balance of \$83.33, due on the following bond:

"We, J. R. Moss as principal, and John Hussey & Co. and Cohn & Kuhn as his securities, are indebted to the corporation of Monticello in the sum of five hundred dollars lawful money, conditioned that J. R. Moss has this day been awarded the privilege of public weigher for the town of Monticello for the year ending June 1, 1884, at the sum of two hundred and fifty dollars, payable as stipulated in his contract of this date with said corporation. Now, if the said J. R. Moss shall well and truly pay the said sum of two hundred and fifty dollars as stipulated in his contract, or cause the same to be paid, then this bond to be void; otherwise in force and effect.

"Witness our hands and seals this the fifteenth day of August, A. D. 1883.

"J. R. MOSS.	[Seal.]
"JOHN HUSSEY & Co.	[Seal.]
"COHN & KUHN.	[Seal.]

The complaint alleged that the town had by ordinance provided cotton scales, and had by contract awarded to Moss the exclusive privilege of weighing cotton thereon during the cotton season of 1883-84, for the consideration of \$250, to secure the payment whereof the bond was executed, etc. The sureties pleaded that the ordinance and contract, which are the authority and consideration for the bond, were null and void for want of corporate power; and, *secondly*, that, after the accrual of the cause of action herein, they had in writing notified and requested the plaintiff to proceed against the principal in the bond; and that no action had been brought within 30 days after the service of such notice, whereby they were exonerated. The plaintiff recovered before the justice of the peace against all of the defendants, but in the circuit court, on appeal, only against Moss.

The answer of the sureties was adjudged to be sufficient on demurrer, and the plaintiff elected to rest its case upon the demurrer.

We need not pause to inquire whether a municipal corporation is authorized, by section 751 of Mansfield's Digest, to do what the plaintiff has here undertaken to do. See *Taylor v. Pine Bluff*, 34 Ark. 603. For, suppose it has no

such power, yet its contract with Moss was executed. Nothing remained to be done except for him to pay the last installment of the price he had agreed to pay for the privilege. He had reaped all the benefits he had proposed to himself in making the contract; and the doctrine of *ultra vires* has no just application. *National Bank v. Matthews*, 98 U. S. 621; *Parish v. Wheeler*, 22 N. Y. 494; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Poock v. Lafayette Building Ass'n*, 71 Ind. 357; *Weber v. Agricultural Soc.*, 44 Iowa, 239. *Helena v. Turner*, 36 Ark. 577, furnishes an illustration of the principle. In that case a city had assumed to let public grounds for private uses, and it was held that the lessee and his sureties could not, after full enjoyment of the lease, deny the right of the corporation to make it.

The second defense arises upon a statute to be found in Mansfield's Digest:

"Sec. 6398. Any person bound as surety for another in any bond, bill, or note, for the payment of money, or the delivery of property, may, at any time after action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and other party liable.

"Sec. 6399. If such suit be not commenced within thirty days after the service of such notice, and proceeded in, with due diligence, in the ordinary course of law, to judgment and execution, such surety shall be exonerated from liability to the person notified.

"Sec. 6400. The two preceding sections shall not extend—*First*, to the bond of any executor, administrator, guardian, or other person given to secure the performance of his trust, or the duties of his office; nor, *second*, to any bond with collateral conditions, except bonds with collateral conditions exclusively for the payment of money or the delivery of property, or exclusively for the performance of a covenant or agreement for the payment of money or delivery of property."

This is a bond single for the payment of money, and is not conditioned for the performance of the duties of an office, or of a trust, nor for the performance of any other covenants. As the second plea presents a perfect bar to the action, the judgment must be affirmed.

FRANCO-TEXAN LAND CO. v. CHAPTIVE.

(*Supreme Court of Texas.* December 3, 1886.)

1. ALIENS—RIGHTS OF—RECOVERY OF PERSONAL PROPERTY.

Aliens are entitled to hold personal property, and to sue and be sued for recovery thereof in Texas courts, or for any debts that may be due them.

2. EXCEPTION—STATEMENT OF FACTS—AFTER TERM.

Where a statement of facts embodying exceptions is filed after an adjournment of the court for the term, under an order of court allowing this to be done, such order does not render valid the exceptions embodied in the statement.

Appeal from Parker county.

The directors of the Franco-Texan Land Company elected A. Chaptive, a Frenchman and resident of France, president of said company, and agreed to pay him a salary of \$1,200 per year for his services as president, and to furnish him with \$300 to defray his expenses from France to Weatherford, Texas. Said Chaptive was furnished with said expense money, and he came to Weatherford, and entered upon the duties of president of appellant about June, 1881, and November, 1882, he died. This suit was instituted by appellees, the wife and son of A. Chaptive, as his heirs, against appellant, on the twenty-eighth day of January, 1884, on an open account to recover of the appellant the sum \$7,441.71, the amount alleged to be due A. Chaptive, deceased, for salary, money advanced, etc. The petition also alleges that the appellant was further indebted to them in the sum of \$600, the amount necessary to defray the expenses of appellees in returning to France, and that ap-

pellant had agreed to pay their expenses in returning. Appellant pleaded in offset \$450, the value of rock sold by A. Chaptive, or by his authority, from the lands of appellant, and charging that A. Chaptive received said \$450, and appropriated the same to his own use, and did not account to the appellant for the same; and also charged that Chaptive was guilty of unauthorized expenditures which were proved to have been entered by him in their books. A jury was waived, and the cause submitted to the court, and the court rendered judgment for appellees for the sum of \$384, from which defendant appeals.

E. P. Nicholson, for defendant and appellant.

Appellees' petition showed upon its face that Marie Chaptive was an alien, and it contained no allegation that such rights as she was seeking in our court were accorded to citizens of the United States by the laws of France, where she is alleged to be a citizen, or by any treaty between France and the United States. Rev. St. p. 5, art. 9; also Id. art. 1658, p. 248; *White v. Sabariego*, 23 Tex. 243.

The court erred in admitting in evidence, over the objection of appellant, the account sued on, when the same had not been proven as required by law. *McCall & McCall*, for appellees.

WILLIE, C. J. Aliens are entitled to hold personal property, and to sue and be sued in our courts for its recovery, or for any debts that may be due them. 2 Kent, Comm. 25. If, therefore, the objection to the right of Marie Chaptive to sue upon the claim which is the basis of this action had been properly taken, it would have been of no avail.

We find in the record no proper bill of exceptions taken to any of the rulings of the court upon the admission of testimony. The only bill of exceptions found outside of the statement of facts does not set forth the objections taken to the evidence; and the same may be said as to the exceptions embodied in the statement of facts. Besides, the statement of facts was filed after the adjournment of the court for the term; and, though an order of court was duly entered allowing this to be done, this did not legalize the exceptions found in the statement, as no order of the court can authorize these to be filed after the term of the court has closed. The findings of the district judge upon the law and the facts are not found in the record. We cannot tell, therefore, upon what evidence the court acted in making up its judgment; and this judgment must be sustained, unless there was proof before the court to justify it. For want of a proper bill of exceptions we must regard the book-account as having gone before the judge without objection. It was not his duty to interpose objections which the defendant below did not see proper to urge, and to exclude it from his consideration, when he was not asked to do so by the party interested in having this done. This account fully sustained the claim of the plaintiffs, and showed them entitled to as much as they recovered, after deducting every payment or credit to which the account was subject under the evidence. The court seems to have given the benefit of the doubt to the defendant as to all items of the account upon which suspicion was cast by the testimony. This certainly was all it could ask under the circumstances. We do not mean, however, to hold that, had the account been properly objected to, it should have been ruled out by the court. It was taken from the corporate books of the appellant, which were shown to have been correctly kept. It constituted an account of transactions had by a corporation through its agents and officers in the regular course of its business. Such books are usually held to be competent evidence in an issue, as this was, between a corporation and one of its members. They are open to the inspection of the members and officers of the corporation at all times; and, if items of debit and credit are incorrecly entered in them, to the detriment of either the corporation, or any individual comprising it, every opportunity is afforded of having them corrected. It would seem to be too late to object to such an

account after it has been treated for a long time as a true statement of the corporate transactions, and the only party by whom its every item could be established has ceased to live. A large number of the items of this account were sworn to be correct by persons having a personal knowledge of the facts upon which they were founded; and this tended to render it probable that the balance of the account was also correct. There was a conflict of testimony as to the \$450 received for rock sold from the company's lands; but, the court having resolved it in favor of the plaintiffs, its judgment in this respect cannot be disturbed.

In the state of the record as it comes before us, we find no error for which the judgment should be reversed, and it is affirmed.

BLUM and another v. BASSETT and others.

(*Supreme Court of Texas*. December 21, 1886.)

1. CONTINUANCE—AFFIDAVIT—ABSENT WITNESS.

In a suit to set aside attachments, in which the sheriff is made a defendant, a first application for a continuance, which shows that the witness for whose testimony the continuance is sought is sick and unable to attend, and has been served with a subpoena, should be granted, and the fact that no attempt was made to take the witness' depositions, or that the subpoena was served by the sheriff's deputy, or that the witness' fees were not tendered him, or that the affidavit is made by an agent of the party seeking the continuance, does not show any irregularity.

2. CUSTOM AND USAGE—EVIDENCE—CUSTOM AGAINST FACT.

Where the fact of a loan being made, and the money thereon paid by a bank, has been plainly established by positive proof, testimony of other bankers and merchants of the town tending to show that they would not have lent the money, and that it was out of the course of business and custom of bankers in the place, is inadmissible.

Appeal from Washington county.

This suit was brought by Leon & H. Blum, junior attaching creditors of H. Cohn, against Bassett & Bassett, Charles Wenar, J. S. Newbauer, and others, seeking to set aside the attachments of Bassett & Bassett, J. S. Newbauer & Bro., Charles Wenar, Isaac Heidenheimer, and S. Lederer, on the ground that they were fraudulent and collusive, and the claims fictitious, and to have the property levied on under the writs of Bassett & Bassett *et al.* first subjected to the payment of the debt of Leon & H. Blum. The sheriff and clerk were joined as defendants. The suit was filed on the twenty-ninth of February, 1884. On the eleventh of September, 1884, a subpoena was issued for C. B. Shepard, F. A. Engelke, Thomas Dwyer, and others. It was served on the seventeenth of September, by J. L. Moore, sheriff, by A. W. Gilder, deputy. Said Moore was a party defendant. On the eleventh of September the case was set for trial on the eighteenth of that month. On the call of the case on that day the witnesses above named failed to answer, and the appellants, plaintiffs in the court below, presented their application for a continuance on account of their absence. While the application was being read, the witness Engelke came into court, and on the next day the witness Dwyer came in and testified; but Shepard was not present during the trial, which lasted from the eighteenth to the twenty-fourth of the month. During the trial it was shown by the testimony of W. W. Searcy, one of the appellants' attorneys, and who was a son-in-law of Mr. Shepard, that he was at home sick in bed; lives about half a mile from the court-house; had been sick two or three weeks; and was sick at the time he was subpoenaed in this case as a witness. It did not appear from the application for the continuance that the fees had been tendered the witness. The affidavit was made by an agent of the plaintiffs, and showed no reason why it was not made by the plaintiffs themselves. Judgment was rendered for defendants, from which plaintiffs appeal.

Scott & Levi, Garrett, Searcy & Bryan, and C. R. Breedlove, for plaintiffs.

(1) The application for continuance being the first application, and in form in compliance with the statute, the court erred in refusing to grant the same. The application was in due form, and was the first application for a continuance. *Rev. St. art. 1277; Lieb v. Washington Co.*, Galveston term, 1885; *Prewitt v. Everett*, 10 Tex. 283; *McMahan v. Busby*, 29 Tex. 191.

(2) The court erred in refusing to permit the witnesses Giddings, Engelke, and Dwyer to testify when asked by plaintiffs as to whether it was customary or usual in banking business to let a man of Cohn's business standing in Brenham have as much money as \$2,000 in the month of February, 1883, without security. The plaintiffs attacked the claim of Bassett & Bassett for fraud. Bassett & Bassett claimed to have loaned Cohn \$2,000 without security. The facts show that Cohn had no commercial standing in Brenham, and that he was insolvent. Giddings and Engelke were both bankers in Brenham. Dwyer was a capitalist and a large merchant. The plaintiffs sought to show by these witnesses that the transaction of Bassett with Cohn was unusual and out of the usual course of business; that B. H. Bassett, one of the members of the firm of Bassett & Bassett, had repeatedly filed suit against H. Cohn, and knew of his being bad pay, etc.

(3) The court erred in refusing to permit the witnesses Giddings, Engelke, and Dwyer to testify as to whether the loan claimed to have been made by Bassett & Bassett to Cohn was a usual transaction, and one to be expected of bankers. The question asked the witnesses, which the court refused to permit them to answer, is as follows: "It is in evidence in this case that on February 12, 1883, Henry Cohn gave to Bassett & Bassett his note for \$500, due in 20 days, there being a pencil memorandum at the bottom of the note, 'No interest to be charged for 60 days;' and also on the same day he gave to Bassett & Bassett another note for \$500, payable in 10 days, with the same memorandum, 'No interest to be charged for 60 days;' and on the same day a third note for \$500, due in 40 days, with the same memorandum as to interest; and on the same day he executed to Bassett & Bassett another note for \$500, due in 30 days, with the same memorandum as to interest. All of these notes stipulated in their body, interest from maturity. State if at that season of the year, at that time, that a man of Cohn's credit and standing in the community, and his previous history here, and in view of the standing of Bassett & Bassett as bankers, a transaction of that kind between them, without any security for this paper, and the facts viewed in all other respects, was it a usual transaction, or one that was to be expected." *Bump, Fraud. Conv. 50.*

(4) The court erred in excluding the tax-rolls of Washington county for the year 1883, as offered by the plaintiffs, for the purpose of showing the amount of capital that Bassett & Bassett had on the first day of January, 1883, which said tax-rolls show that the only property that Bassett & Bassett had was \$12,775 real estate.

(5) The court erred in refusing to permit the witness J. S. Newbauer to state what facts he knew of that justified him in making an affidavit for an attachment that Henry Cohn was about to transfer his property for the purpose of defrauding his creditors. The witness was asked the following question, which the court refused to permit him to answer: "You state in the affidavit for attachment that Henry Cohn is about to dispose of his property for the purpose of defrauding his creditors. State the facts which you had within your knowledge that justified you in making the affidavit. *Secondly*, did you know any facts, or have any knowledge of any facts, to the effect that Henry Cohn was about to dispose of his property to defraud his creditors?" Newbauer had attached Cohn by invitation of Charles Wenar, a son-in-law of Cohn's, who had also attached Cohn ahead of Newbauer. His attachment was sued out on the ground that Cohn was about to dispose of his property

with intent to defraud his creditors. Newbauer also made affidavit in the case of Heidenheimer against Cohn, whose attachment was sued out upon the same ground.

Sayles & Bassett, for appellees, Bassett & Bassett.

(1) There was no error in overruling appellant's application for continuance, because the application did not show the exercise of due diligence to secure the attendance of the witness. The deputy-sheriff could not execute process in a suit to which the sheriff was a party. The statute requires process to be issued "to the sheriff or any constable," (Rev. St. art. 1215,) and, the sheriff being a party to the suit, the service should have been executed by the constable, (*Kirk v. Murphy*, 16 Tex. 654; *Powell v. Wilson*, Id. 59; *Oliphant v. Dallas*, 15 Tex. 138; *Sample v. Irwin*, 45 Tex. 567.) Due diligence must be shown by the application, (Rev. St. art. 1277; Greenl. Ev. § 310;) and due diligence required the tender of fees to the witness, since his attendance could not otherwise be enforced, (Rev. St. art. 2212; *Hensley v. Lytle*, 5 Tex. 497; *Bryce v. Jones*, 38 Tex. 205.) It appearing that the witness Shepard was sick before the issuance of the subpoena, and that that fact was known to appellants' attorney, the issuance of a subpoena was not due diligence. Act April 21, 1879, (Sixteenth Leg. 126;) *Cotton-press, etc., Co. v. Bradley*, 52 Tex. 587; *Galveston, H. & S. A. Ry. Co. v. Gage*, 63 Tex. 568; *Texas & P. Ry. Co. v. Hardin*, 62 Tex. 367. The affidavit, being made by an agent, is defective, in that it does not show why it was not made by the party in person. *Robinson v. Martel*, 11 Tex. 149.

(2) The tendency of the questions propounded to the defendant Newbauer was to show that he had been guilty of a criminal offense, and he had a right to refuse to answer them. The matter sought to be elicited from said Newbauer was in any event immaterial, the judgment being divisible, and the testimony relating to his own attachment only, and the entire proceeds of the attached property having been appropriated to prior attaching creditors.

WILLIE, C. J. We are of opinion that the court erred in overruling the appellants' motion for a continuance. The affidavit upon which the motion was based, was in strict conformity with the statute regulating applications for a first continuance. The service of the subpoena upon the witness was all the diligence required, and it was not necessary that his fees should be tendered. This is too well settled in our practice by decisions of this court to require further discussion. *Transportation Co. v. Hyatt*, 54 Tex. 215; *Pre-witt v. Everett*, 10 Tex. 283; *McMahan v. Busby*, 29 Tex. 191; *Cleveland v. Cole*, 65 Tex. 402. These cases are not in conflict with *Hansley v. Lytle*, 5 Tex. 497; for there no subpoena had been served on the witness, and the party making the affidavit had relied solely upon his promise to attend court. The court did not say that it was necessary to tender fees, but it is plain from the whole decision that the continuance was held properly denied because a subpoena had not been served upon the witness.

We are pointed to no statute forbidding a deputy-sheriff to serve a subpoena issued in a cause wherein the principal sheriff is a party. The statute provides that, where the sheriff is a party to a suit, the citation shall be directed to any constable of the county. Rev. St. art. 1217. Specifying this particular process impliedly excludes all others, and permits their service by officers other than the constable, as in other cases. At any rate, there is no law disqualifying the sheriff or his deputies from serving a subpoena in a suit like the present, and, the statute not disqualifying them, we cannot do so.

Our Revised Statutes expressly authorize an agent to make any affidavit that it may become necessary or proper for his principal to make during the progress of a civil suit or judicial proceeding, (article 5;) and the facts set forth in the motion seem in this case to have been sworn to on the personal knowledge of the agent. The case of *Robinson v. Martel*, 11 Tex. 75, was

decided before any statute of this kind was in existence. That decision, too, was placed upon the ground that the agent or attorney could not know that the witness was not absent through the procurement or consent of the principal. This fact becomes important only upon a second or some subsequent motion for a continuance, and is not required to be stated in a first application. The reason for the rule, as stated in that case, does not, therefore, apply to the present.

The other grounds upon which the court's ruling upon the motion to continue is sought to be sustained are not such as to demand attention.

The court did not err in excluding the testimony set forth under the second and third assignments of error. It was sought through this testimony to prove a custom to contradict a fact plainly established by positive testimony. This is not allowable, as has been held in the case of *International & G. N. Ry. Co. v. Gilbert*, 64 Tex. 541. It had been positively testified that Cohn got in money from Bassett & Bassett every dollar for which his notes to them were given. It was therefore a matter of no importance that other bankers would not have let him have the money under similar circumstances, or that it was out of the course of the business of bankers in the place to make such loans. Bassett & Bassett chose to violate such a custom in this particular; and that they did so was no evidence whatever of fraud on their part, or of a collusion with Cohn to defraud his other creditors, but rather to the contrary, as it was a step towards enabling Cohn to continue in business.

We cannot see what bearing the amount of taxes for 1883, given by Bassett & Bassett to the assessor of Washington county, had upon the question in dispute, and the brief of counsel does not show its pertinency.

The questions to the witness Newbauer were also properly ruled out. Suppose he had answered that he knew no facts that tended to show that Cohn was about to transfer his property for the purpose of defrauding his creditors, what bearing would the answer have had upon the questions at issue? It might have subjected him to a civil suit by Cohn for wrongfully obtaining the attachment, but it would not have entitled a subsequent attaching creditor to take precedence over him in satisfaction out of the same property. But, admitting that it would have been a link in a proper chain of evidence to show that the attachment was sued out by collusion with Cohn, there is nothing in the statement from the record made by the appellant to show that a single fact was proved which, taken in connection with any answer the witness could have made, would have proved collusion between himself and Cohn, the defendant in attachment. The isolated fact proposed to be proved would not have benefited the plaintiff's case under the circumstances, and he was not, therefore, prejudiced by its exclusion. The question propounded to the witness, however, was too obviously without relevancy to the controversy between the plaintiffs and the defendants to require any argument to show that it was justly excluded. But for the error of the court in refusing to continue the cause, as pointed out, the judgment is reversed, and the cause remanded.

CANNON v. CANNON and another.

(*Supreme Court of Texas*. November 12, 1886.)

1. APPEAL—INSUFFICIENT ASSIGNMENTS OF ERROR.

Where three several special exceptions are taken which set up two separate, distinct, and independent objections to the petition in the suit, an assignment of error as follows: "The court erred in not sustaining defendant's special exceptions to plaintiff's supplemental petition filed November 6, 1886,"—is bad, as not complying with the rules of the supreme court of Texas, and will not be considered on appeal.

2. SAME—PAPER ADMITTED BELOW WITHOUT OBJECTION.

An objection not taken below to a paper offered in evidence cannot be taken for the first time on appeal.

3. SAME—ASSIGNMENT OF ERROR—TO REFUSAL TO GIVE SEVERAL CHARGES.

An assignment of error which is taken to the refusal of the court to give several charges is in violation of the rules of the supreme court of Texas.

4. EVIDENCE—CONSTABLE'S DEED—PROOF OF AUTHORITY.

Where a constable signs a constable's deed as such, his signature is *prima facie* evidence of his authority, and such a deed is rightly admitted in evidence in the absence of proof to the contrary.

5. SAME—JUDGMENT OF ANOTHER COURT—CERTIFIED COPY.

The admission in evidence of certified copies of judgments of other courts is governed by Rev. St. Tex. art. 2252, and not by Rev. St. Tex. art. 2257; and a certified copy of a judgment of another court may rightly be admitted without notice.

Appeal from Rockwall county.

This is a suit brought by W. S. and W. B. Cannon against Emberry Cannon, in the form of an action of trespass, to try title to certain premises described in the petition. Appellant answered by general demurrer and general denial, and pleaded specially that the land sued for was purchased by him from one G. B. Davis, who at the time made the deed to appellees for the use and benefit of appellant; that appellant was placed in possession of the said premises by said Davis, and had held the same continuously, and was still in possession of the same, and paid all taxes thereon, and held the said deed from Davis to appellees in his possession, and they, with full notice and knowledge of his rights, had accepted the trust, and held said premises for his use and benefit up to and until the institution of said suit. The appellant prays for cancellation of the pretended title of appellees, removal of the cloud from his title, and for general relief. Appellees filed a supplemental petition denying generally the allegations in appellant's original answer, and pleading specially that the conveyance was taken in the name of appellees for the purpose of hindering and defrauding the creditors of appellant, and was intended as a gift to appellees. They also pleaded statute of 10 years' limitation. Appellant filed supplemental answer demurring both generally and specially to the supplemental petition of appellees, and a general denial of its allegations. On May 3, 1886, the court overruled appellant's demurrers to appellee's supplemental petition, and on May 4, 1886, the cause was submitted to a jury, and resulted in a verdict and judgment for appellees. May 5, 1886, the appellant moved for a new trial, which being overruled by the court, he excepted, and gave notice of appeal, and 10 days were allowed in which to file a statement of facts; and having, within proper time, filed an appeal-bond and assignment of errors, he now brings the cause before this court for revision.

Allen & Vesey and T. L. Stanfield, for appellants.

The court erred in not sustaining defendant's special exceptions to plaintiff's supplemental petition filed November 6, 1885. The facts constituting the fraud must be stated.

The court erred in admitting in evidence certified copy of judgment rendered in the county court of Rockwall county. Copies of judgments from other and different courts having different jurisdiction stand no higher, as to the authenticity of the copy, than a copy of a recorded instrument, and should be filed with the papers of the cause, and information given to the opposite party. The copy of judgment was admitted over objections of appellant, without having been filed with the papers, and without any notice to appellant. Rev. St. Tex. art. 2257.

The court erred in admitting in evidence, over objection of defendant, an original execution and *venditioni exponas*, purporting to be issued out of the county court of Rockwall county on the nineteenth day of September, 1883, as shown by defendant's bill of exceptions No. 2. An original record or a paper of another and different court is entitled to no authenticity or standing unless found in the custody of the legal custodian. The instruments were admitted in evidence without notice, and without coming into court in the

custody of the clerk or custodian thereof. 1 Greenl. Ev. §§ 484, 485; 1 Starkie, 195.

The court erred in admitting in evidence what purported to be a constable's deed to the land in controversy, without sufficient proof of the execution thereof.

The court erred in refusing to give the first special charge asked by the defendant. The defendant asked the court to charge the jury that if they believed from the evidence that on the fourth of November, 1875, the defendant having purchased the land in controversy from G. B. Davis, and paid to said Davis the purchase money therefor, and procured from said Davis a deed to W. S. and W. B. Cannon, the plaintiffs, and that said plaintiffs did not pay to Davis, nor have ever paid to defendant, said purchase money, then the effect of such conveyance, so made, would be to vest the equitable title to the land in the defendant, and in that case defendant would be entitled to recover the premises in controversy; and you will so find, unless you should believe, under the evidence and instruction hereafter given, that defendant was estopped from setting up such claim, or has subsequently parted with his title. *Neill v. Keese*, 5 Tex. 23; 2 Greenl. 267; 2 Story, Eq. 1201; *Cole v. Noble*, 63 Tex. 432; *Hempstead v. Hempstead*, 2 Wend. 109; 3 Wait, 33.

The court erred in refusing to give the jury special charge No. 2 asked by defendant. If the defendant paid the purchase money for the land, before he can be estopped from setting up his claim thereto, it must clearly appear, at the time the land was conveyed by Davis, that the deed was made to plaintiffs for the purpose of hindering, delaying, and defrauding his creditors, and placing the property beyond the reach of his just debts; and the burden of proving such fraudulent intent devolves upon the plaintiffs.

Word & Charlton, for appellees.

WILLIE, C. J. The first assignment of error is as follows: "The court erred in not sustaining defendant's special exceptions to plaintiff's supplemental petition filed November 6, 1885." The special exceptions were three in number, and set up two separate distinct and independent objections to the petition. Which one of these objections the court should have sustained is not pointed out by the assignment. The proposition seems to refer to either the first or second exception; we cannot tell which. Besides, the assignment, if improper, cannot be aided by the proposition. It must stand or fall according as it complies with the rules; which this does not, and will not, therefore, be noticed.

The admission in evidence of the certified copy of the judgment of the county court of Rockwall county was proper. Article 2257, Rev. St., does not apply to such a judgment, but to instruments, the originals of which are permitted or required to be recorded in the county clerk's office under the registration acts. Judgments of another court are governed by article 2252 of the Revised Statutes, and the certified copy in evidence fulfilled the requirements of that article.

The objections taken below to the reading in evidence of the *venditioni exponas* were different from those urged in this court. It was not objected below that the paper did not come from the custody of the proper officer. If so, the plaintiffs might have supplied proof of that fact. An objection not taken below to a paper offered in evidence cannot be taken for the first time in this court. *Sharp v. Schmidt*, 62 Tex. 263; *Galveston, H. & S. A. Ry. Co. v. Gage*, 63 Tex. 568.

It was not error to admit in evidence the constable's deed to the land. Ketchum, who purported to act as constable in making the deed, and who signed it as such, testified to the genuineness of the signature. The fact he signed the deed as constable was *prima facie* evidence of his authority, and there was no proof introduced to the contrary. This was held by this court

in the case of *Deen v. Wills*, 21 Tex. 642, in reference to a receipt purporting to be signed by a person as tax collector, when there was no proof that he held the office at the time it was signed. The rule holds good in a case like the present. Besides, the court judicially knew that Ketchum was constable at the time the deed was signed. Judicial knowledge extends to all county officers, and has often been held to embrace sheriffs and marshals. A constable has the powers of a sheriff in executing the process of the district court and carrying out its orders, and his authority and signature must be known to them. 1 Greenl. Ev. § 6, and authorities cited.

The court did not err in refusing to give the first special charge asked by the defendant. This charge ignores the fact that the grantees in the deed were, at the date of its execution, the minor children of the appellant, living with him, in which case the presumption of law would be that, in taking the deed in their name, their father intended the land as a gift or advancement to them. *Higgins v. Johnson*, 20 Tex. 393, 394; *Sausley v. Jackson*, 16 Tex. 579. This charge also overlooks the point made by the appellees that the deed was made by their father to them for the purpose of defrauding his creditors. It in fact gives the land to the appellant if the appellees did not pay the purchase money, no matter what may have been developed by the evidence as to the intention of their father in reference to the title. This would have been in direct contradiction of the court's general charge upon these questions, which was a correct exposition of the law bearing on them.

The seventh assignment is as follows: "The court erred in refusing to give the jury the special charge No. 2 asked by defendant. If the charge alluded to embraced only one instruction, this assignment would sufficiently comply with the rules. But, under the designation of a single charge, it includes four distinct instructions, each involving a separate proposition, and some of them have no relation whatever to each other. The assignment of error is actually taken to the refusal of the court to give several charges, and is therefore in violation of the rules, as has been frequently held by this court. *Byrnes v. Morris*, 53 Tex. 220; *International & G. N. R. Co. v. Gilbert*, 64 Tex. 536.

The third special charge asked by the appellant was not the law of the case. There was no question of specific performance of a voluntary gift before the court. The gift to the appellees, if made at all, was fully consummated by the execution of the deed, and was not executory. There was no mere promise to give, but an absolute gift evidenced by writing, and taking effect *in presenti*; and as the grantees were, at the time, children of tender years, living with their father upon the land, it was accompanied by all the possession which they were capable of receiving under the circumstances. This is the theory of the appellees' case, so far as the gift to them of the land is concerned. The appellant's theory is that there was no gift whatever, either executed or executory, but that the appellant's promise was that the appellees should have the land when they paid the purchase money given to Davis for it. Any charge, therefore, that set forth what circumstances would authorize the appellees to compel a specific performance of a gift was not authorized by the evidence, and would have misled the jury.

It is enough to dispose of the fourth charge to say that it required a verdict for the appellant, if the constable's sale was void, or if the judgment under which the land was sold had been paid off; whereas, there were other important issues, which, if found for the appellees, entitled them to a recovery.

The court properly refused to withdraw from the jury the issues as to the gift of the land, and the intent of appellant to defraud his creditors in having the deed made to his sons, and to place the case before them solely on the legality and binding force of the constable's sale.

The twelfth assignment is not well taken, as is apparent from what we have said, and the authorities we have referred to, under the sixth assignment of

error. What we have said as to withdrawing one of the issues from the jury is applicable also to the thirteenth assignment of error. Had the charge not been qualified as it was by the court, no issue as to the constable's sale would have been submitted to the jury.

We find no error in the judgment, and it is affirmed.

MAYES v. BLANTON, Adm'x.

(Supreme Court of Texas. January 21, 1887.)

EXECUTORS AND ADMINISTRATORS—RECOVERY OF PURCHASE MONEY—EXECUTOR'S SALE.

The administrator *de bonis non* brought an action against the purchaser of land from an executor to recover the land purchased, and to remove the cloud from title, it having been decided upon the former appeal in this case (*Blanton v. Mayes*, 58 Tex. 424) that the executor had no power to sell. There was evidence tending to show that debts against the estate existed at the time the purchase was made from the executor, and that the estate had received the benefit of the greater part of the money paid, and that the purchase was made in good faith. *Held*, that the purchaser was entitled to recover the money which he paid for the land, in so far as the same may have been applied to the estate or the beneficiaries under the will; and that knowledge, by the estate or beneficiaries, of the source from which the money came, is an unimportant fact in the determination of the right of the purchaser to have returned to him the money received by the estate, or expended for its benefit.

Appeal from Liberty county.

Hugh Jackson, C. L. Cleveland, and Davis & Sayles, for appellant. *Wharton Branch*, for appellee.

STAYTON, J. It appears that T. Schlutter died testate in the year 1875, and by his will named three persons executors, two of whom renounced the executorship, and the other probated the will, and in accordance with its terms received letters testamentary which empowered him to administer the estate without the control of the probate court. The executor seems to have returned an inventory and appraisal. The will had this further provision: "I will and bequeath unto John Howard, Beven R. Davis, and Julius Frederick, of Galveston, and to the survivor of them, all and singular my estate and property, real, personal, and mixed, in trust for the uses and purposes following: *First*, they shall pay out of the above estate all my just debts." The will then provides for the management and control of that part not necessary to pay debts, by the trustees; evidently contemplating that the property should remain in their hands, control, and management for many years for the benefit of the beneficiaries in the trust. The same persons named as trustees were also appointed executors. After the one executor qualified he sold the tract of land in controversy to the appellant, who paid him for it. On a former appeal it was decided that one of the trustees had no power under the will, the others living, to sell the property conveyed in trust, and the opinion questions the power of all the trustees, under the provisions of the will, to sell. *Blanton v. Mayes*, 58 Tex. 424. While the opinion there given recognizes the correctness of the ruling in *Johnson v. Bowden*, 43 Tex. 671, reasserted in *Anderson v. Stockdale*, 62 Tex. 54, there is much in the argumentative part of the opinion which would seem to deny the rule laid down in the cases above mentioned; but it will be seen that there was no evidence in the case, as then presented, which tended to show that the estate owed debts, which alone, under the terms of the will, would have confined the qualified executor, or all of them, had they qualified, to sell the property as executors. We do not now understand that it was decided on the former appeal that the executor who qualified was not empowered to sell property of the estate to pay debts, unless he did so under an order of the probate court in course of a regular administration. That we regard as an open question in the case.

The executor who qualified died within about a year after his qualification, and letters of administration *de bonis non* were granted to the appellee, who brought this action against the purchaser from the executor to recover the land by him purchased, to remove cloud from title, and to recover rents. The defendant set up the fact of his purchase; that he paid for the land; and that the estate received the benefit of the money paid by him; and he asked, in case his title to the land should not be held good, that the plaintiff be not permitted to recover the land without returning to him the money he had paid for it, with interest thereon. He also claimed reimbursement for taxes on the land which he had paid. There was evidence tending to show that debts against the estate existed at the time the executor sold the land, and that the estate had received the benefit of the greater part of the money paid. The trial resulted in a judgment for the plaintiff for the land and for rents.

The court below gave the following instructions: "Generally, when there is a defective or voidable sale of land, and the person in whom the title is received himself the purchase money, he will be required to refund it, upon asking for a recovery of the land. But upon the subject of the claim for the return of the purchase money alleged to have been paid by Mayes to Howard you are instructed that the sale under Schlutter's will, as that instrument has been construed, not being authorized by the power which it was attempted to exercise, but in contravention of its terms, as explained, the defendant made the purchase at his own risk; and the mere payment of the purchase money to one not authorized to sell would not of itself make the estate of Schlutter liable for its return. The receipt and deposit of the money by Howard, or the use of it by him alone, not acting under the authority of the probate court, would not make said estate liable for its return; and, if you find these to be the facts, your verdict will simply be for the plaintiff." "But if the evidence shows you that the estate of Schlutter *knowingly* received the money paid by Mayes to Howard for the land, and the beneficiaries under Schlutter's will used it for their benefit, then the estate would be liable for its return; and, if this has been shown by the evidence, you *can* find a verdict for the defendant for the sum the estate thus received, with interest thereon; and the burden of proving this to your satisfaction is upon the defendant in the case." This is assigned as error.

These charges were erroneous. The record shows that the executor, under the letters testamentary, had the apparent, if not the real, power to do every act which an executor administering an estate under the provisions of a will freed from the control of the probate court may ordinarily do. The appellant is shown to have purchased in good faith, and we know of no rule of law which denies to him the right to recover the money which he paid for the land, in so far as the same may have been applied to the benefit of the estate, or the beneficiaries under the will. Knowledge of the source from which the money came is an unimportant fact in the determination of the right of the appellant to have returned to him so much of the purchase money as may have been received by the estate, or expended for its benefit. The equity arises from the fact that the estate has had the benefit of his money, and now seeks to take from him the property for which it was paid. If the appellant were setting up an estoppel, then knowledge might become a material fact. Equities such as the appellant asserts, and the charge denies, have been enforced in many cases in which the sale on which the money was paid was void. *Howard v. North*, 5 Tex. 316; *Herndon v. Rice*, 21 Tex. 456; *Walker v. Lawler*, 45 Tex. 538; *Story*, Eq. 696, 707. If the plaintiff shall recover the land, the defendant is entitled to have the money of which the estate has had the benefit, with interest on it, as is he entitled to reimbursement of any money which he has expended for taxes on the land.

These views render it unnecessary to consider any of the other assignments of error.

For the error noticed, the judgment will be reversed, and the cause remanded.

WILLIE, C. J., not sitting.

GARCIA v. GRAY.

(Supreme Court of Texas. January 28, 1887.)

1. ERROR—ASSIGNMENT TOO GENERAL—JUDGMENT—EVIDENCE.

Assignments of error which object to the judgment on the ground that it is not supported by the evidence, and is not in accordance with the allegations of the plea in reconviction, without stating in what respect the evidence is insufficient to support the plea, nor pointing out the variance between the allegations of the plea and the evidence introduced in support of it, are too general, and will not be considered. Texas Supreme Court Rules 24, 26.

2. ORDERS—AGREEMENT WITH DRAWER—RELEASE OF DRAWER.

Where A., owing B. a debt, gives him an order on a third party indebted to A. for the delivery of an agreed number of goats, which such party refuses to deliver till satisfied of the extent of his indebtedness to A., and B., after notifying A. of such party's refusal, enters into a written agreement with him to extend the time for receiving the goats, upon such party's agreeing to deliver them at the end of that time, and such party moves the goats to Mexico, held that B. by his agreement released A. from all obligation on the order, and the debt it was given to satisfy.

Appeal from Duval county.

Assumpsit. Judgment for defendant, Gray. Plaintiff appeals.

Bryant & Coyner, for appellant. *James O. Luby*, for appellee.

WILLIE, C. J. Romulo Garcia sued E. N. Gray to recover \$508, balance alleged to be due upon the sale of certain property by Garcia to Gray for the sum of \$737, after deducting therefrom \$229 admitted to have been paid. It was averred in the petition that this balance was to be paid by the delivery to Garcia of 500 goats, and that Gray had given Garcia an order for them directed to Carmelia Vela, who refused to deliver them because he did not know whether or not he was indebted to Gray to that extent. It was further alleged that Gray received due notice of this refusal on the part of Vela, but had failed to pay the \$508 due upon the contract of sale. The defendant below answered that, after notifying defendant of Vela's refusal to deliver the goats, the plaintiff entered into a written agreement with Vela to extend the time for receiving them for over two months, upon Vela's agreeing to deliver them at the end of that time; and that thereby the defendant was prevented from enforcing an immediate delivery of the property. He further pleaded that the plaintiff, after making the agreement with Vela, had knowingly permitted him to remove the goats out of the county of Duval; that plaintiff never demanded them of Vela, after making the said written agreement, until Vela had taken the goats to Mexico, which was done with the consent of the plaintiff. He further pleaded in reconviction a debt due him from Garcia for building a division fence between his lands and those of Garcia, and for the value of certain articles of personal property furnished the latter at his request. The cause was tried before the judge alone, who gave judgment against the plaintiff upon his claim, and also, upon the plea of reconviction, allowing a recovery in behalf of the defendant for \$192, from which judgment Garcia has appealed to this court.

The two first assigned errors are to the judgment upon the defendant's claim in reconviction. These assignments object to the judgment, in this respect, on the ground that it is not supported by the evidence, and is not in accordance with the allegations of the plea in reconviction. In what respect the evidence is insufficient to support the plea the assignment does not state; nor does it point out the variance between the allegations of the plea and the evidence introduced in support of it. The assignments are too general, and

are in violation of the rules of this court, and will not be considered. See Rules 24 and 26.

As to the claim upon which Garcia founded his suit, the facts proven upon the trial fully sustained the defenses set up by the appellee. When the order for the goats was presented to Vela, he declined to deliver them, because, as he stated, a settlement between himself and Gray was necessary before he could tell whether or not he owed Gray to that extent. This was on the eleventh of May, 1885, and on the next day Garcia notified Gray's agent of what Vela had stated. Had no subsequent contract been made between Garcia and Vela in reference to the delivery of the goats, the former would have had grounds for an action against Gray for a breach of the contract for the delivery of the property. When Gray gave the order upon Vela, the position of the parties was the same as if the former had sold to Garcia the 500 head of goats in the possession of Vela. In such cases the vendee is treated as being in the actual receipt of the property when all of the parties agree that the party in possession shall thereafter hold the property for the vendee. Benj. Sales, § 174; Blackb. Sales, § 28. The consent of the vendor that the property shall pass immediately to the vendee upon presenting an order to that effect to the person in possession is given by the order itself. As to whether this is to be effected by an actual change of possession, or by an agreement between the vendee and the person to whom the order is directed that the latter shall hold the property for the former, is a matter of indifference to the vendor, so far as the accomplishment of the purposes of the order is concerned. He has in either case delivered the property, and performed his contract. The vendee may make what agreement he pleases with the third party as to what shall be done with the property, provided the vendor is released from all further responsibility for its reaching the possession of the purchaser. But the vendee cannot, by agreement with such third party, and without the consent of the seller, postpone the date of the delivery so as to allow the goods to remain with the party in possession at the risk of the seller, or cause him to assume any new duties in reference to a delivery of the same.

Garcia agreed with Vela that the latter might keep possession of the goats till the twentieth of July. In this he went beyond the powers he possessed under the order. If he could bind Gray by such a contract, made without his knowledge, and of course without his consent, he could place upon him a responsibility which he had not agreed to assume. He could make for him a contract to which he had given no assent. Gray had agreed that, in case Vela did not deliver the goats within a reasonable time after presentation of the order, he (Gray) would indemnify Garcia for whatever loss he might thereby sustain. He did not agree to furnish such indemnity in case Vela did not comply with any contract Garcia and Vela might choose to enter into for their delivery at some future day. Their agreement to postpone delivery was valid, so far as Garcia and Vela were concerned, but was not binding upon Gray. It was one in which Garcia could bring suit against Vela in case the goats were not delivered according to its terms, but he had no recovery against Gray for its infringement, as Gray had not agreed that it should be postponed. Neither could he sue Gray upon the order given by him, and with which Vela had failed to comply; for he had made a new agreement with Vela, which released him from performing what Gray's order required, and thereby Gray was released from his obligations as to delivering the property. When the order was given, Vela was indebted to Garcia, and a compliance with the order was to be a *pro tanto* discharge of the debt. The plaintiff's agreement with Vela deprived the defendant of any recourse against the latter for his debt. The plaintiff seeks to make the defendant liable for failing to give him possession of the property when the plaintiff's own conduct has placed it beyond the power of the defendant to compel Vela to do any such thing. Defendant did not authorize Garcia to trust Vela for

the future delivery of the goats if he did not accept the order; and, if Garcia chose to take a contract to that effect in lieu of an actual delivery, he must abide the consequences. He put it in the power of Vela to remove the goats out of the state, and, at the same time, rendered the defendant helpless to prevent it. Garcia could have stopped them by the use of the means the law placed at his disposal. The defendant had no means whatever of doing so. The plaintiff cannot charge the defendant with the results of his own negligence, when the defendant could not have protected his rights if he had tried.

The fact that Garcia notified the defendant of the original rejection of the order does not alter the case. His subsequent conduct waived any right he had acquired to seek indemnity from the defendant, and gave him recourse against Vela alone.

These views dispose of all the questions raised in the case that are of sufficient importance to demand consideration, except the objection to Adami's testimony as to the contents of the agreement between Vela and Garcia. It is complained that the court admitted this evidence, without proper notice to produce, over the objections of the plaintiff. Without saying anything in reference to the bill of exceptions reserving the point, which is somewhat defective, it is sufficient to say that Romulo Garcia testified, in this respect, in almost the same language used by Adami, and no exception was taken to his testimony. The contents of the instrument were as fully proved by the one witness as the other. The cause was submitted to the judge alone, and in such cases the admission of illegal testimony to a fact is not cause of reversal if the same fact is proved by evidence admitted without objection.

There is no error in the judgment, and it is affirmed.

FAGAN and others v. STONER and others.

(*Supreme Court of Texas. January 28, 1887.*)

SURVEY—OLD LINE CONTROLLING WIDTH OF LEAGUE GRANT.

Where a marked line is called for in a league grant, and that line can be identified, it will control a call for course and distance; but where the grant calls for no line, but the field-notes in the title call for a width of 2,000 varas, and one line being well established, an old line with marks corresponding in age with the date of the grant is found at such a distance from it as will make the grant 2,560 varas wide, the mere fact of such a line being found will not compel the extension of the grant to such line, instead of the 2,000 vara line.

Appeal from Victoria county.

Trespass to try title. Judgment for Stoner and others, defendants. Plaintiffs appeal.

John & Joseph Fagan, for appellants. *Glass & Callender*, for appellees.

GAINES, J. This is in form an action of trespass to try title, brought by appellants against appellees, but its decision depends upon the determination of a question of boundary. It is conceded that the parties have title to the lands called for in the conveyances under which they respectively claim. The league granted to Edward McDonough and that granted to Juan Gonzales are bounded on the north-east by Calletto creek and the Guadalupe river; the former stream being a tributary of the latter. The south-east boundary of the McDonough grant and the north-west boundary line of the Gonzales are coincident, and the question is as to the true location of that line. If the evidence shows that the McDonough grant, as originally surveyed, is 2,560 varas wide, instead of 2,000 varas, as called for by the field-notes in the title, then appellants should have prevailed in the court below, and the judgment should be reversed. If the evidence does not show this, the judgment must stand.

The case made in the court below seems to us to present purely a question of fact, although the assignments of error all appear to be founded upon the proposition, in substance, that the court erred in holding that the call for

course and distance should prevail over a marked line. We understand the true rule to be that when a marked line is called for in a grant, and that line can be identified, it will control a call for course and distance,—not that, because a marked line is found upon the ground, the distance must be extended so as to reach it, without proof that it was the line originally run by the surveyor as one of the boundaries of the survey. The fundamental principle in all cases is to ascertain where the survey was actually made upon the ground; or, as it is sometimes expressed, the footsteps of the surveyor must be followed, if their locality can be traced, although the effect may be largely to increase or diminish the quantity of land which purports to be conveyed. There is nothing in the record to show that the court below, in deciding the case, did not keep in view this cardinal rule. The description of the land in the McDonough grant names neither marked lines nor course. It is as follows: "Composed of 2,000 Mexican yards, on the Guadalupe river and Calleto creek at their junction, and in the depth on the upper line 12,050 varas, and on the lower line 12,910 varas. It is bounded on the north by said river, on the north-west by vacant lands, on the south-west in the same manner, and on the south-east by citizen Juan Gonzales." The north-west boundary line of this survey is well established by the evidence. The distance called for in the grant, measured from this boundary, gives the line in controversy as appellees claim it. But 560 varas lower down there is found another, which is shown in part by marks indicating an old survey. It is clear that, merely because a line is found upon the ground with marks corresponding in age with the date of the grant, the law does not require the distance named in the field-notes to be greatly extended in order to reach it. Therefore, in order for the appellants to recover in the court below, it was incumbent upon them to show by evidence that the line claimed by them as the boundary of the McDonough and Gonzales surveys was that established by the surveyor preparatory to the issuance of the grants. This they attempted to do, and we shall briefly consider the evidence adduced by them to make out their case, in connection with the testimony offered upon the other side.

Appellants proved that McDonough lived for many years upon his grant, and frequently claimed the lower line as the south-east boundary of his survey. At one time the disputed strip appears to have been occupied by his son, who claimed under him. On the other hand, appellees showed that, a short time before, the owner, Hensoldt, county surveyor, was surveying a tract of land which had been *subsequently* located by White, the colonial surveyor, who run the line in question adjoining McDonough's land on the south-east; that McDonough insisted the lower was the true line, and went for White, and took him upon the land, and after this made no further objection to the survey as made by the county surveyor, which recognized the upper line as his boundary. It was also shown that after this he made no objection when other parties sold timber off the land in controversy for railroad ties, though he was selling trees himself from the undisputed part of his survey for the same purpose. It was also proved, on part of appellees, that McDonough, about 1856, divided his land among his wife, children, and a grandchild; that the deeds purported to convey the entire tract; and that the land in dispute was not included or estimated in the division. It is claimed, also, on the part of appellants, that the survey, as defined by course and distance, does not correspond with the calls in the original grant, nor Calleto creek and Guadalupe river. It is true that the lower line contended for gives a wider margin upon the river by at least 560 varas; but, taking the upper line as the true south-east boundary of the grant, it would still front some 225 varas on the river below the junction of the creek, and would thus answer the call for "2,000 Mexican varas on the Guadalupe river and Calleto creek at their junction."

Appellants also introduced as a witness one Lynn, who testified that he heard White tell J. E. McDonough, the son of Edward McDonough, that the

old man McDonough was right; that the line as claimed by him was the true line, and that White so described it; that the witness found it by a certain live-oak tree near a slough. This tree is well identified by the evidence, and marks the lower line of the survey as claimed by appellants. But this conversation seemed to have taken place before McDonough went for White, and took him upon the ground. The witness who testified to that occurrence also stated that, as White came back, he stayed at his house, and he asked him about the live-oak tree, and that White answered that the tree had some marks on it, but that he did not know whether they were his marks or not. It was also shown that there was an old marked line through the timber where appellees claimed the disputed boundary to be. It was also proved by appellants that, beginning some miles below, at the junction of the San Antonio and Gaudalupe-rivers, and measuring the surveys fronting the river the distance called for in the respective grants, the Gonzales league would not be reached without allowing a large excess in each; but it is not made clearly to appear that this has any bearing upon the case before us. It would seem a violent presumption to suppose that in marking out a line of surveys fronting upon a river the surveyor deliberately disregarded his oath, and gave a uniform large excess to each.

It will be seen from what we have said that the plaintiffs' case was rebutted upon all points by defendants. We are of opinion, therefore, that the court below did not err in its findings, and the judgment is therefore affirmed.

STAYTON, J., did not sit in this case.

BERRYMAN *v.* SCHUMACHER and others.

(*Supreme Court of Texas.* February 1, 1887.)

1. APPEAL—STATEMENT OF FACTS—FILING.

Under the rules of the supreme court of Texas, no statement of facts in the record of a suit which appears to have been filed more than ten days after the adjournment of the court can be considered or reviewed.

2. TRIAL—ISSUE—NO REQUEST—INSTRUCTIONS.

In an action to set aside a deed on the ground of want of sufficient mental capacity to make a contract, the failure of the court to charge the jury on the subject, when no special instruction on the point was requested by counsel, is not error.

3. DEED—CONDITIONS—DEFEASANCE.

Where a deed, in consideration of love and affection, and a covenant on the part of the grantees to pay the grantor \$400 a year during her natural life in quarterly installments, the first to be paid on the first day of January, 1880, by way of condition provided that, in the event the grantees failed to perform the covenant, it should be lawful for the grantor, whenever she elected so to do, to take, repossess, and enjoy the property conveyed as in her former estate, *held*, the grantor having died about the twenty-first of January, 1880, without claiming a defeasance of the estate for the breach of the condition, that the title remained with the grantees, subject to the payment of the installment which had matured.

Appeal from Grimes county.

Boone & Cobbs and W. B. Dunham, for appellant. W. W. Meachum and Hutcheson & Carrington, for appellees.

GAINES, J. On the twenty-first of November, 1879, Nancy Berryman conveyed the property in controversy to her son William Berryman, and her grandson W. T. Schumacher. The deed recites, in substance, that it is executed for the reason that she, the grantor, was old and infirm, and unable to manage her affairs, and that she desired to provide a support for herself in her old age, and states the consideration as natural love and affection, and the covenants contained in it on part of the grantees. In addition to the terms of a warranty deed, the instrument (which is signed by all the parties) con-

tains an express covenant on part of the grantees to pay the grantor \$400 a year during her natural life, in quarterly installments, the first to be payable on the first day of January, 1880, and also provides that, in the event the grantees fail to perform the premises on their part, it shall be lawful for the grantor, "whenever she elects to do so," "to take, repossess, and enjoy" the property conveyed "as in her former estate." She died about the twenty-first day of January, 1880, and administration was granted upon her estate. The administrator not having put the property in controversy upon his inventory, the appellant (who was a son of his intestate) demanded of him that he should do so, and he refused. Appellant thereupon brought this suit, alleging that he and appellees were the sole heirs of his mother, and seeking to have the conveyance set aside, and to recover a third interest in the property upon the alleged grounds that, at the time of its execution, the grantor did not have sufficient mental capacity to make such a contract; that it was procured by undue influence on part of appellees; and that their rights under it had been forfeited by the failure of appellees to pay the installment of \$100 due January 1, 1880. The case was submitted upon special issues, and the jury found, among other things, that the grantor was sane at the time the conveyance was executed, and that it was not procured by undue influence. They also found that the grantees "failed to pay the first installment, but contributed to her necessities," and that "she never revoked the agreement, or repossessed herself of the property."

The first assignment of error to which our notice is called by the propositions in the brief is to the effect that the court erred in failing to charge the law as applicable to the special issues submitted to the jury, and especially a failing to instruct the jury as to the nature and degree of the mental capacity requisite to enable a party to make a valid conveyance. It is to be remarked that the statement of facts in the record appears to have been filed more than 10 days after the adjournment of the court, and that under the uniform ruling of this court it cannot be considered. In the absence of a statement of facts, the charge will not be reviewed. Besides, if the evidence were such as to require a charge upon the subject of the mental capacity of the grantor in the deed, it was the duty of counsel to have asked a special instruction. If a special charge had been requested, and the court refused it, this would have been error. This assignment, therefore, is not well taken.

It is also insisted that the jury having found that the first installment was not paid, that this worked a forfeiture of the conveyance, and the court should therefore have given judgment for the plaintiff. We do not think this deed difficult of construction. It frequently happens that, in instruments of like character with the one under consideration, it becomes a perplexing problem to determine whether a provision contained in it is condition or a mere covenant. But, in our opinion, no such question is presented here. The language of the instrument is so clear that we think the intention of the parties to it apparent. The payment of the several installments as they fall due is made a condition subsequent, enforceable at the grantor's election; that is to say, a condition upon which the grantees' title was subject to forfeiture if she chose to claim it. Hence, if they failed or refused to make any one of the payments provided for, she had the right either to declare the title forfeited, and take possession of the property, or to rely upon the covenant for redress, and demand the money. Forfeitures are never favored; and, since she failed to claim a defeasance of the estate for the breach of the condition, the title remained with the grantees subject to the payment of the installment which had matured.

It is believed that, notwithstanding a great inequality in the division of the grantor's property among her heirs seems to have resulted from this transaction, the circumstances are such that a court of equity would have relieved against the forfeiture, even if the condition had been absolute. *Walker v.*

Wheeler, 2 Conn. 299; *Stuytesant v. Davis*, 9 Paige, 427; *Sanborn v. Woodman*, 5 Cush. 36.

We find no error in the judgment, and it is affirmed.

WOODRUFF v. BASS and another.

(*Supreme Court of Texas*. February 1, 1887.)

APPEAL—JUSTICE OF THE PEACE—JUDGMENT BY CONSENT.

Where parties having cases pending in a justice's court, one of which was tried, and an appeal taken to the district court, and an agreement was entered into by them that they should abide the result of the case appealed in the other cases, and that such judgment should be entered in each of them, in the district court, as might be entered in the appealed case by that court, *held* that, the district court having no original jurisdiction of the subject-matter by law, it could not acquire such jurisdiction by consent; and, the cases not having been brought before it in such manner as to make its appellate jurisdiction attach, it had no authority to render a judgment in either of them.

Appeal from San Jacinto county.

Chapman & Turnley and *L. B. Hightower*, for appellant.

STAYTON, J. Three cases were pending in a justice's court, all instituted by G. G. & W. J. Woodruff. In one of these cases Frank White and J. M. Bass were defendants; in another, J. M. Bass and Joe Harrell were defendants; and in the third, J. M. Bass and Tom Harrell were defendants. The case in which White and Bass were defendants was tried in the justice's court, but the others were not. The case tried was appealed to the district court, and the parties to the other cases entered into an agreement that they should abide the result of the case appealed, and that such judgment should be entered in each of them, in the district court, as might be entered in the appealed case by that court. In the appealed case a judgment was rendered in favor of the defendants. The cases not tried in the justice's court were placed on the docket of the district court; and, when the appealed case was tried, the defendants in the other cases insisted that the same judgments should be rendered in them as was rendered in the appealed case. This was resisted by the plaintiffs on the ground that the district court had not acquired jurisdiction. The court ruled that it had jurisdiction, and proceeded to enter judgment in this case, which is one to which the agreement related, in accordance with the agreement.

This case was one of which the district court had no original jurisdiction, and it was never brought before that court in such manner as to make its appellate jurisdiction attach. The entry of judgment in this case was the exercise of original jurisdiction, and it is well settled that, as to the subject-matter, consent of parties cannot confer upon a court jurisdiction not given to it by law. If this case had been tried in the justice's court and an appeal perfected, the district court might have enforced an agreement of parties made in reference to it; but until the district court acquired jurisdiction of the case in some of the methods by which, under the law, it may acquire appellate jurisdiction of causes tried in a justice's court, it had no power to enforce the agreement. That the agreement was made in reference to a case pending in the justice's court does not give it an effect which it could not have if made in regard to a matter not pending in any court.

The judgment will be reversed, and the cause dismissed, from the district court, leaving the parties to take such steps in the justice's court as may be lawful; the appellant to recover his costs in this court and in the district court. It is so ordered.

SMITH v. SMITHSON.

(Supreme Court of Arkansas. February 5, 1887.)

1. GUARDIAN AND WARD—SURETY ON BOND OF DECEASED GUARDIAN.

In an action against a surety on a guardian's bond, where the principal is dead, the fact that the claim was not presented for allowance against the principal obligor's estate within the two years limited, and therefore an action to charge such guardian's estate would be barred, does not discharge the surety.

2. SAME—SETTLEMENT OF ACCOUNT.

In an action against a surety on a guardian's bond, where the principal is dead, the fact that the probate court, in settling the guardianship accounts, has not directed the payment of the amount found due to any one, cannot be taken to prove that there has been no breach of the bond, where a new guardian has been appointed, but the surety's obligation is fixed without a formal judgment of the probate court against him, or his principal's administrator.

Appeal from circuit court, Washington county.

Action on guardian's bond. Judgment for plaintiff. Defendant appeals. *J. D. Walker*, for appellant. *W. F. Pace*, for appellee.

COCKRILL, C. J. The only question pressed for determination by the appellant, against whom judgment was rendered as surety in a guardian's bond, and whose principal died several years before this action was brought, are as follows:

1. The complaint shows that the claim was not presented for allowance against the estate of the principal obligor within two years of the grant of administration, and it is argued that the demurrer to the complaint should have been sustained for that reason. The facts alleged would have been sufficient to bar a recovery against the deceased guardian's administrator in an action to charge his estate, (*Connelly v. Weatherby*, 33 Ark. 658; *Padgett v. State*, 45 Ark. 495;) but the neglect to probate the claim against the estate of the principal obligor does not discharge the surety, (*Ashby v. Johnson*, 23 Ark. 163; *Padgett v. State*, *supra*.)

2. The second position is that no breach of the bond is shown, because the order of the probate court settling the guardianship accounts does not direct the payment of the amount found due in the settlement to any one. It has been repeatedly announced by this court that no action can be maintained on a guardian's bond until the probate court has ascertained the amount of the guardian's indebtedness, and directed its payment to the party entitled to receive it, and this is unquestionably the general rule. *Padgett v. State*, *supra*, and cases cited. But an examination of the cases will show that the rule, in its broadest statement, has been announced where the amount found due was on a partial settlement in a continuing or subsisting guardianship, as in *Sebastian v. Bryan*, 21 Ark. 447; or in case the guardian was dead, where there had been no final settlement either before or after his death, as in *Vance v. Beattie*, 35 Ark. 93; or in cases where the order to pay has been in fact made, and the question was, when did the cause of action accrue, and the statute of limitations begin to run. When the trust is closed, as it was by the death of the guardian in this case, and a new guardian is appointed, whose duty it is to collect whatever may be due his ward, the material matter under the prior guardianship is to settle the amount actually due to the ward. There can then be no controversy about who is legally entitled to receive it, and the surety's obligation to pay; the deficit in the guardian's account is fixed within the spirit of the rule, without a formal judgment of the probate court against him, or his principal's administrator. *State v. Croft*, 24 Ark. 550; *Connelly v. Weatherby*, *supra*. Now, it is not disputed in this case that the probate court took steps to adjust the deceased guardian's accounts, and to determine the amount of his indebtedness to his ward, and it has not been contended that a valid order fixing the amount of the deficit at the sum

claimed in the complaint was not entered. This order was a final settlement of the guardian's accounts after the close of the trust, and his successor in the guardianship was before the court, pressing the settlement, when it was made. These matters are shown by the probate court record. They can legally indicate but one thing, and that is that the intention of the court was to fix the liability of the principal obligor, and thus lay the foundation for an action against the surety; and we think it was sufficient for the purpose. When the action was brought, Smithson, the former ward, was of age, and was allowed to sue in his own name. This was the correct practice. *Hunnicutt v. Kirkpatrick*, 39 Ark. 172; *Turner v. Alexander*, 41 Ark. 254.

Let the judgment be affirmed.

LITTLE ROCK, M. R. & T. RY. CO. v. LEVERETT, Adm'r.

(Supreme Court of Arkansas. February 5, 1887.)

1. EVIDENCE—DECLARATIONS—RES GESTÆ.

The declarations of a switchman, made immediately after an accident by which he has been knocked down and run over, and while he is still under the car, touching the cause of the accident, is competent, as part of the *res gestæ*.

2. NEGLIGENCE—ACTION FOR DAMAGES FOR CAUSING DEATH—EVIDENCE SHOWING PLAINTIFF DEPENDENT.

Under Mansf. Dig. Ark. § 5226, giving a right of action to the next of kin to recover damages for causing death of a relative through negligence, it is admissible for the plaintiff, the mother of deceased, to give evidence tending to show that she was dependent upon him for support.

3. SAME—INSTRUCTIONS.

In an action for damages for causing the death of an employe, a switchman, brought against a railroad company, an instruction to the effect that, if the defects in the road where deceased was thrown down and mortally injured by defendant's cars were easily and readily seen, and deceased had been accustomed to working there, and in attempting to uncouple cars while in motion received the injuries which caused his death, plaintiff was not entitled to recover, is rightly refused, where there is no evidence that he knew of the condition of the track at the place where he was injured, and it also appears that he was injured on a dark and stormy night.

Appeal from circuit court, Desha county.

Action for damages for causing death, brought by S. L. Leverett, appellee, against the Little Rock, Mississippi River & Texas Railway Company, appellant.

J. M. Moore, for appellant. *X. J. Pindall* and *B. F. Grace*, for appellee.

BATTLE, J. This was an action brought by Sallie L. Leverett, as administratrix of the estate of James W. Leverett, deceased, against the Little Rock, Mississippi River & Texas Railway Company, to recover damages alleged to have resulted from the negligence of the defendant in wrongfully causing the death of the deceased. The action was brought under section 5226 of Mansfield's Digest, to recover damages for the benefit of the next of kin of the deceased. The negligence averred is that defendant's road-bed, tracks, and station at the town of Arkansas City, were constructed on a high embankment, with a narrow and insufficient crown, and steep, slippery, and insufficient slopes; that the cross-ties placed on the embankment extended over the sides of the embankment; that there was no walkway for switchmen to walk or stand upon when in the necessary discharge of their duties coupling and uncoupling cars; and that the road-bed at this place was not sufficiently ballasted or surfaced up. It is averred that the deceased was employed by defendant as a switchman in the yard at this station, and was engaged on the night of the twelfth of January, 1883, in the line of his duty, in uncoupling cars, and that, while so engaged, one of his feet slipped between the ties, and was caught, and, before he could extricate it, he was run over by defendant's cars, and killed; that the deceased had then been recently employed by defend-

ant, and was ignorant of the dangerous and defective construction of the embankment, road-bed, and tracks on which he was engaged at the time he was killed; and that his death was the result of the negligence of defendant in constructing its road-bed and tracks in the manner stated.

On a trial in the circuit court, plaintiff recovered a judgment for \$3,500, and defendant appealed to this court.

It is first insisted that the circuit court erred in admitting evidence of the declarations of the deceased as to the manner in which he was injured. Thomas Leverett, a brother of the deceased, testified that he heard a noise on the railroad, and immediately went over, and found the deceased under the car, lying partly on the rails, between the track, trying to get out, but could not do so, being unable to move his legs; and he asked him how he was caught; and that deceased told him he had stepped in between the cars to uncouple them; that the pin was tight, and he stepped out, and signalled the engineer to back up to loosen the pin; and that he then stepped in between the cars to uncouple them, and, as he did so, he stepped between the ties, and his feet slipped, and, before he could recover, his foot was caught against the tie by the break-beam, and he was thrown down. This statement was made by the deceased while he was under the car, and in the condition found by his brother. Appellant insists that this statement was incompetent evidence, because it was not a part of the *res gesta*.

Wharton says: "The '*res gesta*' may be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or by-stander. They may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary, in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act,—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. * * * Therefore declarations which are the immediate accompaniments of an act are admissible as part of the *res gesta*, remembering that immediateness is tested by closeness, not of time, but by causal relation, as just explained." Whart. Ev. §§ 258-267, and authorities cited.

In *Clinton v. Estes*, 20 Ark. 225, it is said: "It may be difficult to determine at all times when declarations shall be received as a part of the *res gesta*. But when they explain and illustrate it, they are clearly admissible. Mere narratives of past events, having no necessary connection with the act done, would not tend to explain it. But the declaration may properly refer to a past event as the true reason of the present conduct."

In *Carr v. State*, 43 Ark. 102, in speaking of what declarations constitute a part of the *res gesta*, the court said: "Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends, without break or let, down from the moment of the event they illustrate. But they must stand in immediate causal relation to the act, and become part either of the action immediately preceding it, or of the action which it immediately precedes."

Again, in *Flynn v. State*, 43 Ark. 292, it is said: "It often becomes difficult to determine when declarations shall be received as part of the *res gesta*. In cases like this, words uttered during the continuance of the main action, or so soon thereafter as to preclude the hypothesis of concoction or premedi-

tation, whether by the active or passive party, become a part of the transaction itself, and, if they are relevant, may be proved as any other fact, without calling the party who uttered them."

In *Com. v. Hackett*, 2 Allen, 136, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out, "I am stabbed," and he at once went to him, and reached him within 20 seconds after that, and then heard him say: "I am stabbed; I am gone. Dave Hackett has stabbed me." This evidence was held competent as a part of the *res gestæ*. Chief Justice BIGELOW, for the court, said: "If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him, after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances; but it was an exclamation or statement contemporary with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*." Again, the learned judge said: "The true test of the competency of the evidence is not, as was argued by the counsel for the defendants, that the declaration was made after the act was done, and in the absence of the defendant. These are important circumstances, and, * * * if they stood alone, quite decisive. But they are outweighed by the other facts in proof, from which it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanies and illustrates the main fact which was the subject of inquiry before the jury."

In the case of *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 402, where a peddler's wagon was struck, and the peddler injured by the negligence of the engineer, the latter's declaration, made after the infliction of the injury, was admitted as a part of the transaction itself; the court saying: "We cannot say that the declaration was no part of the *res gestæ*. It was made at the time, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

In the case of *Elkins v. McKean*, 79 Pa. St. 493, the plaintiff sued the defendant for damages caused by oil, manufactured and sold by him to plaintiff's husband, exploding while the husband was using it in a lamp, and catching fire, and burning the husband to death. The court held what the husband said as to the cause of the accident, when found enveloped in the flames, or within a few minutes afterwards, was clearly competent evidence as a part of the *res gestæ*.

In *Casey v. New York Cent. & H. R. R. Co.*, 78 N. Y. 518, the plaintiff sued for damages resulting from the death of a child who had been run over and killed by the defendant's cars. On the trial a police officer, who went to the place of the accident immediately after the child was killed, and found the child under the wheels of the car, was permitted, as a witness for the plaintiff, to state what the engineer in charge of the engine said and did in extricating the body of the child from under the wheels of the car. The court

held the statements of the engineer were admissible as a part of the *res gesta*. *Waldale v. New York Cent. & H. R. R. Co.*, 95 N. Y. 284.

McLeod v. Ginther's Adm'r, 80 Ky. 399, was a suit for damages resulting from the willful neglect of appellant's servants in sending dispatches to two conductors of trains which were to run on the same day over the same part of defendant's road. The dispatches were alike, and ambiguous, and construed differently by the two conductors. The result was a collision of trains, and the death of Ginther, plaintiff's intestate, who was an engineer on one of the trains. Fish, the conductor on the same train, within a few seconds after the casualty, remarked to the engineer of the other train, "I had until 10:10 to make Beards." It was held by the court that it was important to show what Fish and Ginther thought of the meaning of the dispatch while they were acting under it, as the negligence in this case consisted of the wording of the dispatch so as to mislead them, and that the declaration of Fish having been made within a few seconds after the accident, in view of the wrecked trains, and amidst the search for persons whose fate was then unknown, and while Ginther, who lived but thirty minutes, was dying from the injuries he had received, was admissible for that purpose as a part of the *res gesta*. The court said: "He had no time to contrive or devise a falsehood by which to exonerate himself from blame, and his declaration was so connected with the circumstances then surrounding him, and which form a part of this case, as to give it importance in determining the fact that he and the engineer had run the engine in the honest belief that they had until ten minutes after ten o'clock to reach Beards station. * * * If we ignore the credit to which Fish may have been entitled as a truthful man, his declaration, made under the circumstances, impresses the mind with confidence in its truth, and is entitled to be given its weight, as any other fact going to make up the transaction."

The statement of Leverett was made immediately after he was run over, and while the wrong complained of was incomplete, he being still under the car, and was a part of the *res gesta*, and fairly go to explain the cause of the condition in which he was at the time it was made. It was an emanation of the act in question, and so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy. Aside from any credit due Leverett for veracity, the circumstances immediately preceding and connected with his statement impress the mind with confidence in its truth. It was competent evidence.

It is next urged that the trial court erred in admitting evidence as to the dependence of plaintiff, Sallie L. Leverett, on the deceased for maintenance and support. The proof was the deceased was her son; that he was about 23 years old at the time he was killed, and that he had never been married; and that he left a mother, brothers, and a sister, but no father, surviving him. The evidence objected to was plaintiff was poor, and deceased lived with and supported her, and that she was dependent on him for support and maintenance. This evidence was admitted by the court over the objection of defendant. In actions of this character the statute says: "The jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person." Under the statute, the plaintiff, being next of kin of the deceased, had a right to show the pecuniary damage suffered by her by reason of his death. The effect and object of the evidence objected to was to show she had suffered a pecuniary damage by the death of her son, and for that purpose it was admissible. *Erven v. Chicago & N. Ry. Co.*, 38 Wis. 622; *Barley v. Chicago & A. R. R. Co.*, 4 Biss. 434; *Cook v. Clay-street Hill R. R. Co.*, 60 Cal. 609; *Opahl v. Judd*, 30 Minn. 126, 14 N. W. Rep. 575.

In instructing the jury, the court told them, if they found for the plaintiff, they should assess her damages at whatever sum they believed would compensate her for the pecuniary loss she had sustained; and that the law prescribes

no rule for the measurement of damages, except the jury should give such damages as they should deem a fair and just compensation with reference to the pecuniary injuries resulting from the death of plaintiff's intestate to his next of kin. The damages allowed by the jury were reasonable, and it does not appear that appellant was prejudiced, or could have been prejudiced, by the evidence objected to, under the instructions of the court.

It is contended by the appellant that the first, second, third, and eighth instructions given by the court to the jury at the instance of the plaintiff are erroneous. The instructions informed the jury that, when appellant employed plaintiff's intestate to work as a switchman in its yards at Arkansas City, it assumed a duty to him to construct and maintain its road-bed and tracks in a reasonably safe condition, so as not to unnecessarily enhance the dangers attending upon the employment; that he assumed the natural risks of his employment, but did not assume the risks arising from the negligence of the appellant in constructing a defective road-bed or track; and that, if the injuries received by plaintiff's intestate were caused by the defective condition of appellant's road-bed or track, plaintiff was entitled to recover such pecuniary damages as plaintiff sustained by the death of her son, unless the injuries were the result of the contributory negligence of her intestate. In this connection the court further instructed the jury that, if plaintiff's intestate entered and continued in the employment of defendant knowing the dangerous condition of the road-bed, plaintiff was not entitled to recover for an injury resulting from the condition of the road-bed; and that if the injury received by him occurred on account of the steep banks of the road-bed, or on account of the lack of ballasting on the track, plaintiff could not recover, if he knew this was the condition of the road-bed at and before the time of the injury; and that, if at the point he was injured the road-bed was in a defective and dangerous condition, and he knew it, plaintiff could not recover for an injury occasioned by such defective road-bed.

Construing these instructions together, appellant was not prejudiced by any of them. In employing the deceased, the appellant assumed the duty of exercising reasonable care and prudence to provide him a safe place and tools to exercise the employment, and to maintain the place and tools in a reasonably safe condition during the time for which he was employed; and the deceased assumed the risks and hazards which ordinarily attend or are incident to the service he was engaged to perform. The negligence of appellant to supply the safe road-bed or place and tools for deceased was not a hazard and risk usually or necessarily attendant upon or incident to the performance of his contract; nor was it one which the deceased, in legal contemplation, is presumed to have assumed, for the obvious reason that he was to use such road-bed, place, and tools as were to be provided by appellant, and had and was to have nothing to do with constructing the road-bed, and place, and purchasing the tools, or with the preservation or maintenance of such road-bed and tools in suitable condition after they were supplied. This risk is not within the contract of service. If it was, appellant would have been relieved of all pecuniary responsibility for failing to perform the obligations he had assumed. Such a doctrine would be subversive of all just ideas of the obligations arising out of such contracts of service, and would withdraw all protection from such employes. A doctrine that leads to such results is contrary to reason, and unworthy of the sanction of any court. *St. Louis, I. M. & S. R. Co. v. Higgins*, 44 Ark. 300; *Davis v. Central Vermont R. Co.*, 11 Amer. & Eng. R. Cas. 175; *Missouri Pac. R. Co. v. Lyde*, Id. 190; *Texas Mexican Ry. Co. v. Whitmore*, Id. 199; *Galveston, etc., R. R. v. Lempe*, Id. 201; *Atchison, T. & S. F. R. Co. v. Holt*, Id. 211; *Same v. Moore*, Id. 247, 252; *Brown v. Atchison, T. & S. F. R. Co.*, 15 Amer. & Eng. R. Cas. 271; *Elmer v. Locke*, 135 Mass. 575; *Pierce, R. R. 370*; *Hough v. Railway Co.*, 100 U. S. 213.

While there was an implied contract between the appellant and the de-

ceased that the former should furnish and provide for deceased a safe place and road-bed in and on which to perform the labors required of him, yet the failure of appellant in that regard furnished no excuse for the conduct of the deceased, if he voluntarily and knowingly incurred the risks and dangers of performing the labors of his employment on a defective and dangerous road-bed. If he had, at and before he was injured, full knowledge of the dangerous character and defects of the road-bed or place on and in which he was required to work, he had the right to decline to work, or require that the road-bed or place should first be made safe; but if he did not, and with this knowledge entered upon the work, he assumed the risk, and should bear the consequences. *Little Rock & Ft. S. R. Co. v. Duffey*, 35 Ark. 613; *Fones v. Phillips*, 39 Ark. 36; *Gibson v. Erie Ry. Co.*, 63 N. Y. 452; *Woods, Mast. & Serv.* §§ 335, 372; *Pierce, R. R.* 379.

A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only required to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known of defects, or that he had the means and opportunity of knowing of them, will not preclude him from a recovery, unless he did in fact know them, or in the exercise of ordinary care ought to have known of them. He is not bound to make an examination to find defects. There is no such legal obligations imposed upon him. That is the duty of the master. He is not bound to search for dangers, except those risks that are patent to ordinary observation. He has a right to rely upon the judgment and discretion of his master, and that he will fully perform his duty towards him. *Ft. Wayne, J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137, 6 N. W. Rep. 553; *Reber v. Tower*, 11 Mo. App. 203; *Woods, Mast. & Serv.* § 376, and authorities cited.

The circuit court instructed the jury that an employe is not bound by a rule of the company not brought to his attention, or which is habitually violated with the knowledge of his superior officers, and without any effort on their part to enforce it, or where the usage and practice of the company would tend to mislead him in the violation of the rule. Appellant insists that this instruction is erroneous, but we see no error in it. *Fay v. Minneapolis & St. L. Ry. Co.*, 11 Amer. & Eng. R. Cas. 193.

Appellant asked the court below to instruct the jury to the effect that if the defects in the road-bed where Leverett was thrown down and mortally injured by its cars were easily and readily seen, and Leverett had been accustomed to working there, and, in attempting to uncouple cars while in motion, received the injuries which caused his death, plaintiff was not entitled to recover, and the court refused to give the instruction. Appellant insists that the court erred in so doing. Contributory negligence is a matter of defense. It is not presumed, but must be proved, and the burden of proving it rests on the defendant. *Hough v. Railway Co.*, 100 U. S. 225; *Burlington, C. R. & N. R. Co. v. Coates*, 15 Amer. & Eng. R. Cas. 265.

We have failed to find, and appellant has not called our attention to, any evidence which would have made the instructions asked for by it, and refused by the court, applicable or appropriate. There was no evidence, so far as we have discovered, to prove that the deceased, before he was hurt, knew, or ought to have known, of the condition of the track where he was fatally injured. There was evidence tending to prove that he was employed to work and had been working in a part of appellant's yard at Arkansas City, where the track and yard were in a good condition. The first time we have any evidence of his working on the road where he was killed, or his having been there, was the night and the time he was killed. It was then dark, cloudy, and had been raining. He was called to fill the place of an absent employe, and, while attempting to uncouple a car, at half past four o'clock in the

morning, was run over by the cars, and so injured that he died within two or three days thereafter. The evidence does not show that the defects which led to his injury were patent to ordinary observation at the time and under the circumstances he was hurt, it being in the night, and dark and cloudy, and we do not feel at liberty to indulge in the presumption that they were. *Brown v. Atchison, T. & S. F. R. Co., supra.*

We find no error in the proceedings of the court below prejudicial to appellant, and the judgment is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. RICHTER.

(*Supreme Court of Arkansas. February 12, 1887.*)

GARNISHMENT—JUDGMENT—CODE CIVIL PROC. ARK. § 224, AS AMENDED 1871.

Section 224 of Arkansas Code of Civil Procedure, as amended in 1871, (Mansf. Dig. § 317.) gives the right to sue out a writ of garnishment on a judgment, but directs that the debt shall be collected from the garnishee as in other cases of garnishment, (Id. § 317.) and that can be done only by suing the garnishee as other defendants are sued.

Appeal from circuit court, Saline county.

Dodge & Johnson, for appellant. *Geo. R. Hughes*, for appellee.

COOKRILL, C. J. Richter recovered judgment by default against the railroad before a justice of the peace for \$66.07, on January 26, 1885. An appeal was prayed to the circuit court, and the judgment superseded the next day. Before the cause was reached for trial in the circuit court, a judgment creditor of Richter sued out a garnishment upon a judgment rendered by another justice, and caused it to be served on the railroad company, for the purpose of satisfying the judgment against Richter. The company did not answer the garnishment, and a judgment by default in the garnishment proceedings was rendered against it for \$15.65, the amount of the judgment against Richter. When the circuit court convened, the railroad filed its answer, setting out this state of facts, and made no defense to the residue of the claim. The court sustained a demurrer to the answer, and rendered judgment against the company for the full amount claimed, and awarded execution therefor. The company appealed.

In the case of *Trowbridge v. Means*, 5 Ark. 135, it was decided that a judgment debtor was not subject to the process of garnishment. See, too, *Tunstall v. Means*, Id. 700. This was not because the terms of the garnishment statute were not broad enough to cover a debt which had been reduced to judgment, but for the reason that to permit the garnishee to be pursued by process upon his creditor's judgment and that of the garnishor at the same time would bring about a clash of jurisdictions, or else subject the garnishee to the hazard of paying the same debt twice. The result in the first instance, it was thought, would lead to inextricable embarrassment, and in the second a wrong would certainly be perpetrated through the instrumentality of the law. But neither of these evils will be presented in allowing the plaintiff's debt to be garnished in this case. The appeal has opened the case, for the purpose of a trial anew in the circuit court, as if no judgment had been rendered, and the defendant is thus afforded the opportunity of shielding himself from the liability of making payment both to the plaintiff and the plaintiff's creditor; and there is no danger of a conflict of jurisdictions in the collection of the debt, because no execution can issue on the suspended judgment, and it is in the power of the circuit court to render a new judgment in the still pending cause that will prevent all complications. So far as the right to reach the plaintiff's debt by garnishment is concerned, the case stands simply as an action pending for its collection; but the pendency of suit for the collection of a debt does not place it beyond the reach of garnishment process. *Freem.*

Ex'ns, 166. There is nothing to prevent the presentation of this defense in the circuit court. Notwithstanding the judgment was by default, the defendant may make any defense he might have made before the justice, excepting pleas by way of set-off. *Hall v. Doyle*, 35 Ark. 445. These are regarded as new actions, and the circuit court cannot mingle appellate and original jurisdiction in the same cause, and try issues that are altogether new. Mansf. Dig. § 4151; *Amis v. Cooper*, 25 Ark. 14; *Texas & St. L. Ry. v. Hall*, 44 Ark. 375; *Whitesides v. Kershaw*, Id. 377. But the garnishee who is compelled to pay his debt to his creditor's creditor is not merely subrogated to the latter's right, and forced to resort to set-off for his protection. The payment is itself a release *pro tanto* from the indebtedness. (Mansf. Dig. § 340,) as though it had been made to his own creditor. The case of *Minard v. Lawler*, 26 Ill. 301, is in point.

But the railroad company has not yet paid off the garnishment, nor has it been sued by the garnishor, and had judgment rendered against it for the garnished debt. The answer alleges, it is true, that a judgment by default was rendered against the company on the return-day of the writ of garnishment in the garnishment proceeding, and such a judgment was formerly authorized in garnishments after judgment, (Mansf. Dig. § 3418,) but that method of procedure has been abrogated, as was pointed out in *Giles v. Hicks*, 45 Ark. 271.

Section 224 of the Code of Civil Procedure, as amended in 1871, (Mansf. Dig. § 317,) gives the right to sue out a writ of garnishment on a judgment, but directs that the debt shall be collected from the garnishee as in other cases of garnishment under the Code, (Id. § 317,) and that can be done, as we decided in *Giles v. Hicks*, *supra*, only by suing the garnishee as other defendants are sued. And, as if to leave no room to question the legislative intent to make the Code remedy exclusive, the amending act referred to embraces a provision similar to one already found in the Code, (Mansf. Dig. §§ 4910, 6363,) to the effect that all other acts prescribing or regulating the practice in our courts are repealed, and that the Code, "as amended" by it, shall "constitute and regulate all civil practice and proceedings." (Id. § 5317.) So that, if this provision was not repealed by the Code in 1868, as it most probably was, (*Dowell v. Tucker*, 46 Ark. 438; *Giles v. Hicks*, *supra*;) the amendment of 1871 effected the repeal.

There has, then, been no valid final judgment against the company in favor of the garnishor. The answer, therefore, shows only the service of a writ of garnishment on the defendant. But, as the plaintiff's creditor is not denied access to the debt in suit by process of garnishment, the service of the writ fastened it in the garnishee's hands, and fixed the right of the garnishor to pursue the garnishee to satisfaction in the manner pointed out by the statute. The garnishee (the railroad company) must pay the debt, and it is a matter of no concern to it to whom it is paid, so that it gets an acquittal from its indebtedness. The temporary inconvenience to which the plaintiff debtor may possibly be exposed, by withholding his remedy for satisfaction of the debt until his creditor has had the opportunity to perfect his right to appropriate it, cannot outweigh the policy of the law to subject all of the debtor's property not exempt from seizure to the payment of his debts. So much of the judgment as awards execution against the defendant for the amount of the garnished debt is erroneous. Drake, Attachm. § 701; Waples, Attachm. 520, §-16. To that extent the judgment is reversed, and the cause remanded, with instructions to stay the execution, to that extent, for such time as the court shall be advised is proper. Otherwise the judgment is affirmed.

DICKENSON and Wife v. HARRIS and another.

(Supreme Court of Arkansas. February 12, 1887.)

1. LANDLORD'S LIEN—PARTIES—SUIT BY WHOM BROUGHT.

One who leases his wife's land in his own name, and takes a note for the rent payable to himself as "attorney," can maintain a suit in equity to enforce the landlord's lien in his own name, as "one with whom and in whose name a contract is made for the benefit of another."

2. SAME—JOINING PARTY IN INTEREST.

It is not necessary, however, that such a suit should be in his own name, and the wife may therefore be joined in it, either originally, or after the institution thereof.

3. SAME—ENFORCEMENT BY SUIT—CLAIM FOR RENT NOT SEGREGATED.

A suit to enforce a landlord's lien on crops, for rent, may be maintained, although the contract shows that the amount claimed is for rent and hire of personalty combined, without separating the two; especially if the bill alleges that the hire of the personalty was worth nothing.

Appeal from circuit court, Drew county.

U. M. & G. B. Rose, for appellants. *Wells & Williamson*, for appellees.

COCKRILL, C. J. The appellants' complaint in equity against the appellees, to compel them to account for the proceeds of cotton which it was alleged they purchased from the appellants' tenants with notice of the landlord's lien, was dismissed by the court upon demurrer. The suit was instituted within the life of the lien by J. W. Dickenson alone. The complaint discloses that the land belonged to his wife; that in leasing it for the year in question he acted as her agent; but that the contract was made by him with the tenants in his own name. A note for the rent, executed by the tenants, and containing the terms of the lease, is made a part of the complaint, and is payable to the "order of J. W. Dickenson, Atty." After the time for instituting suit to enforce a landlord's lien had expired, Dickenson's wife, the real party in interest, was made a party plaintiff with him, and the appellees' argument is that this must be regarded as the real date of beginning the suit, and that it is, by the adjudged cases, out of time.

The statute provides that every action shall be prosecuted by the real party in interest, except that "an executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or the state, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted." Mansf. Dig. § 4936.

It is apparent that J. W. Dickenson is not the real party in interest, but he is a party with whom, and in whose name, a contract is made for the benefit of another, and as such he comes within the limitation upon the general requirement as to interest made by the statute cited, and is authorized to sue in his own name notwithstanding the beneficial interest is in another. This provision is found in the codes of other states, and it has generally received the construction which its language obviously indicates. *Bliss*, Code Pl. §§ 55, 58; *Pom. Rem.* § 175; *Considerant v. Brisbane*, 22 N. Y. 389; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6-18; *Scanlin v. Allison*, 12 Kan. 85; *Rice v. Savery*, 22 Iowa, 471; *Ely v. Porter*, 58 Mo. 158; *Durfee v. Morris*, 49 Mo. 55; *Pindall v. Trevor*, 30 Ark. 249.

In *Boyd v. Jones*, 44 Ark. 314, it was held that the person to be beneficially interested was a necessary party to that suit, because the object of the bill was not only to collect the fund, but to have the court administer or distribute it; but it is there said that, if the only object was to recover the fund so as to enable the trustee afterwards to distribute it agreeably to the trust, it was unnecessary to bring before the court the parties beneficially interested.

The only object of J. W. Dickenson's suit was to collect the rent. The resort to equity was made necessary only by reason of the change in the form of the property upon which the lien was impressed. *Reavis v. Barnes*, 36 Ark. 575; *Anderson v. Bowles*, 44 Ark. 110. This suit in nowise affected his relations with his wife, who held the beneficial interest, and she was not a necessary party. *Carey v. Brown*, 92 U. S. 171. It is not essential, however, that the party in whose name a contract is made should become plaintiff. The real party in interest may sue as was done in the case similar to this of *Nolen v. Royston*, 36 Ark. 561. *Hunnicutt v. Kirkpatrick*, 39 Ark. 172; *Bliss*, Code Pl. § 58. As this suit was legally instituted by J. W. Dickenson within the time prescribed by the statute, the defendants could sustain no injury by permitting the person holding the beneficial interest, and who might have sued alone or as co-plaintiff with J. W. Dickenson, to be joined as party plaintiff at any time after the institution of the suit. *Winkelmaier v. Weaver*, 28 Mo. 358; *Price v. Wiley*, 19 Tex. 142.

It is further insisted that the order of dismissal is right because the contract shows that the amount claimed is for rent and the hire of personal property combined, without separating the two; but this fact does not destroy the equity of the bill to enforce whatever lien there may have been upon the cotton for rent of the land. *Harris v. Hanks*, 25 Ark. 510. The amount due as rent is a question of fact, to be determined by the proof, (*Varner v. Rice*, 39 Ark. 344; *Roth v. Williams*, 45 Ark. 447;) and the bill alleged that the hire of the property named was worth nothing, and the whole amount claimed was for rent of the demised premises. The appellees could take nothing upon their demurrer.

We have avoided saying anything about the allegations in the bill seeking to compel the appellees to account for money collected by them upon a policy of insurance against loss by fire on a part of the crop. The facts are indefinitely set forth, and the question has not been argued by counsel. Sufficient is seen to reverse the decree, and the parties can make their issues as to this question, if desired, in a more tangible form.

Reverse and remand, with directions to overrule the demurrer.

HARTZELL and others v. CRUMB.

(Supreme Court of Missouri. January 31, 1887.)

1. VENDOR AND VENDEE—REFUSAL TO CONVEY—MEASURE OF DAMAGES.

Where one who has agreed to sell land, and make a warranty deed, refuses to perform his contract, the measure of damages in a suit by the vendee (who has not paid the purchase money) to recover damages for the breach is the difference between the contract price and the value of the property at the date of the breach; and it is immaterial that the vendor in good faith refused to convey because he could not make a warranty deed, vendee being willing to accept such title as he could make. In such case the date of the breach is the time when vendor put it out of his power to perform his contract by conveying the property to another, unless he previously gave direct notice to vendee that he would not convey to him.

2. PRINCIPAL AND AGENT—CONTRACT SIGNED BY AGENT—PAROL EVIDENCE.

A contract not under seal for the sale of land being signed by one as agent, but the terms of the instrument leaving it in doubt whether the principal is bound or the agent only, parol evidence is admissible to charge the principal.

Appeal from circuit court, Cape Girardeau county.

Dennis & Smith, for respondent. *R. H. Whitelaw*, for appellant.

BLACK, J. Plaintiffs, who are partners under the name of Hartzell & Bros., brought this suit to recover damages for a breach of the following contract:

"Received of Hartzell & Brother one hundred dollars as earnest money on purchase of 722 acres, leaving a balance of 1,400 dollars, [describing land,] in

Bollinger Co., Mo., the last-described 165 acres to be Q. C. deed, balance warranty, from the owner, D. S. Crumb and his wife.

"O. P. HEDGES & Co., Agents.

"*Bloomfield, Mo., August 20, 1881.*"

Hedges & Co. were real-estate agents at St. Louis, and had Crumb's land for sale as his agents. Hartzell, Hedges, and Crumb met at Bloomfield, and the above contract was then made on the day of its date. It was signed by Hedges in the presence of and at the request of Crumb. Hartzell then paid the \$100, \$50 of which Crumb retained, and the balance was handed to Hedges to procure abstracts, and forward them to Hartzell, in Indiana, and if satisfactory Hartzell was to send the balance of the purchase money to St. Louis. Crumb forwarded deeds to a bank at St. Louis on the twenty-second of the same month, to remain there for 10 days. The first abstract was not such as Hedges and Crumb saw fit to submit to Hartzell, and others were procured. This caused considerable delay. In the mean time the bank returned the deeds to Crumb. Hartzell received the abstract about October 13, 1881, and at once remitted the balance of the purchase money to a bank in St. Louis. Crumb, on receiving notice of this, wrote Hedges a letter in which he inclosed a check for the \$50 earnest money, and in it says: "I became satisfied that your purchaser had given up the trade, and gave Weber the refusal again. He this day tells me he will take the land." Hedges refused to receive the check, saw Crumb, and it would seem the latter agreed to make the deeds. At all events, on the twenty-fourth October, 1881, Crumb sent to St. Louis a quit-claim deed of the land to Hartzell. In a letter of the same date to Hedges he notified the latter of that fact, and then refers to adverse claim made to the land, and says he does not want, at the price at which he was selling the land, to have any trouble thereafter. Hartzell refused to accept this deed, and insisted upon warranty and quitclaim deeds as agreed upon in the contract. There is evidence to the effect that Crumb refused to make the deeds as he had agreed, because of the increased value of the lands from the contemplated or actual construction of a railroad near to them. On the other hand, there is evidence tending to show that the abstracts disclosed some defects in Crumb's title; that Bollinger county made claim to the land, and for these reasons he declined to convey to plaintiff by warranty deed. He sold the land to Brown on April 4, 1882, by quitclaim deed for \$1,500.

It is earnestly insisted in an elaborate brief for the appellant that the court erred in the instruction as to the measure of damages. By this instruction the jurors were told that the measure of damages would be the sum paid on the contract, with 6 per cent. interest, and, in addition thereto, the difference between the price Hartzell & Bros. agreed to pay and the market value of the land at the time of the breach. The rule of *Flureau v. Thornhill*, 2 W. Bl. 1078, is strongly contended for by the appellant. There it was held if the title proved bad, and the vendor was, without fraud, incapable of making a good one, the purchaser was not entitled to damages for the goodness of his bargain. The reason for the rule as given by BLACKSTONE, J., is that these contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. After nearly 100 years it was again ruled in *Bain v. Fothergill*, L. R. 7 Eng. & Ir. App. 158, that upon a contract of sale of real estate, where the vendor, without default, is unable to make a good title, the purchaser is not entitled to recover damages for the loss of his bargain. The fluctuation and the different applications of the rule are fully discussed in the case last cited, and also by all the text writers upon the subject. The authorities in the United States as to the measure of damages, where the breach is on the part of the vendor, are conflicting, and cannot be made to harmonize. It would seem that where the doctrine of *Flureau v. Thornhill*, *supra*, has been applied in whole, or with modifications, the

question of good or bad faith on the part of the vendor is made an element in determining the measure of damages.

In *Kirkpatrick v. Downing*, 58 Mo. 32, the vendor gave the vendee a title-bond for the conveyance of the land upon the payment of the purchase money. A part of the money had been paid, when the wife of the vendee, without authority, surrendered the bond, and the vendor sold the land to another person, thereby putting it out of his power to make a deed to his first vendee. In a suit on the bond brought by the vendee the trial court gave as the measure of damages the amount of the purchase money paid, and refused to instruct on the basis of the difference between the purchase price and the value of the land at the time of the breach, it having been shown that the land had greatly decreased in value at that date. WAGNER, J., speaking for the court, refers to the conflict in the authorities, and proceeds to a review of them to determine which line would most likely promote the ends of justice. It is held that the rule must be reciprocal; that, were the property has enhanced in value, the purchaser gets the benefit of the enhancement, and where a depreciation has taken place he must submit to a corresponding loss. The further conclusion is stated as follows: "But, where there is evidence given showing a change in value of the land, the value at the time the breach occurred, and when the conveyance ought to have been made, will furnish the standard of damages. This is fair and just for both parties, as they obtain precisely what they are entitled to, and the basis is predicated on actual loss,—the full and adequate compensation." The instruction there refused, and which it was held should have been given, did also predicate the fact that the defendant sold the land to the third person in good faith; but that fact is not made an element entering into the conclusion reached. The court then quoted approvingly from *Hopkins v. Lee*, 6 Wheat. 109, where it is ruled that it makes no difference in principle whether the contract be for real or personal property. "In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference."

The rule which allows damages in these cases the same as in sales of personal property has been followed in a number of the states. The decisions to that effect are collected in the notes to 1 Sedg. Dam. (7th Ed.) 429. The author of the notes says: "We believe the rule to be the correct one on principle." The rule that excludes the distinction between contracts made for the sale of real estate and personal property, and also excludes as a consequence any consideration of the question of good or bad faith, seems to meet with the approval of some of the modern text writers. Field, Dam. §§ 504, 506. Or, as stated in 2 Suth. Dam. 211: "The general rule is the same that applies generally adequate compensation for the actual injury, or, as it is briefly expressed, damages for the loss of the bargain. In some jurisdictions there is no deviation from this rule on account of good faith, and inability to perform resulting from an unsuspected defect in the vendor's title; and there the symmetry of the law relating to sales is preserved."

It is to be remembered that in this country, especially the western states, lands are quite as much the subject of trade as personal property. Titles, for the most part, are not complicated. Statute law has reduced conveyances to a great degree of simplicity. There is no good reason why one who undertakes to sell real property by a specified form of deed should not abide the terms of his contract. He can readily contract against any unexpected real or supposed defect in the title. So long as the vendee is willing to accept the deed bargained for, the vendor ought not to be relieved from paying an adequate compensation for breach of the contract. The supposed or real defect in the title, and the question of good faith, or want of good faith, should not be considered. Adequate compensation requires that the vendee should be put in the same position, as near as can be done by the award of damages,

that he would have been in if the contract had been performed as agreed. Where the purchase money has not been paid, the measure of damage is the difference between the contract price and the value of the property at the date of the breach. In this case the damages will also include the advanced payment. We therefore adhere to what was said in *Kirkpatrick v. Downing*, *supra*.

2. As to the date of the breach, the court in substance told the jury that, before the defendant could rescind the contract on the ground that plaintiffs had failed to comply with their part of it, he must give them notice in writing of the date at which the contract would end, which must be a reasonable time after notice given. The other instruction upon the subject is as follows: "The jury are instructed that in this case, unless they believe from the evidence that Crumb gave plaintiffs, or their agents, direct and positive notice that he would not carry into effect the contract to convey the lands to Hartzell & Bros., made at Bloomfield, August 20, 1881, then the breach, if any, occurred when the defendant, Crumb, put it out of his power to comply with his contract by conveying it to Brown on April 4, 1882."

There is no evidence that notice of the termination of the contract in writing was given by defendant. Under these instructions the jury could not have found the date of the breach to be earlier than the fourth April, 1882. Now, there is evidence tending to show that in October, 1881, the defendant refused to do more than make a quitclaim deed, and that plaintiffs then refused to accept such a deed, and all this was known to both parties. Indeed, the plaintiffs seem to have acted upon this understanding, for they withdrew their deposit in January, 1882. The time consumed in furnishing abstracts to the plaintiffs could not operate against them. When they received the abstracts, and forwarded the money, which they did in due time, and Crumb had notice thereof, and refused to make a warranty deed, and communicated that fact, by himself or agents, to the plaintiffs, then there was a breach of the contract, full and complete. The plaintiffs could have sued for damages at once. No further or additional notice was required. It should be left to the jury to determine when the breach occurred by stating hypothetically what facts would constitute a breach. Of course, if there was no breach prior to the deed to Brown, then that date may be taken as the date of the breach.

3. The further claim is that the contract is not the defendant's contract, but the contract of Hedges & Co. It is to be noted this is not a contract under seal. In contracts of the character here in question it will be sufficient if upon the whole instrument it can be gathered that the party acted as agent, and intended to thereby bind the principal, and not to bind himself. Story, Ag. (9th Ed.) § 160a; *Klostermann v. Loos*, 58 Mo. 290, and cases cited. As said in that case, if the instrument is so uncertain in its terms as to throw the whole matter in doubt whether the principal or agent is to be held bound, such uncertainty may be obviated by the introduction of parol testimony. Here Hedges & Co. sign the contract as agents, Crumb is stated in it to be the owner of the land, and he and his wife are to make the deed. On proof of the agency of Hedges & Co. we are of opinion the contract sufficiently appears to be the contract of Crumb. But the evidence of the other circumstances under which it was executed, was properly admitted.

It results from what has been said that the judgment must be reversed, and the cause remanded; for the period at which the value of the land is to be estimated is material and important in this case, and upon that question the jury was misdirected.

(All concur.)

MUEKES v. BUNCH and others.

(Supreme Court of Missouri. January 31, 1887.)

1. FRAUDULENT CONVEYANCES—DEED FROM FATHER TO SON.

Where a father conveyed land to his sons in consideration that they would support him and his wife, and pay off a mortgage on the land, which the sons did, and, one of the sons (the older) having conveyed the land to the younger, he sold it to a third party, and paid part of the purchase money to his mother, (the father having died in the mean time,) *held*, the deed from the father could not be set aside as without consideration, or the deed between the sons, and from the younger son to the third party, be set aside as fraudulent, even at the instance of creditors whose claims existed at the time the first deed was made. Fraud in such cases may be gathered from all the circumstances attending the transactions, but here everything is consistent with good faith.

2. SAME—SUIT TO SET ASIDE—RELIEF—GENERAL PRAYER.

While plaintiff may, under a prayer for general relief, have any relief to which he may show himself entitled, yet there must be facts stated in his pleadings upon which the relief can be based. So, where facts are alleged to show that deeds were made without consideration or in fraud of creditors, the creditors are, upon proof of these facts, entitled to have the deeds canceled, but not to have them treated as mortgages, or to be substituted to the debtor's vendor's lien for the unpaid purchase money.

Appeal from circuit court, Osage county.

Mosby & Krauthoff, for respondent. *Silvers & Ryors*, for appellant.

BLACK, J. George Bunch, being the owner of the 80 acres of land here in question, conveyed the same to his sons James and William Bunch by deed dated November 17, 1876. In 1879, William conveyed to James, who reconveyed to William, and in 1880 the latter sold and conveyed the land to the defendant Drury Smith. George Bunch died in 1878, indebted to the plaintiff and others on demands existing at the date of the deed to the sons. These demands were allowed by the probate court against the estate of Bunch, and the plaintiff now prosecutes this suit to set aside the deeds before mentioned, and to subject the property to the payment of his demands, which amount to three or four hundred dollars. The petition alleges that the deed to the sons was without consideration; and, further, that that deed, and the other deeds between the sons, were to defraud the creditors of George Bunch, and that the defendant Smith had notice and knowledge of that fraud when he purchased the property.

The evidence shows that, when George Bunch made the deed to the sons, he was old, infirm, and unable to work. He and his wife and son William, who was under the age of 21, resided upon the land. The property was incumbered by a mortgage, payment of which was being pressed, and he was unable to pay it in whole or in part. The father proposed to convey this land to the sons if they would pay the mortgage debt, and keep the old folks the remainder of their lives, and the deed was executed upon that verbal agreement. James, who was then married and living to himself, moved to the land in question, and at once paid the interest on the mortgage, and in time the two boys liquidated the debt, at the same time giving the father and mother a support. The land was worth twelve or fourteen hundred dollars. The amount of the mortgage is not given. It must have been in excess of \$400. William became indebted to the defendant Smith, and sold the land to him for \$1,700. The widow of George Bunch preferred to live with her son George, and William gave her \$700 of the money received from Smith.

There can be no doubt that the deed to the boys was made upon sufficient consideration. The party who seeks relief upon the ground of fraud must prove it. Fraud may be gathered from the circumstances attending the transaction, and oftentimes they furnish the most convincing proof of fraud. But here the circumstances are all consistent with good faith. The arrangement was such

as the rather had a right to make, and one which his necessities demanded. The payment of the \$700 by William to his mother would at first indicate some previous secret trust, but it is to be remembered that he was then under an obligation to give her a support; and, as she desired to go and did go to live with the other son, it was proper for him to pay her the money in lieu of the support. Some of the evidence tends to show that the boys were to pay all the debts of the father, but there is express evidence to the effect that they were to pay only the mortgage. Be that as it may, there is no evidence in the case to justify the decree, even as against the boys. It may be stated that this property was the homestead of George Bunch, and as against him could not have been sold for the payment of the unsecured debts.

It is also urged that the consideration of the sale by the father was the assumption and payment of the unsecured as well as the secured debts, and that the defendant Smith had notice of all this when he purchased. On this proof it is contended (1) that the deed should be treated as a mortgage; (2) that the creditors have a vendor's lien as for unpaid purchase money; (3) that a trust results to them to the extent of their debts. These questions of fact and law are not before us for determination; for the petition lays no foundation for relief on any such grounds. The plaintiff may, under the prayer for general relief, have any relief to which he shows himself entitled, and which is also founded upon and consistent with the petition. But there must be facts stated upon which the relief can be based,—facts from which, when proved, the relief flows as a legal sequence. *Newham v. Kenton*, 79 Mo. 382. The only facts stated in this petition are that the deeds were made in fraud of creditors, and one of them without any consideration. These facts, if proved, lead to a cancellation of the deeds,—not an affirmation of them.

The judgment is therefore reversed, and the bill dismissed, for failure of proof.

(All concur, except SHERWOOD, J., absent.)

BOATMEN'S SAV. BANK v. OVERALL and others.

(Supreme Court of Missouri. January 31, 1887.)

1. GARNISHMENT—FRAUD OF CREDITORS—PROCEEDS OF WIFE'S REAL ESTATE—EVIDENCE.

In a garnishment proceeding, it appeared that the garnishees had in their hands the proceeds of notes, which were payable to the principal debtor, A., but they claimed that such proceeds belonged to the wife of A., from whom they had received the notes for collection. Plaintiff introduced evidence that the notes were given for a loan made by A. to the maker of the notes, a company of which he was president; that A. deposited the money loaned in a bank in his own name, and checked it out in the same way, and that he was then insolvent. The garnishees called A., who testified that the money belonged to his wife, being the proceeds of real estate transferred by him to his son, and by the latter to her, two years before the loan, when he was solvent; that he made the loan as her agent, and transferred the notes to her accordingly. *Held*, that the plaintiff's evidence made a *prima facie* case, and that it was not so far rebutted by that of the garnishee as to deprive him of the right of going to the jury.

2. SAME—INSTRUCTIONS.

Held, however, that an instruction allowing the jury to find that the money was reduced to the possession of A., "as his money, with the consent of his wife," was not justified by the evidence; and that an instruction that, if the real estate was transferred to A.'s son, the proceeds of the sale thereof, coming to A.'s hands, could not be lawfully assigned to his wife, was misleading; and for such errors defendant was entitled to a new trial.

Appeal from St. Louis court of appeals. Garnishment.

The following opinion was delivered in the court of appeals by RAMBAUER J.:

"This cause presents some close questions, and it is not without hesitation that we have arrived at the conclusions announced in this opinion. The appellants are garnishees in attachment proceedings brought against one William

V. Kay, as indorser of two notes of the Missouri Cotton-seed Oil Company. The notes, which were made by Kay as president of the company, bore date November 13, 1880, and were payable 60 days after date. The indebtedness evidenced by them originated in November, 1879, and January, 1880. The garnishees, who are attorneys at law, answering plaintiff's interrogatories, denied any indebtedness on their part to William V. Kay, but admitted that, at the date of the service of the garnishment, they did hold a check for \$10,000, since cashed, as proceeds of certain notes secured by deed of trust on the property of the Missouri Cotton-seed Oil Company, which notes they had received as attorneys from the agents of one Mary A. Tilden and one Jane G. Kay. They averred that said notes had been the sole, separate, and individual property of said parties in the proportion of \$3,000 for Mrs. Tilden and \$7,000 for Mrs. Kay, and that the debtor and defendant in the attachment suit, William V. Kay, had no interest therein. This answer was denied by plaintiff; the denial asserting that the money consideration of these notes secured by trust deed was furnished by defendant Kay. The denial further stated that Kay, being insolvent, and intending to cheat and defraud his creditors, had pretended to transfer these notes to the agents of Jane G. Kay, his wife, and Mary E. Tilden, a relative. Plaintiff's denial was contradicted by reply; the reply stating, among other things, that the garnishees had, since the service of the writ upon them, parted with some of the funds, but had retained sufficient to cover plaintiff's claim. The cause was tried by a jury upon these pleadings.

"Plaintiff gave evidence showing that, in the fall of 1880, William V. Kay, the debtor, kept an account in his own name with the Bank of Commerce, in the city of St. Louis; that on that account he deposited, November 5, \$5,000; November 8, \$5,000; December 7, \$375; December 15, \$500; and December 16, \$500,—all in the year 1880; that \$10,000 of this money, or thereabout, was loaned to the Missouri Cotton-seed Oil Company, and checked out by William V. Kay's individual checks; that the company had, on the twenty-eighth day of October, 1880, executed a deed of trust on its property to secure four notes, all bearing date October 27, 1880, and all payable six months after date, two of said notes being for \$2,000 each, and two for \$3,000 each, which notes were payable to William V. Kay, president, and were delivered to him as security for the advances made as above stated; that the deed of trust was not recorded until January 15, 1881; that the notes so made were the notes which subsequently came to the hands of the garnishees. Plaintiff also gave some testimony tending to show that William V. Kay was, in the latter part of 1880, in embarrassed circumstances, and probably insolvent. The judgment recovered by the plaintiff against Kay in the attachment suit was also put in evidence. This being all the testimony for plaintiff, the garnishees demurred by instruction, but their instruction was refused.

"The garnishees thereupon called William V. Kay, the debtor, who testified, in substance, that \$10,000 of the money deposited by him with the Bank of Commerce, in November, 1880, was the money of his wife, Jane G. Kay; that he loaned \$7,000 of this money, as agent of his wife, to the Missouri Cotton-seed Oil Company, and took the notes of said company, and sent and delivered three of them, amounting to \$7,000, to his wife; that the \$10,000 above mentioned were part proceeds of sale of some real estate which his wife had owned in Lake Forest, Illinois, and which she had sold in November, 1880; that Mrs. Kay had instructed him to lend the money to the Missouri Cotton-seed Oil Company; that he had loaned \$3,000 of the money of Mrs. Tilden to the company prior to this time, and gave to Mrs. Tilden one of the \$3,000 notes secured by trust deed as security. On cross-examination, witness stated that the property at Lake Forest, Illinois, sold by his wife, had at one time stood in his own name; that in March or April, 1878, he transferred it to his son, William G. Kay, who shortly thereafter transferred it to his (defend-

ant's) wife; that the property stood in his wife's name for two years before she sold it, in the fall of 1880; that he was solvent at the date of the transfer of the property to his son and wife, and that his embarrassments came from the failure of the oil company, in the early part of 1881. The manner of the witness testifying, as far as preserved in the record, was such as might have affected his credit with the jury, under the particular circumstances surrounding these transactions.

"One of the garnishees then testified that the notes were placed in the hands of his firm for collection by Wm. G. Kay, the son of the attachment debtor, who stated at the time that one note, for \$3,000, belonged to Mrs. Tilden, and the others to his mother, Jane G. Kay. The witness had no personal conference with these clients, and could not say whether he ever had received any written instructions from either of them. This was, in substance, all the testimony bearing upon the instructions of the court.

"At the close of the entire testimony, the garnishees again demurred by instruction, and the court again refused that instruction, but gave all other instructions asked by them.

"There was no error in the action of the court in overruling the demurrers to the evidence. It is true that, under the pleadings, the burden of proof in the first instance was upon the plaintiff. *Holten v. Railroad Co.*, 50 Mo. 151. But when plaintiff had shown, without contradiction, that the consideration of the notes, out of which the fund held by the garnishees arose, consisted of certain money held and controlled by the attachment debtor, that these moneys had been deposited by him in his own name in bank, and were thence drawn on his individual checks, plaintiff did make a *prima facie* case, rebutting the case made by the garnishees' answer. Possession of personal property is presumptive evidence of title. 1 Greenl. Ev. § 34; *Summons v. Beaubien*, 86 Mo. 307. The plaintiff was entitled, at the close of its case, to have the question of title submitted to the jury. It was sufficient to shift the burden of proof; and plaintiff was entitled, at the close of the entire testimony, to have the question submitted to the jury, whether its *prima facie* case was avoided by the testimony of the defendant in the attachment, unless we first find that that testimony was such that the jury was bound to give credence to it, as a matter of law.

"We have said in a recent case that, 'where the testimony offered in support of the allegations of the party who sustains the burden of proof, is, if believed, sufficient to make out his case, and is clear, consistent with itself, delivered by an unimpeached witness, and no circumstance is developed tending to cast suspicion upon it, it must be believed, in the absence of controverting testimony.' *Lionberger v. Pohlman*, 16 Mo. App. 392. But the testimony offered by the garnishees, being the testimony of the attachment debtor, fails to meet several of these requirements. There was therefore no error in refusing garnishees' demurrers to the evidence at any stage of the trial; and if the court had stopped there, and the jury would have found for plaintiff, as they did, we would not have disturbed the verdict, as the only objection that could have been urged against it would have been that it was against the weight of evidence. But the court went further. At the request of plaintiff it instructed the jury:

"(3) If the jury believe from the evidence in this case that the money loaned to the Missouri Cotton-seed Oil Company was the proceeds of the sale of real estate in Illinois, which was conveyed to a son of Wm. V. Kay, and which, at the time of such conveyance, belonged to William V. Kay, then said proceeds of sale, coming to the possession of Kay, if he was then insolvent, could not be lawfully assigned to his wife while he was insolvent; and if the jury find that the money in the hands of the garnishees was the proceeds of the loan of said funds, then the jury will find for plaintiff.

"(4) The jury are instructed that if they find from the evidence that the

money deposited in the Bank of Commerce was reduced to the possession of Wm. V. Kay, as his money, with the consent of his wife, in the state of Illinois, and brought into this state, and loaned to the Missouri Cotton-seed Oil Company as his money, and again transferred to his wife after he became insolvent, and to hinder, delay, or defraud his creditors, then the jury will find for the plaintiff, notwithstanding they may believe from the evidence that said money was the proceeds of real estate sold belonging to the defendant William V. Kay's wife.'

"Neither of these instructions can be justified under the facts of the case. The law in regard to voluntary conveyances is very simple. A conveyance made without consideration is void as to existing creditors, regardless of intent; as to subsequent creditors, it is void only when made with intent to hinder, delay, or defraud them. *Payne v. Stanton*, 59 Mo. 159; *Hurley v. Taylor*, 78 Mo. 238; *Fisher v. Lewis*, 69 Mo. 629. The conveyance made by Kay, the debtor, to his son, in March or April, 1878, and more than 20 months before the inception of plaintiff's claim, could not be questioned by plaintiff. The only transfer of property that could be challenged as fraudulent was the assignment of the notes by Kay to his wife at the time when he was a debtor of plaintiff, and probably insolvent. His testimony was to the effect that the money was that of his wife, the proceeds of the sale of some real estate belonging to her, and given to him for the purpose of loaning it to the corporation, whose notes, given for this money, he returned to his wife. If this be true, he never had any title to these notes which he could assign.

"The fourth instruction asked by the plaintiff, and given by the court, tells the jury that if they find that the money in the Bank of Commerce 'was reduced to the possession of Wm. V. Kay, as his money, with the consent of his wife,' etc. We find no evidence in the record to support this instruction, unless we can assume as a legal proposition that a jury may, when a fact is asserted by a discredited witness, not only disbelieve him, but consider his assertion of one fact as affirmative testimony of another fact diametrically the reverse. This we must decline to do.

"The third instruction asked by plaintiff, and given by the court, is obscure in meaning, and tended to mislead the jury. If Wm. V. Kay transferred property to his son prior to the inception of plaintiff's claim, and without any presumable intent of hindering the plaintiff, the property became that of his son, and we cannot see how the proceeds of that property, coming afterwards to the hands of Wm. V. Kay, could not lawfully be assigned by him, except as against his son, to anybody. If he gave the property of his son away, that son is the proper party to complain, and not his creditors. If that instruction was framed to convey the idea that the conveyance to young Kay was a mere cover, the real title to the property remaining all along in Kay, the debtor, and that when the property was sold the proceeds thereof became the property of the debtor, then its language was very inaptly chosen.

"While we are loath to disturb the verdict of a jury on a question of fraud, being sensible that the offense is one much easier accomplished than proven, we deem it essential that even in such cases, that regard be paid to the substantial elements of form which long experience has shown to be essential to the proper administration of justice.

"The judgment of the circuit court is reversed, and the cause remanded to be proceeded with in conformity with this opinion.

"(All concur.)"

W. B. Thompson, for appellant. Overall & Judson, for respondent.

PER CURIAM. The judgment in this case is affirmed on the ground and for the reasons stated in the opinion of the St. Louis court of appeals, which is reported in 16 Mo. App. 510.

STATE *ex rel.* FAIRES *v.* BUHLER, Road Overseer, etc.

(Supreme Court of Missouri. January 31, 1887.)

1. HIGHWAYS—KEEPING IN REPAIR—OVERSEER—REVISION Mo. 1879, CH. 147, § 6941.
Under the general power conferred on a road overseer by section 6941, c. 147, Revision Mo. 1879, "to keep the roads in his district in good repair," it is his duty to accept the actually existing and recognized public roads in his district at the date of his appointment, or that may thereafter be established during his term of service, as the roads committed to his care, and which, under the law, he is bound to keep in good repair, as provided by the statute.
2. MANDAMUS—OTHER REMEDIES—ROAD OVERSEER—OBSTRUCTIONS OF ROAD.
In all cases where full and ample relief may be had either by appeal, writ of error, or otherwise, from the judgment, decree, or order of a subordinate court, *mandamus* will not lie against a road overseer to compel him to remove obstructions from a public road; and the fact that the person aggrieved or complaining has, by neglecting to appeal when he might have done so, placed himself in such a position that he can no longer avail himself of its benefits, constitutes no ground for interference by the writ.

Appeal from circuit court, Andrew county.

Rhea & Son and Heren & Son, for respondent. *C. F. Booker and Sanders & Mercer*, for appellant.

RAY, J. This is a proceeding by *mandamus* to compel defendant, as road overseer, to remove certain fences from across a certain alleged public road in his district. Suit was commenced in April, 1882, in the circuit court of Andrew county, at the relation of J. H. Faires. The petition and alternative writ charge that relator is a citizen and tax-payer of said county, and that defendant is road overseer of district No. 42, in said county, having been appointed February 14, 1882; that there was an ancient legally established road in said district, over and across the W. $\frac{1}{2}$ of S. E. $\frac{1}{2}$ of section 4, 59, 35, in said county; that in 1874 said road was unlawfully obstructed by building a fence across the same at a point where it enters on said tract on the north, about 65 4-5 rods east of the north-west corner thereof, and also by a like fence where it leaves said tract, on the south, about the south-east corner thereof; that said defendant is aware of said obstructions; that it is his duty under the law to remove the same; that he has ample power and authority for that purpose, but wrongfully refuses so to do, to the irreparable injury of the relator, and the public at large. Whereupon the defendant was commanded by said alternative writ to remove said fences, or show cause why he has not done so. The return of defendant to the writ sets up that the road in question, over and across said tract of land, was changed and vacated by order and judgment of the county court of said county, on a proceeding for that purpose began in 1873 by S. R. Selecman, the owner of said land, for the purpose of cultivation and improvement, and that said road was properly and legally changed and relocated accordingly; that due notice thereof was given; that the relator voluntarily appeared in said court as a party to said proceedings, and failed to appeal from the final order and judgment of said court changing and vacating that part of said road. To this return the relator filed his plea, putting in issue all the new matter set up in the return, and charging affirmatively that there was no notice of said proceedings, no report of commissioners, and no final order or judgment changing and vacating said road. The cause was submitted to the court upon the pleadings and the evidence.

At the trial it was concluded that, at and prior to the year 1873, there was and had been a certain public road leading back and forth from Savannah to Rosedale, in said district and county, which, in its course between said points, passed over and across said W. $\frac{1}{2}$ of S. E. $\frac{1}{2}$ of section 4, 59, 35, from north-west to south-east. It was also concluded that, in the year 1873, one S. R. Selecman owned said tract of land, and, wishing to cultivate and improve the same, commenced proceedings in the county court of said county, under

sections 43-45, 2 Wag. St. 1872, p. 1226, for the purpose of changing and vacating so much of said road as passed over and across said tract of land, and relocating the same on the north-west and south lines of said tract at his own expense. The records of said county court also show that such proceedings were had and conducted therein, under said sections of the statute, as resulted, if valid, in a final order and judgment of said court granting and establishing said change, and vacating so much of said road as passed over and across said tract; and that the relator—who assumed to represent not only himself, but the public at large—had notice of said proceedings, got up a remonstrance against the proposed change, appeared in court, and opposed the same, and, failing in his efforts, neglected to appeal from the judgment so rendered. The records further show that in 1874 said Selectman—who is no party to the suit—in good faith, and at his own expense, opened up and constructed said new road, upon said tract of land, and thereupon inclosed the same, and in so doing built the fences over and across the old road so vacated and changed, and thereafter continued to occupy and maintain the same, under claim of right and color of authority. It also appears that said new road, so constructed in lieu of the old, at the defendant's appointment as overseer of district 42, and also at the date of the commencement of the suit, was one of the existing and recognized public roads of the district, although not in good repair on the south line,—especially for heavily loaded wagons,—by reason of freshets and washouts; and it further appeared that, in point of fact, there was not, and had not been for some six or eight years, any public road whatever over and across said tract of land where the fences sought to be removed by this proceeding are ended. The entire record of proceedings of the county court, pertaining to said change of said road, including the petition, notice, and report of commissioners, was also put in evidence.

Upon this state of facts the court, at the instance of relator, over the objections of defendant, gave the following declarations of law, to which defendant at the time excepted:

"(1) There being no sufficient notice in law shown by the record or otherwise of the petition of S. R. Selectman, filed in the county court, May 6, 1873, asked to change and turn so much of the road leading from Savannah to Rosedale, in Andrew county, Missouri, as is now located on the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 4, township 59, range 35, but, on the contrary, the notice read and shown to the court by the relator herein is wholly insufficient in law; and the court declares the law to be that the county court had no jurisdiction of the subject-matter, and that its action pertaining to the change of said road was wholly null and void.

"(2) The report of the commissioners filed in this case, August 4, 1873, not being a report as required and prescribed by section 44, 2 Wag. St. 1226, and said commissioners wholly failing in said report the width, the respective distances, and situation of the ground of the established and proposed roads at the first term of the court thereafter, as required by law, the court declares the law to be that the county court had no jurisdiction of the subject-matter, and that its action pertaining to establishing or vacating said road was wholly null and void."

The following declarations, asked by defendant, were refused by the court, to which defendant at the time excepted:

"(1) If it appear from the evidence that, about the year 1873, one S. R. Selectman, being the owner of the land through which the road in question then run, filed his petition in the county court of Andrew county for permission to change said road on his own land for the purpose of improvement and cultivation, and that said county court, after proof that not less than three notices of said petition had been set up at least twenty days before said petition was presented to said court, in the neighborhood of said proposed change of road, appointed three commissioners to view and measure out said road,

and report thereon, and that said county court, after receiving the report of said commissioners, allowed said change of road, and afterwards made an order vacating the road in question, then said order vacating said road is not void, but valid and binding on all parties until reversed or annulled by proper proceedings, and said order vacating said road, or the regularity or sufficiency of the proceedings in said county court in connection therewith, cannot be reviewed or set aside in this action, and the finding must be for the defendant.

"(2) If the owner of the land on which the road in question was situated, inclosed said land about the year 1874, thereby fencing up said road, and has ever since that time kept the same inclosed, claiming that said road had been vacated, then *mandamus* will not lie to compel the road overseer to open said road."

Whereupon the court found for relator, and awarded a peremptory writ, commanding and requiring defendant to remove said fences, from which defendant, after unsuccessful motions for new trial and in arrest of judgment, appealed to this court.

The propriety of these rulings of the trial court is the question for review now before us. Two questions arise in this case: (1) As to the powers and duties of the road overseer in the premises; (2) as to the proper functions and office of *mandamus*.

The law of roads and highways in this state is found in chapter 147, p. 1364, 2 Revision 1879. The provisions governing the mode and manner of opening, changing, and vacating roads, (of which the county courts have exclusive original jurisdiction,) as well as those prescribing the powers and duties of road overseers, are found in the various sections of that chapter. It may be concluded that it is competent and proper for the circuit court, upon appeal from the orders and judgments of county courts, as well as in other proper cases, between proper parties, to review and pass upon the regularity and validity of said proceeding, orders, and judgments; and it may also be granted that, in the absence of proper notice, report of commissioners, or other material requirements, the county court acquires no jurisdiction of the subject-matter of the proceedings, and that its orders and judgments in such cases would be null and void, and assailable even in collateral proceedings; yet it does not follow that the circuit court, under the facts of this case as developed by the record, had jurisdiction by *mandamus* to review and pass upon the validity of said proceedings of the county court, or to award the peremptory writ in question. Unless it was clearly the duty of the defendant under the law, as overseer of road-district 42, to remove the fences in question, all the authorities agree that the circuit court had no jurisdiction to award the writ; since the writ of *mandamus* neither creates nor confers power upon the officer to whom it is directed, but is only used to compel the performance of pre-existing duties imposed by law.

Section 6941, c. 147, *supra*, provides, among other things, that "the several county courts shall divide their counties into convenient road-districts, and shall appoint a road overseer for each district, and furnish him with the boundaries thereof, and at the February term of the court in each year the court shall appoint a suitable person in each district to act as overseer for the ensuing year. It shall be his duty to keep the roads in his district in good repair, according to the provisions of this chapter," etc. Other sections point out specific circumstances under which he may be ordered by the county court to remove fences and other obstructions from public roads, none of which, however, have any application to the case at bar. It may also be concluded that, under the general power conferred by section 6941, *supra*, "to keep the roads in his district in good repair," that it was the duty of defendant, as such overseer, to remove any and all fences and other obstructions, if any, from any of the public roads in his said district. But the question remains, what is here meant by the term "roads" in his district? Does it mean roads actually

laid out, constructed, used, and recognized as such; or does it mean roads that have only a nominal existence *de jure*, without any visible or tangible existence *de facto*? We apprehend that, under a fair construction of the statute, the actually existing, traveled, and recognized public roads of his district is what is here contemplated by the statute. We do not imagine that the statute ever intended to impose upon road overseers the onerous and difficult duty of searching the records and proceedings of the county court, and, at his peril, pass upon and determine the regularity and validity of the various proceedings by which the different public roads in his district had been created, changed, or vacated. On the contrary, we apprehend that it is his duty to accept the actually existing and recognized public roads in his district at the date of his appointment, or that may thereafter be established during his term of office as the roads committed to his care, and which, under the law, he is bound to keep in good repair as provided by the statute. The duty of deciding between roads *de facto* and roads *de jure*, we apprehend, in general devolves upon the court, in proper cases, rather than upon mere ministerial officers of the law.

The books show that the language of the standard authorities, when treating of the functions and office of *mandamus*, and under what circumstances its jurisdiction exists, is to the effect following: That, when the law enjoins upon a public officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy, be enforced by *mandamus*. The writ of *mandamus* in no case has the effect of creating any new authority, or of conferring power which did not previously exist; its proper function being to set in motion and to compel action with reference to previous and clearly-defined duties; and, to warrant the court in granting the writ against a public officer, such a state of facts must be presented as to show that the relator has a clear right to the performance of the thing demanded, and that a corresponding duty rests upon the officer to perform that particular thing. And when substantial doubt exists as to the duty whose performance it is sought to coerce, or as to the right or power of the officer to perform the duty, the relief by *mandamus* will be withheld. Especially will the court refuse in such a case to interfere, when it is apparent that the interests of third parties not before the court are involved. And the rule underlying the jurisdiction by *mandamus* is that the existence of another adequate legal remedy is always a bar to relief by *mandamus*. And in all cases where full and ample relief may be had, either by appeal, writ of error, or otherwise, from the judgment, decree, or order of a subordinate court, *mandamus* will not lie, since the courts will not permit the functions of an appeal, or writ of error, to be usurped by the writ of *mandamus*; and the fact that the person aggrieved or complaining has, by neglecting to appeal when he might have done so, placed himself in such a position that he can no longer avail himself of its benefits, constitutes no ground for interference by *mandamus*. See High, Extr. Rem. §§ 7, 16, 32, 39, 177; *State v. Supervisors Sheboygan*, 29 Wis. 79; *Dunklin Co. v. District Court*, 23 Mo. 449; *Blecker v. St. Louis Law Com'r*, 30 Mo. 111.

Tested by these rules and authorities, we conclude that, under the facts of this case, it was not the duty of defendant, under the law, to remove the fences in question; and that the circuit court, under the circumstances, has no jurisdiction to award said peremptory writ, and for these reasons its judgment in that behalf ought to be, and is hereby, reversed.

(All concur, except SHERWOOD, J., absent.)

STATE *ex rel.* HOLT v. BUHLER, Overseer, etc.

(Supreme Court of Missouri. January 31, 1887.)

Appeal from circuit court, Andrew county.

David Rhea & Son and Heren & Son, for appellant. *Sanders & Mercer and C. F. Booker*, for respondent.

RAY, J. This case, in all its essential elements and principles, is like that of *State v. Buhler, ante*, 68, (decided at the present term.) The difference in its facts in no way changes or withdraws it from the operation of the principles and rules governing and decisive of that case.

The judgment of the circuit court in this case, unlike that in the other case, was for the defendant; and that judgment should be affirmed on the same grounds, and for the same reasons, that the other was reversed; and it is accordingly so ordered.

(All concur, except SHERWOOD, J., absent.)

VANHOOVER v. BERGHOFF.

(Supreme Court of Missouri. January 31, 1887.)

1. MALPRACTICE—EVIDENCE—MEDICAL EXPERTS.

When, in an action against a surgeon for malpractice, the plaintiff is permitted to show the skill, reputation, and standing of one as a surgeon and physician, by the testimony of medical experts, who were then asked and permitted to give their opinions upon the material issues, on the assumption that his diagnosis of the case was correct, the defendant may show, by the same experts and witnesses, his own skillfulness and reputation in that behalf.

2. SAME—QUESTION FOR JURY.

Where, in an action against a surgeon to recover damages for malpractice in the improper treatment of a dislocated bone, there was a question whether he was justified in not using the "splint" which had been practically tested, and was in common use in such cases, by the profession, and in adopting and using a substitute in the manner stated, or whether there was in this behalf a want of the requisite and proper skill and attention ordinarily bestowed in similar cases, it was one of fact for the consideration of the jury.

3. SAME—INSTRUCTIONS—BURDEN OF PROOF.

In an action against a physician and surgeon for malpractice, an instruction to the jury that "the defendant was bound to possess and use all the knowledge, skill, and ability that was reasonably necessary to properly treat plaintiff, and, unless the evidence showed to the satisfaction of the jury that defendant, in the treatment of plaintiff, did use such knowledge, skill, and ability, they should find for the plaintiff, if they further found that the injuries complained of were the result of defendant's so failing to use such knowledge, skill, and ability," was erroneous, as being open to the construction that the burden of proof was upon the defendant to show these facts to the jury.

Appeal from circuit court, Buchanan county.

Action to recover damages for malpractice. Verdict and judgment for plaintiff. Defendant appealed.

Woodson, Green & Burns and Rainy & Brown, for respondent. *Jas. Limbird*, for appellant.

RAY, J. On Monday, the sixteenth day of October, 1881, plaintiff fell from a wagon loaded with barrels of apples, one of which rolled on him, and dislocated his left hip. He was at the time several miles from home, and was carried to a neighbor's house, and Dr. Davis called in to see him. Dr. Davis testifies that he then "reduced" or set the bone "by manipulation." Whether this is so or not, on the Wednesday following, plaintiff was placed upon a bed, and transferred by wagon, over rough and frozen roads, to his own house. Some time afterwards plaintiff called in Dr. Culver, a neighboring physician, who examined the left hip, and pronounced it dislocated,

and advised sending for Dr. Gough, of Atchison. After the accident, perhaps some three weeks, Dr. Gough, accompanied by Dr. Culver and Dr. Davis, called and examined plaintiff, and found the left hip dislocated; and Dr. Gough, after administering chloroform, attempted, "by manipulation," to put the dislocated hip in place, but failed. He then left, as he was not at that time prepared with the necessary mechanical appliances to set the bone, and, as the arrangements he demanded about his fee were not made, he did not return. Thereafter, and on November 14th, Press Vanhoover, the uncle of plaintiff, went with Dr. Davis to St. Joseph, and employed the defendant to come out, and put the bone in place, or to see if it could be done, for which service he was to receive the sum of \$40. Plaintiff charges in his petition, objections to which will be hereafter noticed, and contended upon the trial, that, through the unskillfulness and negligence of defendant, the bone was never properly set; or that, if restored to place, the proper means and appliances were not used to keep the bone in place, and that the result was to make him a cripple for life. The special answer of defendant, so far as material, set up a special contract to reduce the dislocated left hip, and charges that said service was duly rendered. The evidence, or parts of it, the demurrer to the evidence, and instructions, will be adverted to in the course of this opinion. There was a verdict in plaintiff's favor, and judgment thereon, from which defendant appeals to this court.

The first exception urged upon us is the refusal of the court to give, at the close of the evidence in plaintiff's behalf, an instruction in the nature of a demurrer to the evidence, which was asked upon the ground that "the contract as pleaded is an entirety, and is an absolute contract to cure." If this is so, the undertaking is a special one, and more comprehensive than the law imposes on the surgeon. Under the law, his contract is not one of warranty that a cure will be effected, but only that he possesses, and will use, reasonable skill, judgment, and diligence, such as is ordinarily possessed and employed by members of the same profession. It is, however, competent for the surgeon to make a contract expressly binding himself to cure; and the petition in this case charges that defendant undertook to reduce and set the bone, and to attend, cure, and heal the same; but it also charges that he "promised *carefully and skillfully* to perform said service," and that he *carelessly, negligently, and unskillfully* failed to set, locate, and reduce the dislocation, and to bind up, dress, and secure the same. Taken altogether, we do not think the petition sets out an express promise to cure, but only such an undertaking as the law implies, which is to employ in this behalf reasonable skill and diligence. This view is, we think, supported by the authorities to which we have been referred. *Reynolds v. Graves*, 3 Wis. 416; *Hoopingarner v. Levy*, 77 Ind. 455; *Grindle v. Rush*, 7 Ohio, 409.

The instruction was again asked at the close of all the evidence, and the claim made that the evidence shows, without any conflict therein, a fulfillment on the part of defendant of the contract made and entered into with plaintiff. This exception we will now consider and dispose of in this connection. There is little, if any, variance, we may observe, in the circumstances and terms of the employment of defendant, as the same is given in the evidence of Press Vanhoover, who testified for plaintiff, and that of Dr. Davis and Dr. Berghoff, examined on the part of defendant. Press Vanhoover, who acted for plaintiff, says as to this: "I came to St. Joe with Dr. Davis, and went to Dr. Berghoff's office. I asked him what he would take to come out and put the bone in place. He said, as it was Dr. Davis' case, he would come out and set it for \$40. I told him I would give that. * * * I only hired him to set the bone,—to put it in place. No; I didn't employ him to attend to, to care for, or treat him,—only just to set the bone." This, then, was, so far as expressed, the contract of professional service undertaken by defendant. Perhaps the law would imply or attach, if not embraced and cov-

ered by these terms, the further duty of properly bandaging the bone, or the use of reasonable skill and care in that behalf. Ordinarily it would also be proper and necessary that the surgeon should also give directions and warnings such as would be generally given to enable plaintiff or his nurse and attendant to act intelligently in the further management of the limb. There is evidence to show that defendant gave directions in this behalf, such as to keep plaintiff quiet at first, and subsequently to move the limb gently, as the patient could bear it, to prevent stiffness in the same. But in this case, even if there was no evidence of this sort, it will be perceived that Dr. Davis was first in charge of the case, and was expected to and did continue in attendance, as plaintiff's physician, for some time afterwards; and directions might properly be given to him, which both Dr. Davis and defendant say was done, and his judgment and skill could properly be, and was, perhaps, relied on as to directions and after-treatment of the case.

When defendant called on plaintiff, which he did on November 16th, the second day after his said employment, on November 14th, after learning from plaintiff the history of the accident, which had also been previously given him by Dr. Davis, he placed plaintiff on the floor, after administering chloroform, tried to set the bone by manipulation, but failed to set it by this means, just as Dr. Gough had failed in his said endeavors so to do. He then employed pulleys and the Jarvis adjuster, which were the proper mechanical means, and, after some three hours' work, succeeded, with the assistance of Dr. Davis, as both doctors testify, in reducing the dislocation. The bone, however, did not move back into place with a "snap," which it seems is one of the recognized signs of success in such operations; but this is accounted for by the physicians in attendance at the time by the fact that the dislocation was an old one, of some 30 odd days' standing at the time, and the cavity may have been filled, or partially filled, by plastic or some solid material at the time. But, however this may have been, the plaintiff himself testifies that, when he came from under the influence of the chloroform, the defendant, who claimed the leg was then all right, "moved it up and down, in and out, and sideways, which couldn't be done before." Press Vanhoover, upon this showing, paid the \$40, as he had agreed to do. Defendant at this time discovered, as he claimed, that plaintiff's right hip also was dislocated; but, as plaintiff was then believed to be too much exhausted to permit the attempt at that time to put the right hip in place, arrangements were then made for defendant to come back at a subsequent day, and reduce the dislocation of the right hip. Ten or twelve days thereafter defendant returned for this purpose, and was accompanied on this visit by Dr. Davis and also by Dr. Magar. At this second visit plaintiff testifies that all three of said doctors, in turn, took hold of his left leg, moved it up and down, in and out, and sideways. All three physicians testified that they rotated the limb delicately, but firmly, and that the bone was then in place, and all right. When the limb can be extended, and thus rotated freely, this is said ordinarily to be sufficient evidence that the bones are in place. Immediate relief from pain, it seems, is also one of the recognized signs that the operation has been successfully performed. In view of this fact, the statement which the plaintiff makes, among others, that his left leg "quit hurting him, after the defendant put it in place, until a few days after he put the right hip in place," is, to say the least, very significant. Upon the occasion of said second visit, the defendant and his assistants again administered chloroform, and operated upon the right hip of plaintiff. We omit the controversy as to whether the right hip was dislocated or not, and the evidence upon that subject, as the same is wholly irrelevant and immaterial in this action. After said operation upon the right hip, the legs were tied or bound together, and pillows placed under them, and defendant left, leaving the patient in the care of Dr. Davis. Some three or four days after this, and some sixteen or seventeen days after defendant had

set or operated upon the left hip, the uncle of plaintiff discovered that the left leg didn't look right, the knee being drawn up and over, and the heel turned out, and the toes in. On December 7th, Dr. Davis sent for defendant again, and he went down on the next day, to see the plaintiff for the third time, and, upon examination, said that the left hip was again out of place; but the weather was extremely cold, and, as the patient would have to be placed before the open door for the operation, the windows being boarded up, it was decided to be imprudent to attempt the operation at that time. About 10 days afterwards defendant returned for his fourth visit, and, with Dr. Davis, again put the left hip-bone in place, as they testify, and then left. After this nothing was ever done by plaintiff, who never again notified or sent for defendant, or employed any other doctor; but, as he testified, just let it go, with the result already indicated,—the right hip being sound in all respects, and the left one being firmly fixed in its position.

This evidence, it must be confessed, presents the case very favorably for the defendant, and is, to say the least of it, of great force and weight. We may observe that we have not been favored with any additional abstract or brief, or with any oral argument, in behalf of the respondent; but the evidence in the record, which we suppose is relied on as of a contrary tendency, is, in substance, about as follows: Dr. Gough, whose reputation as a skilled surgeon is shown to be of high order, it will be remembered, was called to see plaintiff a week or more, perhaps, before defendant was employed. He testified that he thought that, by the use of the proper appliances, and the exercise of ordinary skill on the part of the surgeon, the bone of the left hip could have been reduced, and a good limb secured, and that such would have been the ordinary and probable result of proper treatment. He examined the plaintiff before giving his deposition in the cause, and gave it as his opinion, from his two said examinations, that the dislocation of the left hip-bone had never been reduced. Dr. Geiger, and a number of other physicians and surgeons, upon the assumption that Dr. Gough's diagnosis was correct, and upon the testimony given in the cause, gave it as their opinion that the dislocation had never been reduced. Some of these also further testified that if the bone had been put in place, and remained so for 12 days, it would require a great deal of violence to again dislocate it; and that, in their opinion, it could not redislocate itself, or be redislocated by the patient in bed by any use or exercise of his body. The testimony of others, however, was just to the contrary in this respect. The testimony of plaintiff and his wife and attendants tends to show that the directions given by defendant were followed, and that the plaintiff remained quiet in bed, and that, when unbandaged, his left hip was found in the same condition, and still out of place. One or more of these described the left leg before defendant came to treat it "as turned in, somehow," and says that, after defendant left, it remained "very much the same."

These features in the evidence, taken altogether, tend, we think, somewhat to show that the bone had never been set or put in place; that it might have been so set by the exercise of reasonable skill and diligence; and are sufficient, as we are inclined to believe, to create a substantial conflict in the evidence, and to take the issue to the jury. After the dislocation had been reduced, the surgeons testifying in the cause disagree as to the necessity of employing splints or other appliances, ordinarily, to retain the bone in place. Dr. Gough, for example, testified that he would have extended the limb, and "applied a long splint on the outer aspect of the leg;" while Dr. Malin, another expert introduced by plaintiff, testified that his practice was "to extend the limbs, and tie the legs together, without any splints." An authority upon this subject, to which, among others, we have been referred, says that "dislocations, as a rule, are characterized by preternatural immobility, and when reduced do not need support to retain the bone in position." McClel. Malp. 410. If

this is so, and if there is, as seems to be the case, a want of definite and prescribed mode or system of treating the joint after the bone is set, and differences among practical and skillful surgeons in this behalf, the surgeon may, we think, exercise his own best judgment, employing the methods his experience has shown him to be the best; and a mere error of judgment as to this would not, under the law, make him liable in damages.

But the authority already quoted further says: "Sometimes, however, after reduction, the bone has a strong tendency to redislocation, and will not remain in place without support." There was manifestly such a tendency to redislocation in this case; and, recognizing this, defendant, when he reset the leg, tied the legs of plaintiff together, and wrapped up a small stick of stove-wood in a blanket, and placed the same under or against the left hip, which was intended, perhaps, to act to some extent as the splint would, and in lieu thereof. A further circumstance shown by the evidence is that, after defendant had reset the left leg at the time of his last visit, some of those attending plaintiff discovered, immediately after defendant left, something wrong with the leg, as they thought, as the foot seemed to be slipping down out of bed, and went after him, and brought him back. Defendant thereupon, before leaving, put a plank between the leg and the bed rail, to obviate this difficulty. Whether the defendant, after it had thus become manifest to him that some means or appliances were necessary to support and hold the dislocated bone in place, was justified in not using the "splint" which had been practically tested, and was in common use in such cases, by the profession, and in adopting in lieu thereof the rude substitute mentioned, and using the same in the manner stated, or whether there was in this behalf a want of the requisite and proper skill and attention ordinarily bestowed in similar cases, was, we think, also a question for the jury, and we so hold.

But there were a number of other exceptions taken upon the trial, and among them the following: Plaintiff was permitted to show the skill, reputation, and standing of Dr. Gough, as a surgeon and physician, by the testimony of the medical experts, who were then asked and permitted to give their said opinions upon the material issues, on the assumption that his diagnosis of the case was correct. After this proof was admitted in plaintiff's behalf, the defendant, in his turn, offered to show, by the same experts and witnesses, his own skillfulness and reputation in that behalf, which evidence so offered was, on objection of plaintiff, excluded. It will be perceived and remembered that the petition charged defendant both with a want of skill and with negligence in the treatment of the case. The possession or want of skill by defendant was thus made a material issue, and plaintiff was not limited, either in his pleadings or by the instructions in the cause, to the issue of negligence. The possession of the required skill by defendant, if he did not apply or use it in the case, would, it is true, be no protection; but it would make the liability depend upon the question of negligence merely, and, where both issues are thus tendered and submitted together, we are not disposed to hold that it is immaterial whether the defendant is or is not reputed to be, and is or is not, a skillful surgeon.

In *Leighton v. Sargent*, 7 Post. 475, as in the case at bar, the defendant was charged with both a want of skill, and with neglect in the treatment of the plaintiff, and similar evidence was there offered and excluded. The court observes that nothing in the declaration confined plaintiff to either of these views, and "nothing had occurred in the course of the trial to restrict the plaintiff to the point of negligence. He was therefore at liberty to take his position before the jury that defendant was ignorant and unskillful, or that he was negligent and careless, or, if he so pleased, that he was both unskillful and negligent. Any evidence, then, calculated to repel the inference of ignorance and unskillfulness, to show that he was a man of suitable education and acquirements for the safe practice of his profession, must surely be com-

petent and proper. Such evidence must change the whole position of the case before the jury; because, if the jury were satisfied he had proper knowledge and skill, the only question must then be whether he had adopted the course of his treatment from mistake, mere error of judgment, or from negligence and a want of ordinary care. This, it is obvious, presents a very different state of the question from that where the points of ignorance, negligence, and error are to be considered. As the evidence in question seems to us both pertinent and material, as tending to show ordinary knowledge and skill, we are satisfied it should have been received." The experts whose testimony was offered in this behalf were, we may remark, personally acquainted with defendant, and some of them, at least, had been associated with him in practice in similar cases; and it was, we think, and so hold, competent to prove by such witness, thus qualified to testify, whether defendant was or was not a skillful surgeon.

The admission of similar evidence as to the skill and reputation of Dr. Gough manifestly would strengthen his diagnosis of the case, and give value to the opinions of the experts based thereon, and this, we think, rendered it all the more proper and necessary that the jury should have the same proof as to the skill of defendant in considering his diagnosis and treatment of the case. As already said, the issue as to the skillfulness of defendant was submitted with the other issue as to negligence in the instructions given in the cause, but competent evidence in that behalf was, we think, under the said ruling, excluded, and this, we think, was error, and we so hold.

Exceptions were also taken to the court's action and ruling upon the instructions, and one of these, we think, is well taken. The fifth given in plaintiff's behalf seems to put the burden of proof upon defendant to show to the satisfaction of the jury that he possessed and used the knowledge, skill, and ability that was reasonably necessary to properly treat plaintiff. If it is open or subject to this construction, as we think it is, it is out of harmony with other instructions given in the cause, and is manifestly erroneous.

As the cause goes back for rehearing, we deem it proper to add that instructions numbered 4 and 7, given at defendant's instance, unnecessarily and improperly include the treatment of plaintiff's right hip by defendant, as to which there is no issue or claim made for damages.

(All concur.)

STATE v. JEWELL.

(*Supreme Court of Missouri.* January 31, 1887.)

1. CRIMINAL LAW—APPEAL—MOTION FOR CONTINUANCE—NEW TRIAL.

The action of a trial court in overruling an application of defendant for a continuance, upon the admission by the state that the desired witness would if present testify as stated in the application, not having been urged in the motion for a new trial, is thereby waived, and cannot be reviewed by the supreme court.

2. SAME—MOTION FOR CONTINUANCE OVERRULED.

Even if properly before the supreme court, the ruling of the trial court in overruling the motion for a continuance would not be error; following *State v. Henson*, 81 Mo. 386.

3. SAME—MOTION FOR NEW TRIAL—AFFIDAVITS.

The action of a trial court in refusing a motion for a new trial, where the grounds urged are not supported by affidavit or otherwise, as appears by the record, cannot be reviewed by the supreme court.

Appeal from criminal court of St. Louis.

The Attorney General, for respondent. *Albert Burgess*, for appellant.

RAY, J. Defendant was indicted in the criminal court of St. Louis, at the May term, 1885, for murder in the first degree, for killing his wife, Eliza.

Jewell, and, upon a trial at the October term, was convicted of that offense. The defendant shot his said wife on December 30, 1884, the bullet entering the face, under the right eye, and penetrating to the back and lower part of the head. The wound was not immediately fatal, but produced, as the medical testimony shows, a "dilatation or aneurism of the coats or walls of the internal carotid artery," which continued to grow and push out into the throat, and to threaten to rupture and give way at any moment. About the middle of April, and when death was deemed inevitable, a surgical operation was undertaken, as a possible chance of saving her life; but this was unsuccessful, and death ensued about the last of the month, resulting, as the evidence shows, from the gunshot wound aforesaid. The defendant, who was about 22 years of age, had been married to his wife, who was only 17 years old, about one year prior to the time the shooting occurred. The evidence shows that they did not get on well together; that defendant, on several occasions, threatened to kill his wife; and that, on one of these, he struck at her with a knife, cutting her clothing, but doing her no injury at the time. At the time of this trouble defendant had a room rented in the house of his wife's father and mother, but his wife was not living with him at the time, having left him, and gone out to work, a week or more prior to this difficulty. The night before the shooting was done the wife returned to her mother's, and the difficulty took place in the room used as a dining-room, about noon of the day following, on the said thirtieth day of December, 1884. There were present in the room, at the time, defendant and his wife, Eliza, Mrs. Drummond, who was the wife's mother, and a younger sister of the wife's, named Annie; and of these the only witnesses of the immediate transaction, Mrs. Drummond and the daughter Annie, were sworn in behalf of the state, and the defendant in his own behalf.

The testimony of the wife's said sister and mother, as to the immediate facts and circumstances of the shooting, is, in substance, the same, and about as follows: That when the defendant met his wife there in the morning he insisted she should live with him again, which she refused to do; that he went away, and returned several times, perhaps, in the course of the forenoon, and that in one of these parleys he told her that if she would not live with him, she should not live; that he came in the last time about noon, with his hand in his overcoat pocket, and was standing in front of the mantel-piece, when his wife, Eliza, walked up to him, and asked him, "Dan, what are you going to do with that pistol?" that he replied, "I haven't any pistol;" that she then slapped her hand on his overcoat pocket, and said, "Ah, I knew you had that pistol," and turned away from him to the machine; that defendant then said, walking up to her, "I ain't going to do anything to you, I tell you; my word is my bond;" that she leaned her back against the sewing-machine, and turned to him, and said, "You can't fool me;" and as she said this, or immediately thereafter, he pulled the pistol, and shot her. After the shooting, defendant, with the pistol in his hand, ran out, back through the alley, at the end of which he was met by the witness Robinson, who had heard the report of the pistol, and who seized the defendant, and held him until the officer came up, and took the pistol out of his hand, and arrested him.

The defendant was the only witness in his own behalf, and his statement and claim is that the shooting was entirely unintentional and accidental; that there had been no quarrel between them previously of any consequence, and that they had lived together on very good terms. He testifies that the morning the shooting occurred he had been down town, and came back for some clothes, which he intended to take to the laundry, and that, shortly after he came in the room, his wife put her arm about his waist, and said, "You got your pistol;" that he said, "Yes, I have got it, and it is loaded;" that she then said, "Give it to me," and that he told her no; that she said, "Let me see it, then;" that he pulled it out at the time with his left hand; that she

-snatched hold of it, and stumbled, and they both stumbled together, and at that time the pistol went off, and that he did not know or remember how it happened.

The attorney for the state read in rebuttal, and solely for the purpose of showing contradictory statements by defendant, the application for a continuance made and sworn to in said cause by him at a previous term of the court, in which he stated that one Perkins was present at the time of the shooting, and that he expected to prove by him that, at the time the shooting took place, the pistol was in the hands of the deceased, and that she was endeavoring to shoot him, and that, while he was trying to protect himself, by pushing the pistol from his person, it went off, and inflicted the wound which caused the death.

This evidence, which is the substance of that in the record, needs little comment, if any, from us. We can say no more, and perhaps should say no less, than that it shows no provocation or excuse whatever for this atrocious deed. The defendant's explanation of the shooting was disbelieved by the jury. We may remark that there is no brief or argument or assignment of errors filed in the cause in defendant's behalf in this court, and that we are therefore not advised as to the particular grounds, if any, upon which a reversal of the judgment below is claimed.

An exception was taken to the overruling of the application for a continuance upon the admission by the state that the desired witness would, if present, testify as therein stated. The court's action, in this behalf, is not now before us, as the same was not urged in the motion for a new trial, and was thereby waived. *State v. Mann*, 83 Mo. 589; *State v. Burckhardt*, Id. 430. But, if properly here, this ruling of the court would not be error, as has recently been held by this court. *State v. Henson*, 81 Mo. 386; *State v. Hickman*, 75 Mo. 419. The application for a continuance was also based upon an affidavit of Mr. Burgess to the effect that there had not been sufficient time since he was notified, on October 1st, of his appointment by the court to defend, to enable him to prepare the case for trial on the day set, which was October 12th; but there was no statement of special facts or reasons in the affidavit showing why a longer period was asked or required. This is a matter within the sound discretion and control of the trial court, and there is nothing in this behalf before us to show that its power and discretion were in these respects arbitrarily or unsoundly exercised.

The instructions which the court gave of its own motion, we think, cover the case made by the evidence. The first instruction defines murder in the first degree, and says that, to constitute that crime, it is necessary that the killing should have been done feloniously, willfully, and deliberately, premeditatedly, and with malice aforethought, and that, if either of these elements is lacking, the crime is not murder in the first degree. It also further defines these terms thus used in the indictment and instructions. The second is merely as to the form of the verdict, if they found defendant guilty. The third is that, if the jury find from the evidence that the killing was accidental, they should acquit. The fourth is the usual one as to the credibility of witnesses. The fifth is that the defendant is a competent witness in his own behalf, and that the jury may consider the fact that he is testifying in his own favor in determining his credibility. The sixth and remaining instruction is upon the presumption of innocence, and defining a reasonable doubt, and is in the usual and approved form.

Further grounds for the motion for new trial, such as the discovery of new and material evidence since the trial, and that defendant was compelled to be represented by counsel he objected to, are not supported by affidavits or otherwise, as appears by the record, and we cannot review the actions of trial courts upon unsupported allegations in motions for new trials.

The case seems to have been well tried, under proper instructions, and,

finding no error in the record, the judgment of the criminal court is therefore affirmed.

(All concur, except SHERWOOD, J., absent.)

MACK, Ex'r, etc., v. HEISS.

(Supreme Court of Missouri. January 31, 1887.)

1. HUSBAND AND WIFE—ANTENUPTIAL CONTRACT—RELEASE OF DOWER—HOMESTEAD.

By an antenuptial contract between the testator and his wife, the testator, in consideration of her agreement to release her claim of dower in his estate, bequeathed and gave to his future wife, in lieu of dower, the sum of \$1,000. There being no ambiguity, conflict, or obscurity in the words employed in the contract, *held*, that the only right released by the wife was the right of dower, and not the right of homestead.

2. HOMESTEAD—CONVEYANCE BY WIFE TO HUSBAND'S EXECUTOR.

Where, after the death of the testator, his wife executed a deed to the executor, releasing, remising, and quitclaiming all her right, title, and interest in the testator's estate, whether of dower or otherwise, and all claims and demands against said estate, whether under the will or under the law, *held*, that it passed the widow's right of homestead.

Appeal from St. Louis court of appeals.

John G. Chandler, for appellant. *Z. J. Mitchell*, for respondent.

RAY, J. A trial of this cause before the circuit court of St. Louis, without the intervention of a jury, resulted in a judgment for defendant, which, on appeal by plaintiff therefrom, was affirmed in the court of appeals. As no report of the opinion of that court per TROMPSON, J., has been made, beyond an imperfect statement or digest thereof, which appears in the appendix to 15 Mo. App. 595, 596, we deem it necessary and proper, in determining this appeal taken by plaintiff from that decision, to make a fuller statement of the controlling facts in the case.

The plaintiff is the executor of the will of George Heiss, deceased, and the defendant, Mary Heiss, is the widow of said George Heiss, and the action is in the nature of ejectment. The petition states the facts, which show that the premises sued for were the homestead of the said George Heiss, on which he resided at the time of his death, and also contains the usual allegations in the ordinary action of ejectment. The answer of defendant sets up, in appropriate averments, the homestead right as her defense to the action; and it was admitted at the trial that the defendant was the widow of deceased, and was, at the time of his decease, living with him, as his wife, on the premises, and continues in possession thereof; and that the amount in quantity and value of said premises is not greater than she would be entitled to as a homestead, if, under the facts in the case, she is entitled to a homestead at all.

In 1873 plaintiff's said testator, George Heiss, and defendant, entered into an antenuptial contract, which was acknowledged and recorded, by which, in consideration of her agreement to release her claim of dower in his estate, he gives and bequeaths to his future wife, in lieu of dower, the sum of \$1,000, to be paid to her by his executor or administrator or legal representative, as soon as convenient after his decease, and agrees to allow her to keep all the property she then possessed, or should acquire, as her separate and individual property, free from his interference, or any claims he might have as husband.

Afterwards, said George Heiss made his will, and the first statement therein, after declaring the making and publishing thereof, is as follows: "I, and my beloved wife, Mary Heiss, have settled our affairs to our own satisfaction, as will be shown by our marriage contract." The plaintiff, Mack, was appointed executor by the will, and, after qualifying as such, advanced and paid to the defendant the sum of \$1,000; and the defendant thereupon exe-

cuted the following instrument, which bears date August 3, 1882: "Know all men by these presents, that in consideration of the sum of \$1,000 advanced and paid to me by Abraham Mack, executor of my deceased husband, George Heiss, I do hereby remise, release, and forever quitclaim to him, the said Abraham Mack, all my right, title, and interest in the estate of said deceased, whether of dower or otherwise, and including every claim and demand which I might have against said estate for allowance as widow or otherwise, and whether such claims were under the will or under the law; and I do hereby covenant from time to time to make such further assurance as shall in any contingency whatever be proper to vest in said Abraham Mack every such right as I may be deemed to have; it being the intention hereof that, after said payment and advancement to me, I shall have no further interest whatever in said estate, in any character whatever."

The oral testimony as to the circumstances of the execution of the deed cut no figure at the trial prejudicial to the plaintiff, as is apparent from the court's action upon the declarations of law. It is also apparent from its said action in that behalf that its finding was based upon its construction of same or all of the written instruments aforesaid. It is therefore not necessary to set out in this opinion said oral evidence, or said declarations of law, as the only question of merit and value to the parties is as to the construction of the marriage contract, said will, and said deed; all of which, it may be added, were read in evidence by plaintiff. Indeed, counsel claims in his brief that the case turns here upon the construction to be given said instruments. This question he presents in this court in several aspects or views. His first position is that, assuming the reference in the will to be equivalent to a bequest, then the marriage contract alone is sufficient to destroy all claims of defendant to her husband's estate, or any part of it, for the reason that the purpose of said marriage contract was to completely sever the property interests of the parties; that the contract was drawn by an unskillful hand, the word "dower" being employed in the contract as expressive of all the rights of the wife in the husband's estate. The trouble with this view is that the marriage contract does not admit of a resort to the rules of construction, some of which we have been referred to in the brief of counsel. There is no ambiguity, conflict, or obscurity in the words therein employed. As often as there is occasion to mention the right the future wife is to release, the word "dower" is used. It says nothing about the right of homestead. There is a total absence of any other expression, general or qualified, in connection with the claim released, or intended to be released, by the wife. Where this is so, "there is no room for construction, and nothing for construction to do." 2 Pars. Cont. 500.

As is said by the court of appeals in its opinion, found at length in the transcript, we see no evidence "in the instrument itself which necessarily leads to an inference that it was drawn by an unskillful person, beyond the fact that it failed to say anything about her right of homestead. We are not at liberty to draw any inference from this fact which would vary the legal meaning of the word 'dower,' because we see in it just as much ground for concluding that it was omitted by design as by accident."

The second view in which the case is presented is that, at all events, the deed executed by defendant of date August 3, 1882, and a short time after the death of the testator, released to the executor the homestead right, as well as dower, and all other rights which she had or might claim in the estate of the husband. The court of appeals declined to adopt this construction of the deed, but held its meaning to be that the widow thereby only released in favor of the executor every interest which she would have in the estate, which, on the death of her husband, the probate of his will, and the grant of his letters testamentary, vested in the executor; that the widow's homestead is no part of the estate of the decedent, as the term is used in the administration law; that, as she was in the actual occupation of the homestead at the date of the

release, the right of homestead was therefore a vested estate in her, and not part of the estate of the deceased husband; that, as she had not agreed in the antenuptial contract to release the right of homestead in consideration of the \$1,000, she was under no obligation to do so, to entitle her to the payment of such sum.

In these views of said court, and its said holding in this behalf, we are not able to concur for a number of reasons. If the homestead was vested in the defendant at the date of the release, she could convey it, and not otherwise; and the fact that it vested under the statute, and by operation of law, is not material. Nor is it material, as we think, that she had not agreed in the antenuptial contract to release the homestead right, or that she was under no obligation to do so, to entitle her to the payment of such sum out of her husband's estate. The vital question is, has she parted with that right under the said deed?

The answer, we may again remark, is one of general denial, and, as we have seen, sets up the homestead right as the defense relied on in bar of the action. The deed in question is not assailed or impeached for want of consideration or otherwise, and no rescission of it is asked. Why, then, we may ask, should not the deed be read and construed just as the marriage contract was, and, if so read, is it not equally plain on its face? Its terms are unambiguous and apt, and sufficient to release, as it purports to do, all right, title, or interest in the estate, whether of dower or otherwise, and all claims and demands against said estate, whether under the will or under the law. If we are to look to the terms of the deed alone, there can be no pretense that they are not broad enough to comprehend the homestead right as well as all others.

If the deed and marriage contract are to be read together, which is to control, modify, and limit the other? The marriage contract pertains to dower, and nothing else; while the deed embraces each and every interest, whether of dower, homestead, or otherwise. These instruments do not in any way refer to one another, but are manifestly independent instruments. Until the deed is assailed or impeached or avoided for fraud, mistake, or other reason, which was not sought to be done in this action, it must, we think, be held effectual to pass the title.

No point has been made as to the right of the executor to maintain this action of ejectment, or as to the necessity of some order or direction of the court in that behalf. That question, therefore, is not passed on, but waived.

For the reasons indicated, the judgment of the court of appeals and of the circuit court will be reversed, and the cause remanded.

(All concur; NORTON, C. J., in the result.)

SPRINGFIELD & S. RY. CO. v. CALKINS, Adm'r, etc.

(*Supreme Court of Missouri.* January 31, 1887.)

1. RAILROAD COMPANIES—PROCEEDING TO CONDEMN LAND—PLEADING—ARBITRATION—VARIANCE.

Under the issues as made by the pleadings, the inquiry was as to the damages, if any, sustained by the defendant by reason of the taking of his land by the plaintiff railroad company for the right of way of its road; and where, upon the trial, plaintiff offered to prove an arbitration, *held*, that the offer was properly rejected, the arbitration being new matter in bar, and, as such, should have been set up by appropriate pleading.

2. SAME—VALUE OF LAND—OPINION—DAMAGES.

Upon the question of the value of property, real or personal, and as to the amount of damages done to property in controversy, parties shown by the evidence to be acquainted with the value or damage may, in connection with the facts, state their opinion as to the value or damage.

3. SAME—LAND DESCRIBED IN PETITION—DAMAGES—LIMITATION OF INQUIRY.

In a proceeding begun by a railroad company to condemn certain lands of defendant for a right of way for plaintiff's railroad, the land of defendant described

in the petition was the 80-acre tract, being the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 29; but the defendant's farm, of which said tract was a part, consisted of 94 acres, and was an entire, compact tract of contiguous parcels. *Held*, that the jury had a right to consider the entire tract of defendant in the assessment of damages, and that the inquiry is not confined to the tract of land described in the petition.

4. ARBITRATION—CONFIRMATION OF AWARD—NOTICE—REV. ST. MO. § 334.

An award of arbitrators, such as is contemplated by chapter 4, Rev. St. Mo., is not subject to confirmation by the court, unless a copy thereof, together with a notice in writing of the motion to confirm, is served upon the opposite party at least 15 days before filing the award and motion in the proper court. Section 334, Rev. St. Mo.

Appeal from circuit court, Dade county.

John O'Day, for appellant. *B. U. Massey*, for respondent.

RAY, J. This is a proceeding begun by plaintiff to condemn certain described lands of defendant for a right of way for the railroad of plaintiff. The petition is in the usual form for such actions. The strip of 100 feet taken for said right of way amounted to 8.13 acres, and the land cut off from the main body of the farm, which consisted of 94 acres, contained 7 acres. After the filing of the petition with the circuit clerk of Green county, in July, 1882, the court ordered the hearing thereof for July 15, 1882, and that 10 days' notice be given defendant, which was done; and on July 15th three commissioners were appointed, who, after taking the statutory oath, and viewing the premises, filed their report on July 24th, awarding defendant damages in the sum of \$200. Thereafter, and on August 3d, defendant filed exceptions to said report of the commissioners, and demanded a jury to assess damages, and the award was upon this ground set aside by the court in January, 1883. At a subsequent term, the venue was changed to the circuit court of Dade county, where the cause came on for trial at the April term, 1884, and resulted in a verdict for defendant for damages in the sum of \$450, upon which judgment was rendered, and from which this appeal is prosecuted.

Before the introduction of any evidence, the plaintiff offered to prove, that after the change of venue was taken, and subsequent to the last term of the Dade circuit court, the plaintiff and defendant, by instrument of writing duly executed, submitted to the decision of two arbitrators the subject-matter of controversy between them in these proceedings, and agreed that a judgment of the court should be rendered upon the award so made; that two arbitrators were duly selected, and appointed a time and place for hearing, and notified the parties thereof, and did take and subscribe the statutory oath to faithfully hear and examine the matters in controversy, and make a just award; that they did meet, and hear the allegations of the parties pertinent and material to the cause, and did award the defendant the sum of \$405, which award was made in writing, subscribed by the arbitrators with their oath therewith filed, and attested by a subscribing witness. Plaintiff asked to be allowed to prove these facts, to have the award confirmed, and that judgment be rendered accordingly. The court refused to admit the evidence, or to render judgment according to the award, and plaintiff at the time excepted.

If the award here mentioned is such as is contemplated by the statute, (chapter 4, entitled "Of Arbitrations,") it was not subject to confirmation by the court, unless a copy thereof, together with a notice in writing of the motion to confirm, had been served on defendant at least 15 days before filing the award and motion in the proper court. Rev. St. § 334. If this course was not adopted, the arbitration, if relied on at the trial, should have been set up in the pleadings by amended or supplemental pleading, or plea *puis darrein continuance*. When offered in evidence by plaintiff, it was objected to by defendant upon the ground that it was not pleaded, and therefore immaterial, and was excluded by the court for this reason. Under the issues, as made by the pleadings, the inquiry was as to the damages, if any, sustained

by the defendant by reason of the taking of the land by plaintiff for its said right of way for the railroad. The arbitration was therefore new matter in bar, and, as such, should have been set up by appropriate pleading; and, as this was not done, the evidence in that behalf was, we think, properly excluded.

A further exception to the ruling of the trial court, urged for a reversal, is that witnesses were permitted to express their opinion as to the amount of damages caused by the appropriation of the land for the railroad, including the value of the portion taken, and the damage done to the rest of the tract. The witnesses so testifying were shown to be competent, and acquainted with the premises, location, and surroundings; and in the course of their evidence they state the facts as to how the railroad ran through the farm in question, how the same was divided, and the shape in which the parcels were left, the character and quality of the land, and whether improved or not. Upon the question of the value of property, real or personal, and as to the amount of damages done to property in controversy, parties shown by the evidence to be acquainted with the value or damage may, in connection with the facts, state their opinion as to the value or damage. *Shattuck v. Stoneham Branch R. R.*, 6 Allen, 115; *Vandine v. Burpee*, 13 Metc. 288; *Grannis v. St. Paul & C. Ry.*, 18 Minn. 194, (Gil. 178;); *Lehmicke v. Railroad Co.*, 19 Minn. 481, (Gil. 406;); *Swan v. Middlesex*, 101 Mass. 173; *Rockford, R. I., etc., Co. v. McKinley*, 64 Ill. 338.

In the case cited from 6 Allen, it is said: "This is permitted as an exception to the general rule, and not strictly on the ground that such persons are 'experts,' for such an application of the term would greatly extend its signification. The persons who testify are not supposed to have science or skill superior to that of the jurors; they have merely a knowledge of the particular facts in the case which the jurors have not. And as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety."

The further objection is urged that the only lands of defendant described in the petition was the 80-acre tract, being the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 29, township 29, range 21; and that damages to the remaining 14 acres in defendant's farm, off the east end of S. E. of the S. W. $\frac{1}{4}$ of the same section could not be assessed in this action. In Illinois the rule, it seems, is that the inquiry as to damages, in proceedings of this sort, should be confined to the tract of land described in the petition, in the absence of a cross-bill by defendant showing his ownership of contiguous lands which will also be damaged. See *Mix v. Lafayette, B. & M. R. Co.*, 67 Ill. 322; *Jones v. Chicago & I. R. Co.*, 68 Ill. 382. We are not advised as to what, if any, may be the peculiar requirements of the Illinois statutes in proceedings of this character, but the cases cited by plaintiff in support of this view are all from that state. The current of authority is, we think, otherwise. *Wilmes v. Minneapolis & N. W. Ry.*, 10 Amer. & Eng. R. Cas. 161; *Winona & St. P. R. R. v. Denman*, 10 Minn. 267, (Gil. 208;); *Bigelow v. West Wisconsin R. R.*, 27 Wis. 478; *Welch v. Milwaukee & St. P. R. R.*, Id. 108; *Atchison, T. & S. F. R. R. v. Blackshire*, 10 Kan. 477.

In the case of *Wilmes v. Railroad Co.*, cited *supra*, the owner's farm consisted of three 40's in line from east to west, and connected, his residence being on the easterly 40. The company located its line of railroad across the two westerly 40's, and instituted condemnation proceedings under the statute. The two westerly 40's were the only lands described in the petition. Upon the trial, evidence of the ownership and damage to the east 40, not touched by the railroad or described in the petition, was received, and the propriety of receiving such evidence in that behalf was the important question in the case. The court, in sustaining the admission thereof, over a similar objection to the

one made in the case at bar, say, among other things, that "the damages arise, and the compensation is to be made, not only for the specific thing taken into actual possession, but for the taking of it in the way in which it is taken; and hence damages and compensation for taking a strip of land for the right of way are the damages which result to the owner from the taking, and the sum to which he is entitled to justly compensate him therefor." The conclusion, admitting the evidence as to the east 40, it is said, is not at all affected by the fact that it was not mentioned in the petition or subsequent papers, as the owner was nevertheless entitled to have his damages for the taking assessed and paid, and the whole damages sustained by the owner to his entire farm was properly before the jury for one complete assessment. This, it is further said, is the only construction of the statute which secures just compensation to the owner for the appropriation of his property, and the only one not subject to constitutional objection.

There is, we apprehend, nothing in our statute or practice requiring an answer or other formal pleading by defendant in cases of this sort. The proceeding is a statutory one, the corporation being authorized to apply to the circuit court of the county where the land or part thereof lies, or to the judge in vacation, by petition setting forth the general directions in which it is desired to construct the railroad, and a description of the real estate or other property which the company seeks to acquire; and praying the assessment of such damages as the owner may sustain in consequence of the establishment, erection, and maintenance of such railroad over such lands. Commissioners may be appointed to assess the damages the owner may sustain by reason of the appropriation, who are required to make return of such assessment and damages forthwith to the clerk, and their report may be reviewed by the court on written exceptions filed by either party. The court may, upon good cause, order a new appraisal to be made, at the request of either party, by a jury, under the supervision of the court, as in ordinary cases of inquiry of damages. Strictly speaking, perhaps, the only land within the words of the statute, and expressly required to be described, is the strip of 100 feet, for that is all that the corporation seeks to acquire; but manifestly the damages to be assessed are not to be limited to that alone, which is merely the land taken, and does not embrace all the damages which the owner sustains by reason of the condemnation. In the case at bar defendant's said farm consisted of the 94 acres, and was, as the evidence shows, one entire, compact tract of contiguous parcels. See *Wyandotte, K. C. & N. Ry. Co. v. Waldo*, 70 Mo. 631; *Quincy, M. & P. R. Co. v. Ridge*, 57 Mo. 601. Manifestly, then, the damages which the jury were required to assess were such as would compensate the owner, and the owner could not be compensated for the damages sustained by the construction of the railroad unless the jury considered the entire tract in their assessment of damages. The 40-acre tract which the railroad actually passed through was no more part of the defendant's farm than the said 14 acres lying to the east. The damage sustained and to be paid was that done to the entire farm. These were, indeed, not divisible or apportionable,—recoverable partly in this action, and partly in some other. One assessment would exhaust his remedy therefor, whether the entire damage was in fact considered by the jury or not. Manifestly the payment and satisfaction of the judgment recovered in this case, where the entire damages to the whole farm have in fact been considered and assessed, would bar any subsequent action for the same or any part thereof. We therefore think, and so hold, that there was no error in the ruling of the trial court in this behalf.

This leads to an affirmance of the judgment, and it is so ordered.

(All concur, SHERWOOD and BRACE, JJ., in the result.)

CURTIS v. STATE.¹

(Court of Appeals of Texas. November 13, 1886.)

1. CRIMINAL LAW—FORMER ACQUITTAL AND CONVICTION—JEOPARDY—AGGRAVATED ASSAULT—MURDER—CASE APPROVED.

A conviction for aggravated assault and battery under an indictment for assault with intent to murder will not bar a prosecution for murder, after the death of the assaulted party, the death resulting from the same transaction. Plea of former acquittal, conviction, and jeopardy, based upon the trial of the defendant under an indictment for assault with intent to murder, and his conviction for aggravated assault and battery, prior to the death of the assaulted party, interposed to a prosecution for murder after the death of the party, was properly rejected by the jury in this case. Note the opinion for an approval of the doctrine laid down in *Johnson's Case*, 19 Tex. App. 453; and note, also, the distinction between the two cases held immaterial in principle.

2. HOMICIDE—NEGLIGENT HOMICIDE—EVIDENCE—CHARGE OF THE COURT.

See the statement of the case for evidence in a murder trial held to demand a charge upon negligent homicide in the second degree.

Appeal from district court, Williamson county.

This conviction was in the second degree for the murder of George Walton, and the penalty assessed against the appellant was a term of seven years in the penitentiary. The testimony in this case disclosed that a large number of the citizens of Williamson county, Texas, congregated in the village of Granger on the night of December 24, 1885, to celebrate the advent of Christmas with a display of pyrotechnics and other festivities. At an early hour of the night, the crowd collected in front of the store of Avent & Bell, to which there was a front gallery. The deceased and another purchased at the said store some roman candles, and gave them to two boys to be used in a friendly duel. Following the boys to witness the duel, the deceased stepped out of one front door of the store to the gallery, in advance of his companion, one Barnett, and just as Barnett reached the other front door a party, afterwards identified as the defendant, sitting on a horse at the corner of the store building, exclaimed: "God d——n it! Hell! Shall I turn her loose!" Some person in the crowd replied: "Yes, d——n her, turn her loose." Four shots, fired at random apparently, followed, the evidence showing that they were fired by the defendant. It was soon ascertained that one of the shots took effect in the left shoulder of George Walton, entering from behind. Bright's disease of the kidneys ensued as a result of the wound, and Walton died on the thirteenth day of April. There was no previous quarrel between defendant and deceased on that night, nor between any of the parties present. Everybody appeared to be in good humor, and intent only upon enjoying the Christmas festivities. So far as any of the witnesses could state, defendant and deceased were good friends. It was shown that this transaction was the same upon which, prior to Walton's death, the defendant was tried for assault with intent to murder Walton, and convicted of aggravated assault and battery.

Fisher & Townes, for appellant.

Disputing the doctrine laid down in *Johnson's Case*, 19 Tex. App. 461, it is maintained that a prosecution in good faith, upon indictment, in a court of competent jurisdiction, for assault with intent to murder, prior to the death of the injured party, which, carried to a conclusion, results in the acquittal of the accused of all grades of offense higher than aggravated assault, operates to bar a prosecution for murder after the death of the injured party, the death resulting from the same transaction. Const. Tex. art. 1, § 14; Code Crim. Proc. arts. 9, 20, 21, 553; *Quitzow v. State*, 1 Tex. App. 47; *Simco v. State*, 9

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

Tex. App. 338; *Hirshfeld v. State*, 11 Tex. App. 211; *Grisham v. State*, 19 Tex. App. 510; *Ex parte Lange*, 18 Wall. 163; *State v. Cooper*, 13 N. J. Law, 362; *State v. Damon*, 2 Tyler, 387; *Ben v. State*, 22 Ala. 9.

The trial court should have charged the jury upon the law of negligent homicide. It is submitted—*First*, that the firing of a pistol voluntarily, unlawfully, and wantonly, with utter and reckless disregard of human life, into and among a crowd of men, is, under our law, only a misdemeanor, unless there be in the mind of the party firing a specific intent to kill, which intent cannot be inferred, but must be found as a fact by the jury before such act would be assault with intent to murder, or felony of any kind; and, *second*, that if any person, in the commission of a misdemeanor, shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide of the second degree; but when, in the execution of, or attempted execution of, an act made a felony by *the penal law*, shall kill another, though without an apparent intention to kill, the offense does not come within the definition of negligent homicide. Pen. Code, art. 578.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. The appellant was indicted at the July term, A. D. 1886, of the district court of Williamson county, for the murder of George Walton, on December 24, 1885. The wound was inflicted on that day, but Walton did not die until April 13, 1886. At the January term of same court, 1886, appellant had been indicted for assault with intent to murder Walton, and was tried at that term on that indictment, and convicted and punished for an aggravated assault. At the July term, 1886, he was placed upon trial on the second indictment, pleaded, specially former jeopardy, former acquittal, and former conviction, and also not guilty. His special plea was found untrue, and he was convicted of murder in the second degree, and his punishment fixed at seven years' confinement in the penitentiary.

The defendant's first three assignments of error, which involve the same principle, are submitted and will be considered together. The question presented by these assignments is well stated in the argument of counsel for defendant as follows: "Does a prosecution, upon indictment, in a court having jurisdiction of that offense, for assault with intent to murder, instituted in good faith by the state, and prosecuted to a final determination on its merits, prior to the death of the party injured, which results in a verdict acquitting of all grades of offense higher than aggravated assault, and a conviction of that offense, and a payment of all penalties denounced, have any effect upon a prosecution for murder, based upon the death of the party, resulting from the identical act of defendant upon which the former prosecution was predicated?"

In *Johnson v. State*, 19 Tex. App. 453, we held that a conviction of aggravated assault and battery, upon an indictment charging an assault with intent to murder, could not bar an indictment for murder, although the assault and battery was the same act which produced the murder, because, at the date of the conviction of the assault and battery, the party assaulted was living, and the offense of murder had not then been completed. In support of this view, we cited those standard authors Wharton and Bishop, (Whart. Crim. Pl. & Pr. § 476; 2 Bish. Crim. Law, § 1059,) whose texts fully sustain our decision; and, in support of their texts, they cite a number of decisions, only a few of which we have had access to; but, as far as we have examined the cases cited, they sustain the texts of those eminent authors. The reason of the doctrine is well stated in a Scotch case by Lord ARDMILLAN, as follows: "There never can be the crime of murder till the party assaulted dies. The crime has no existence, in fact or law, till the death of the party assaulted. Therefore it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new

element of the injured person's death is not merely a supervening aggravation, but it creates a new crime." *Stewart's Case*, 5 Irv. 310, cited in note to section 1059, 2 Bish. Crim. Law.

We believe this doctrine to be sound in principle, and sustained by unanswerable reason. The *assault* and the *murder* are not the same *offense*, within the meaning of the words "same offense," as used in our constitution. If the offense of murder had been completed by the death of the injured party at the time of indictment found, then the assault would be included in the murder, and the state could carve but one offense out of the transaction; and if, in such case, the indictment be for an assault, a conviction or an acquittal thereunder would be a bar to a prosecution for any grade of homicide. But this doctrine of carving has no application to the case under consideration, because at the time of the first prosecution there was no offense of murder, and the state had no election to carve as between an assault and any grade of homicide. We do not think that this view of the question conflicts with, or in any way infringes upon, any provision of our constitution, for the simple reason that the offense of which the defendant was first convicted or acquitted is not the same offense for which he is being tried, within the meaning of the constitution and the law, having no existence at the time of said first conviction or acquittal.

Between the *Johnson Case*, *supra*, and the one before us, there is this difference: Johnson was, upon the second prosecution, convicted of *manslaughter* only, while this defendant stands convicted of *murder* in the second degree. It is insisted by counsel for defendant, in a very able argument, that this difference in the cases is very material, in this: that the effect of the defendant's conviction of an aggravated assault and battery in the first prosecution under the indictment charging an assault with intent to murder was to *acquit* defendant of *malice*, and therefore he could not thereafter be tried for and convicted of murder, because *malice* is an essential ingredient of murder; that he could only be tried and convicted for a grade of homicide not involving *malice*. This argument is very plausible, and, when first presented, it appeared to us unanswerable. But upon reflection we are satisfied it is specious. A complete answer to it, in our judgment, is that the acquittal of the defendant of the charge of assault with intent to murder was not necessarily a finding by the jury that the defendant was not actuated by malice in committing the assault. The jury may not have been satisfied from the evidence that he committed the assault with a specific intent to kill, and upon this ground alone may have acquitted him of that offense. This specific intent is as essential an ingredient of the offense of assault with intent to murder as is malice, while it is not an essential ingredient of murder. Murder may be committed when there is no specific intent to kill the deceased. It is plain to our minds that the verdict of the jury convicting the defendant of an aggravated assault and battery cannot be held to be necessarily an acquittal of the charge that the act was committed with malice aforethought. It was an acquittal of the charge of assault with intent to murder, but it cannot be claimed that it was an acquittal of each and every separate ingredient of that offense. If the jury could not have acquitted him of said offense upon any other ground than the absence of malice on his part in the commission of the act, the position contended for by counsel would be sound, and we would have to hold that defendant could be tried for no higher grade of homicide than manslaughter. These being our views, we answer the question propounded by the defendant's counsel in the negative, and hold that there was no error in the rulings or charge of the court with reference to defendant's special pleas.

2. It is objected to the charge of the court that it does not submit to the jury the law of negligent homicide. It is contended by the counsel for the defendant that the issue of negligent homicide in the second degree is fairly

raised and presented by the evidence, and we concur with counsel in this view of the evidence.

One phase of the case, that relied on by the state, is that the defendant "voluntarily, unlawfully, and wantonly, and with utter and reckless disregard of human life, shot off a pistol into and among a crowd of men, and in doing so did inflict a wound upon George Walton, then in said crowd," from which wound said Walton died. This phase of the case is strongly supported by the evidence, and was submitted to the jury by the charge of the court.

But defendant's counsel insists that there are two other phases of the case, to-wit: (1) That the killing was accidental; and (2) that it was the result of negligence and carelessness while the defendant was in the performance of an unlawful act,—that is, while defendant was committing a misdemeanor by discharging his pistol in a public place. As to the first of these phases the court sufficiently instructed the jury. As to the other no instruction was given.

While the evidence in support of this last-named phase of the case may not be satisfactory, or even strong, still there are facts in proof which fairly present the issue, and tend to establish the theory that the offense committed was that of negligent homicide of the second degree. This being our view of the evidence, we hold that the law of negligent homicide in the second degree was a part of the law of the case, and that the failure of the court to give it in charge to the jury was error for which the judgment must be reversed. We do not recite the evidence upon which we base this conclusion, as the facts will be stated by the reporter, and it will be seen therefrom that the jury might well have concluded that the killing was not a higher grade of homicide than negligent homicide of the second degree.

As to other objections made to the charge of the court we shall not consume time in discussing and in determining them, as upon another trial the supposed errors complained of are not likely to occur.

Because the court omitted to charge the law of negligent homicide of the second degree the judgment is reversed, and the cause remanded.

LEE v. STATE.¹

(Court of Appeals of Texas. December 8, 1886.)

CRIMINAL LAW—INDICTMENT—TIME.

Indictment which charges the offense to have been committed upon a date subsequent to its presentment is fatally defective.

Appeal from district court, Lamar county.

The conviction was for forgery, and the penalty assessed was two years in the penitentiary.

Hale, Baldwin & Hale, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. In this case the indictment was presented and filed on the fourth day of October, 1886, and alleges the offense to have been committed on the twenty-second day of October, 1886. The indictment is therefore fatally defective, and the judgment is reversed, and the prosecution dismissed.

STEPHENSON, Adm'r, v. MARTIN and others.

(Supreme Court of Texas. November 16, 1886.)

ESTOPPEL—DEED IN SATISFACTION OF JUDGMENT.

N., an attorney, recovered two separate judgments, for S. and B., respectively, against L., an administrator. L., with the authority and approval of the probate

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

court, conveyed three tracts of land, part of the estate, to W., in trust, towards the payment of each of said judgments *pro rata*, at an agreed price for each parcel. Only one of these tracts was sold, and S. received no part of the proceeds thereof. W. conveyed two of the tracts to B. Subsequently L., as administrator under order of the court, conveyed to S. a tract other than the three before mentioned, in full satisfaction of S.'s judgment, by a deed reciting that L. and W. had been required to settle the balance due on said judgment by such conveyance, and the land so conveyed formed no part of the land conveyed originally to W. This deed was unknown, and was never delivered to S. Held, in a suit by S. to recover an interest in part of the land originally conveyed in trust to W., and for a partition thereof, that the deed to him in satisfaction of his judgment was no estoppel.

Appeal from district court, Navarro county.

Suit to recover real estate by John W. Stephenson, administrator, appellant, against F. M. Martin and John L. Bonner, respondents.

The following is a short historical statement of the facts referred to in the opinion in this suit:

C. M. Winkler, attorney, recovered a judgment in the court below in favor of said John L. Bonner against J. R. Loughridge, administrator of W. B. Pillow, deceased, for \$1,183, besides costs, November 27, 1872, bearing 10 per cent. interest. He also recovered a judgment in same court in favor of John W. Stephenson, administrator, against said Pillow's administrator, J. R. Loughridge, for \$920, and costs, July 31, 1875, bearing 8 per cent. interest. Afterwards, on the twenty-second September, 1877, said J. R. Loughridge, administrator of said Pillow's estate, by orders of the probate court of Navarro county, with full authority and approval of said court, conveyed to C. M. Winkler, in trust for the payment *pro rata* of each of said judgments, the following property:

- | | |
|--|-----------|
| (1) 213 acres, part of 640 acres, of Thomas J. Church survey, at - - - - - | \$ 753 66 |
| (2) 165 acres, part of one-third of a league H. R. of G. A. Campbell, in Hill county, at - - - - - | 492 00 |
| (3) 106 acres, undivided, out of George Gardner 640, in Navarro county, at - - - - - | 318 00 |
| (4) 238 acres, of 1280-acre certificate issued to Thomas Harlow, at - - - - - | 100 00 |

Amounting in all to - - - - - \$1,663 66

—to be sold by said Winkler, and proceeds divided *pro rata* "in part payment of the two judgments above described." On the fourth of July, 1879, said Winkler conveyed said 165 acres and said 106 acres to said John L. Bonner, without consideration, reciting that "said J. L. Bonner is desirous of having a division of his part of said lands, and has agreed to take tracts 2 and 3 instead of the proceeds thereof;" which deed slumbered in said Bonner's pocket, unknown to plaintiff below, till he was informed thereof by Croft & Blanding, in 1885. Previous to this, September 27, 1877, Winkler sold the Church land to D. Cerf for \$300 cash, and \$448 due by note, January 1, 1879, which he foreclosed in his own name on the land in April, 1880; James Garrity being purchaser, for \$490. The case was tried before the judge below without a jury, resulting in a judgment in favor of the defendants, from which plaintiff appeals.

Croft & Blanding, for plaintiff and appellant.

The court below erred in considering that the plaintiff had ratified and approved the acts of Winkler in making a deed to Bonner, by receiving a conveyance from Loughridge, administrator of Pillow, of other lands in full satisfaction of the balance due on plaintiff's judgment against said Pillow's estate; for the reason that the deed of trust from Loughridge, administrator as aforesaid, to Winkler, as trustee, was only, as it states, in part payment of the two judgments named therein, and each judgment creditor was interested

pro rata in the lands mentioned in said deed of trust, and could not take a deed from said trustee for any part of the lands mentioned in said deed of trust to the exclusion of the other. And, if Bonner did receive a deed for the land sued for from said trustee, he held the interest of plaintiff in trust for him, and not to his exclusion; and for the further reason that the deed from Loughridge, administrator, to plaintiff, for the 164 acres in Hill county, was in satisfaction of the balance due plaintiff on his judgment against Pillow's estate, with which Bonner had nothing to do, and in which he was not interested.

The court below erred also in his conclusions of law, in considering "that the recitals of the various deeds and orders show that said Winkler had settled the matter with all parties," for the reason that said recitals and orders show to the contrary.

The court below erred in his conclusion of law "that Stephenson, having obtained and consented to an order of the court requiring Pillow's administrator to convey the land aforesaid to him in settlement of the balance due and his judgment, and said deed having been made and delivered in pursuance of said order, that said judgment was thereby completely settled, and the said Stephenson estopped from asserting any further claim, either against the said estate of Pillow, or against the fund which had been delivered to the said Bonner in payment of his judgment;" because, although said deed did satisfy the Stephenson judgment against Pillow's estate, it was not the intention of the court, nor Pillow's estate, nor of Stephenson, administrator, to benefit Bonner in the transaction, but it was the intention only, of all parties thereto, to satisfy the balance due Stephenson's administrator on his judgment aforesaid; and the deed expressly states: "This conveyance is not intended to embrace, but is in addition of, the same tract heretofore conveyed in part satisfaction of said judgment."

The court below erred in rendering judgment in favor of the defendant, for the reason that the deed of trust to Winkler did not authorize him to sell to Bonner to the exclusion of Stephenson's administrator, and because Bonner knowing the interest of Stephenson, administrator, in the lands conveyed to him, held the same in trust for Stephenson subject to partition in this suit. *Merriman v. Russell*, 39 Tex. 278; *Long v. Steiger*, 8 Tex. 460; *Burdett v. Haley*, 51 Tex. 540; *Ryan v. Porter*, 61 Tex. 106; *Clark v. Haney*, 62 Tex. 511.

WILLIE, C. J. This is a suit for the recovery of an interest in 106 acres of the George Gardner survey, in Navarro county, and to have the same partitioned. It was brought by the appellant, as administrator of the estate of T. B. Stephenson, and John L. Bonner and F. M. Martin were made parties defendant. It seems that C. M. Winkler, as an attorney at law, had control of two judgments recovered in the district court of Navarro county against J. R. Loughridge, as administrator of W. B. Pillow,—one for \$1,183 and interest, recovered November 27, 1872, in favor of said John L. Bonner; and the other for \$920 and interest, recovered July 31, 1875, in favor of the appellant, as administrator of T. B. Stephenson. On the twenty-second September, 1877, Loughridge, as administrator of Pillow's estate, with the authority and approval of the probate court in which the estate was pending, conveyed to Winkler, in trust for the payment of each of said judgments, three tracts of land and one land certificate; one of the tracts being the land sought to be partitioned in this suit. The aggregate value of these tracts, as stated in the conveyance, was \$1,663.66. These lands were to be sold by Winkler, and the proceeds applied *pro rata* towards the payment of the two judgments. Only one of these tracts was sold, so far as the record shows. The appellant testifies that he received no part of the proceeds. On July 4, 1879, Winkler conveyed to Bonner two of the tracts, one an undivided interest in 640 acres,

known as the "Gardner Survey" in Navarro county, and the other 165 acres out of one-third of a league granted to G. A. Campbell, lying in Hill county. This conveyance seems never to have been recorded, and appellant did not know of its existence till 1885. On the twenty-third of August, 1881, Loughridge, as administrator of Pillow's estate, under an order of the district court of Navarro county authorizing him so to do, conveyed to the appellant 165 acres of land out of the Campbell survey for the sum of \$450, in full satisfaction of his judgment against Pillow's estate. The deed recites that there was due from Pillow's estate on the Loughridge judgment about \$450, as appeared by the report of said Loughridge, administrator, on file with the papers of said Pillow's estate. It further recites that Loughridge and Winkler had been required to settle the balance due on said judgment by the conveyance of the 165 acres of land by Loughridge in full payment and satisfaction of the balance of said judgment. The administrator then conveys the land for this purpose and consideration. The 165 acres conveyed is stated not to be the same originally deeded to Winkler by the administrator, but the balance of the Campbell tract left in the estate. This deed was unrecorded, and it seems was not known to the appellant for a long time after it was executed, and was never delivered to him. Under this state of case, the appellant prayed to be decreed an interest in the 106 acres of the Gardner tract, for a partition, and for general relief. The court rendered judgment for the appellees, on the ground that the deed last mentioned was taken in full settlement of the balance due on the Stephenson judgment; that it was completely settled, and Stephenson estopped from asserting any further claim against the estate of Pillow or the land conveyed to Bonner.

On the trial the appellant offered to read in evidence the papers in a suit he brought against Winkler's administrator to recover an interest in the proceeds of the tract of land sold by Winkler. The contents of the papers are not shown in the bill of exceptions. The court rejected the evidence. At the time the last deed was executed, Pillow's estate owed a balance upon the judgment held against it by the appellant. By the former conveyance in trust to Winkler, it has made a payment upon the judgment, the amount of which could be easily ascertained. The lands conveyed had been taken at a named valuation, and it was only necessary to ascertain the *pro rata* of this sum that was to go to Stephenson's judgment, in order to find out the amount that should be credited upon it. What was left after deducting this amount, with interest added, was the unpaid balance due upon the judgment at the time specified in the deed. This was evidently what the parties did, as can be seen by making the calculation. But there was another matter still open for settlement, and that was between Winkler and Stephenson, as to what had been done with the property the former received in trust to be sold, and the proceeds applied in part to the payment of Stephenson's judgment. This was a matter with which Loughridge had nothing to do. Whether Winkler divided the proceeds of the lands equitably between the judgments, or paid anything at all upon them, did not affect the rights of Pillow's estate, or make the balance due upon the Stephenson judgment more or less. Nothing that he could say or do in the absence of these parties could affect their rights, or estop them from asserting them. Had he declared in the deed that the land conveyed was received by Stephenson in full of all his claims against Winkler, it would not have estopped Stephenson, unless he accepted a deed with that declaration contained in it. But this deed was not accepted by Stephenson, but by Winkler for him. Of course Winkler could not, by accepting a deed for Stephenson, estop him in a different matter, in which a controversy was pending between Stephenson and himself. The appellant might have subsequently ratified such an acceptance, but it does not so appear, as the deed was retained in possession of Winkler. No notice of it was given to Stephenson, so far as the record shows, and the deed was never recorded.

But the deed, as we have seen, did not purport to affect the matters in controversy between the appellant and Winkler, but to settle claims of Stephenson against the estate of Pillow. Its very language is susceptible of no other construction. It was the balance due from Pillow's estate to appellant that was satisfied by the conveyance. This balance appeared from the report of Loughridge filed among the papers of Pillow's estate in the probate court. What could Loughridge know about the balance due from Winkler to appellant, and what business had he to report to the probate court upon a matter with which Pillow's estate had no concern? It is clear, from the very language of the deed, the considerations expressed in it, the causes which brought about its execution, the parties between whom it was executed, and the want of any participation therein by Stephenson, or an acceptance by him of the deed, that it was intended only to settle the balance due from Pillow's estate to the appellant. We think the court erred in holding him estopped by the deed, and this will require a reversal of the judgment.

As the cause will be remanded to the court below, we deem it proper to make one or two suggestions for the consideration of the parties before they proceed to a new trial of the cause. The appellant claims an interest in the land sought to be partitioned by reason of the deed made by Pillow's administrator to Winkler. This deed did not convey the lands to Winkler, to be by him conveyed to Bonner and Stephenson, or to be held in trust for them; but to be sold, and the proceeds applied towards the payments of the respective judgments of these parties. Did this conveyance give the beneficiaries any title whatever in the land? Did they have anything more than a lien upon the lands, and the right to demand their sale in satisfaction of their respective debts? If not, we cannot see how the appellant can claim any interest in the Gardner survey, or demand its partition. His remedy is of a different kind altogether. Had his prayer been for a partition only, we should be disposed to reverse the judgment, and dismiss the cause; but there is also a prayer for general relief, and under this, with appropriate amendments, he may obtain the relief to which the facts of the case entitle him. It would seem, too, that Loughridge in conveying the lands of Pillow's estate, acted beyond his powers. Neither the act of 1876, under which the first deed was made, nor the Revised Statutes in force when the last was executed, authorized such a conveyance, though sanctioned by the probate court. This may not be of importance in the present suit, as neither the heirs nor the administrator of Pillow make complaint. Some of the matters alluded to must be of importance upon another trial of the case, but we do not feel called upon to decide them in advance, when they have not been noticed in the briefs of counsel. We are not informed by the bill of exceptions what the papers in the case of *Stephenson v. Frost, Adm'r*, would have proved, so that we cannot tell whether they were pertinent to the present case or not. The mere fact that a suit was brought for an interest in the proceeds of the Church lands proved nothing. So there is nothing in the first assignment of error.

For the errors pointed out the judgment will be reversed, and the cause remanded.

WORD, JR., and others v. BOX and others.

(*Supreme Court of Texas.* October 22, 1886.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—EXCHANGE.

In an action of trespass to try title where the main issue is as to whether certain land was at the date of a title deed separate or community property, evidence that B., the husband, owned, as separate property, certain land certificates; that 35 years before the suit he conveyed them to one Mc.; that on the same day Mc. executed a mortgage to B. of said certificates, and the land to be conveyed thereunder, reciting that Mc. had conveyed to B. the land in controversy, and providing that the mortgage should be void on condition that Mc. should make a good and

valid title to B. of said land, and keep him and his heirs in possession; and evidence of a deed from Mc. to B. of the land in controversy for the same consideration as that for the certificates,—justifies the jury in finding that the conveyances were in fact an exchange, and that the land so conveyed to B. was his separate property, the deeds being ancient, and the parties thereto being dead.

2. VENDOR AND VENDEE—BONA FIDE PURCHASERS—NOTICE OF WIFE'S SEPARATE PROPERTY.

In an action of trespass to try title, where the defendants' title was derived through the widow of a former owner of the land, who was proved to have taken it in exchange for separate property, it appeared that the exchange was effected by ancient deeds, executed and recorded on the same day, and expressing the same consideration, but not otherwise evidencing the fact that they were made for the purpose of effecting the exchange. *Held*, that the purchaser from the husband's executor, and the widow was not affected with notice that the land was separate property of the husband by such deeds, and, if he had actual notice, it would not affect the right of the defendants, if they, or any of those persons through whom they derived title, were purchasers for value without notice of facts which would make the land the separate property of the husband of the widow through whom they derived title.

3. STATUTE OF LIMITATIONS—ADVERSE POSSESSION.

A party claiming a tract of land under color of title given by a deed, which also includes other land to which he has a good title, will not be deemed in adverse possession thereof by his possession and occupation of that land included in the deed of which he has a good title.

Appeal from Anderson county.

This was an action of trespass, brought by J. J. W. Box and others, appellees, against Jeff Word and John H. Reagan, appellants, and a number of parties, to try the title to the John Arthur one-fourth of a league of land situated in Anderson county, Texas. The plaintiffs are the children of James E. Box and Mary Box, deceased, and claimed the land as devisees under the will of James E. Box, and as his separate property. Mary Box claimed the land as community property, and the defendants Reagan and Word claimed 152 acres of said land under deeds from said Mary Box to R. A. Reeves, and disclaimed title to the balance. They also claimed as purchasers in good faith, for a valuable consideration, without notice of the plaintiffs' claim, and under the statute of limitations of three, five, and ten years. Reagan and Word severed from the other defendants in the trial, by agreement.

On the trial the jury returned the following verdict: "We, the jury, find the land in controversy to be the separate property of James E. Box, deceased. We find in favor of plaintiffs, or such of them as are not barred by the statute of limitations, viz., Mrs. Woodard and Mrs. McClung. We find for the defendants the remaining three-fifths of the land, on their plea of the statute of limitations."

The plaintiffs read in evidence the following deeds: A deed from James E. Box to William S. McDonald, agent of Leonard Kuhn, dated February 27, 1847, and therein reciting that said Box, in consideration of \$1,000, had sold and delivered to McDonald, as agent of Kuhn, the following land certificates, viz., one certificate for 640 acres, one for 369 acres, and one for 320 acres, in all 1,329 acres; and which McDonald was authorized to locate on vacant lands in Anderson county, and apply for and receive patents from the state for Kuhn. A deed of mortgage from McDonald, agent of Kuhn, to James E. Box, dated February 27, 1847, and therein reciting that McDonald, as agent, had sold and delivered to James E. Box the above-named certificates, with the land to be surveyed under the same; and further reciting that McDonald, agent of Kuhn, had conveyed to said James E. Box one-fourth of a league of land granted to John Arthur; and providing that the mortgage should be void on condition that McDonald, agent of Kuhn, should make good and valid title to Box for the Arthur head-right, and have regularly proven up and recorded a power of attorney and transfer from Arthur to Kuhn for the same, and keep Box and his heirs in possession of the land. The deed from Mc-

Donald, agent of Kuhn, to Box, for Arthur's head-right above referred to, is dated February 27, 1847, and recites that McDonald, agent of Kuhn, for the consideration of \$1,000 paid him by Box, had sold, transferred, and conveyed to said Box the Arthur head-right. All of said deeds bear the same date, and were filed with the clerk for record at the same date. It was proved that McDonald and the subscribing witnesses to all of the above deeds were dead. A deed from Mary Box, releasing the mortgage on the certificates, and conveying to Kuhn the land surveyed under the certificates, retaining a lien on the land until Kuhn should convey to her, said Mary Box, all his title to the Arthur head-right, and also should have regularly proved up and recorded a power of attorney from Arthur to himself for said land, dated July 25, 1853. An instrument purporting to be a power of attorney from Arthur to Kuhn was recorded without proof of its execution, and was not read in evidence. A deed from James Douthitt, executor of the will of James E. Box, deceased, and from Mary Box to R. A. Reeves, reciting that they had, by virtue of the power and authority vested in them under said will, and for the consideration of \$438.60 paid to them by said Reeves, sold and conveyed to said Reeves two tracts of land described in the field-notes and in said deed as tracts Nos. 1 and 2, being part of the Arthur head-right, and containing together 146 2-10 acres land, and the said Mary Box, for the said consideration, sold and conveyed to said Reeves said tract of land, describing the same as part of the community property acquired during the marriage of herself and James E. Box, and to which she was entitled as his surviving wife, and warranting and defending the title to said Reeves against all lawful claims whatever, dated December 23, 1851, and recorded on the same day. The death of the subscribing witnesses to said deed was also proven. The executor, James Douthitt, died in November, 1852. Roland H. Box, the other executor named in the will, never qualified as executor, and was dead. After the death of the executors, Mary Box conveyed two additional tracts, part of the Arthur head-right, to said Reeves,—one tract for 25 acres, and the other for 40 acres, describing the same by metes and boundaries, and therein reciting that the sale was made to pay the debts of James E. Box, deceased; and therein further reciting that she executed and delivered said deeds in her own right, and as widow and administratrix of said James E. Box, deceased, warranting and defending the title to the same, and acknowledging the receipt of the purchase money for the first-named tract, \$117, and for the other, \$240. One of said deeds bears date January 11, 1854, and was recorded the next day, and the other is dated July 10, 1855, and recorded on the same day. The sales to Reeves were all made before Mrs. Box married Davis, and before the sale to Jackson, and before she removed from the Arthur survey.

The defendants Reagan and Word claim under a regular claim of title from R. A. Reeves down to themselves, and which was duly recorded. Reagan and Word purchased from Oppenheimer four tracts of land, all purchased at the same time, as a whole, and as one entire tract, being about 152 acres, including the land in controversy. Two of said tracts, one for 25 acres, and the other for 40 acres, are the tracts in controversy. A few days after their purchase they had the lines around said land of 152 acres run off by a surveyor. Their deed from Oppenheimer bears date June 12, 1872, and was recorded on the same day. Their tenants occupied a cabin, to which was attached a garden and inclosure, situated in part on one of the tracts included in the purchase from Oppenheimer, which was a part of Reeves' first purchase of 146 2-10 acres from Mrs. Box, and not in controversy in this suit. The cabin and garden were not on the tracts in controversy, but were within the lines of the survey of 152 acres, and the tenants claimed possession of the entire survey of 152 acres, using the timber thereon, and protecting the same against trespassers for these defendants, until they sold the part of the tract on which the cabin and garden were situated, in the summer of 1883. The land was laid

off into blocks, sections, lots, and streets, mapped and designated as "Reagan and Word's Addition to Palestine;" and on June 20, 1877, the map was placed on record in the land records of Anderson county, being five years and eight days after defendants took possession by their tenant. They paid all the taxes on the land since their purchase, and since the subdivision; describing the same as blocks, lots, and sections, in accordance with the map, and claiming under the deeds as aforesaid. The plaintiffs' original petition was filed October 6, 1883.

R. A. Reeves, for appellants. *Word & Glenn*, for appellees.

STAYTON, J. The jury found that the property in question was the separate property of James E. Box, through whom the plaintiffs claim by inheritance. The first and second assignments of error do not question the correctness of the charges of the court upon the matters referred to in them, but assert that the evidence did not justify the finding. The conveyances from Kuhn to Box, and from Box to Kuhn, as well as the hypothecation by Kuhn of the land certificates for the purpose of securing title to Box for the land conveyed to him, are ancient transactions; the persons who were present, participating in them, and doubtless aware of the real purpose and consideration for and on which they were executed, having passed away. All having been executed at the same time, the recital of the same consideration in many of the conveyances from one to the other, and the proof that at that early day conveyances were frequently made in exchange of one piece of property for another; the fact that the perfecting of the title to the land conveyed to Box by Kuhn was secured by the hypothecation of the land certificates sold by the former to the latter on the same day; as well as the fact that the land certificates were the separate property of James E. Box,—were facts to which the jury might look to determine whether the land in controversy was the separate property of James E. Box, and we cannot say that the evidence was not sufficient to sustain the finding. The question was fairly submitted to the jury by a charge so clear that the jury could not have considered the evidence before them to have a weight to which it was not entitled. They were informed that the instruments, as matter of law, looking to their legal effect, did not show an exchange of property.

The third assignment simply, in effect, asserts that the evidence required a finding that the property was community estate between James E. Box and his wife, through whom the defendants claim, through a deed executed by the wife after the death of her husband. This assignment has been disposed of in what we have said in regard to the finding of the jury that the property was of the separate estate of James E. Box.

The charge of the court upon the presumption to be indulged by the jury that the property was community property, from the fact that the conveyance from Kuhn to James E. Box was made during the marriage, and that the burden of proving to the contrary rested upon the plaintiff, was clear, and as favorable to the defendants as it could legally be made.

The fifth assignment of error calls in question the sufficiency of the evidence to warrant the finding that R. A. Reeves or the appellants had notice that the property was the separate property of James E. Box at the time they purchased. R. A. Reeves, through whom the appellants claim, was acquainted with James E. Box as early as the year 1846; knew that he then lived upon the land, and was a married man, and that this state of facts continued until his death, in 1851. The land was conveyed to Box by Kuhn, February 27, 1847, by a deed which recited a consideration of \$1,000 then paid, with no fact stated in it which could cause any person even to suspect that this was not the real consideration. These facts were sufficient to raise the presumption and to induce the belief that the property was, as it appeared to be, community property. After the death of James E. Box, on December 28, 1851,

the executor of his will, in the exercise of power therein conferred upon him, joined by the widow, conveyed to Reeves, by a deed which recited the fact that the property was community property acquired during the marriage, a part of the tract, not embracing the land in controversy; and subsequently the widow, the executor having died, conveyed to Reeves, by deeds dated in the years 1854 and 1855, the two tracts now in controversy, and these deeds recited the fact that these tracts were sold to pay debts. The evidence tending to show that the land, of which the tracts sold to Reeves were a part, were of the separate estate of James E. Box, consists of the following facts: (1) On the same day that Kuhn conveyed the land to Box the latter conveyed, by a separate instrument, to the former, three land certificates for a consideration, as recited, of \$1,000. This last deed is not in the record, and we cannot know what description was therein given of the three land certificates, which, by other evidence, are shown to have been certificates issued to James E. Box, most probably for such considerations as would make them his separate property. So far as we can see from the record, there was no intimation of any fact which would cause any one to believe that the land certificates were the consideration paid by Box to Kuhn, for the quarter of a league of land of which that in controversy is a part, except that the two instruments were of the same date, between the same persons, and subscribed by the same witnesses. (2) The transfer of the quarter of a league, of which that in controversy is a part, from the original grantee to Kuhn, not having been properly proved or acknowledged for record, Kuhn, through his attorney in fact, who transacted all the business between Kuhn and Box, on the same day the two instruments before referred to were executed, by an instrument having the same witnesses, hypothecated the land certificates which Box had conveyed to Kuhn as a security for the completion and perfecting of the title to the land conveyed to Box. This instrument recited the sale of the land to Box, and the sale of the certificate to Kuhn, but there is no intimation in it as to what was the real consideration for either conveyance. The three instruments referred to were filed for record on the same day they were executed. There is no evidence that R. A. Reeves ever saw the instrument made by Box conveying the land certificates, nor the instrument by which they were hypothecated to Box, and it is certainly true that he would not be affected with notice, even of their contents, from the fact that they were recorded. They were not in his chain of title, nor did the deed to Box, through which he claims, in any way refer to them. He is shown to have paid value for the land, and we are of opinion that there was not sufficient evidence to show that he had notice of any fact which would cause him even to suspect that the land was not as the law, in the absence of evidence to the contrary, from the facts shown to have existed, would presume it to be,—community property of James E. Box and his wife. If Reeves, from any source, had notice that the real consideration paid for the land was the land certificates conveyed by Box to Kuhn, and that these were the separate property of Box, it could not affect the right of the appellants, if they, or any of those persons through whom they derive title from Reeves, were purchasers for value, without notice of the facts which would make the land the separate property of Box. We find no facts tending to show notice of such facts to these persons, and we are of the opinion that the assignment under consideration must be sustained.

We deem it unnecessary to discuss the sufficiency of the evidence to authorize a finding that the estate of James E. Box owed community debts at the time his widow conveyed the land in controversy to Reeves. If such debts then existed, and there were no facts known to Reeves, or to those who claim through him, which would operate as notice that the property was the separate estate of James E. Box, if such was its real character, then, if the other facts necessary to constitute an innocent purchaser existed, the appellants would be entitled to hold the land they claim, although in fact it may have

been the separate property of James E. Box. If, however, the appellants, or those through whom they claim, were innocent purchasers, and there were no debts or other facts which gave to the surviving wife the power to sell the community property, then they would only be entitled to hold one-half of the land which they claim, whether the property was the separate or community estate of James E. Box. It appearing to be community property, in the absence of notice to the contrary, the rights of innocent purchasers must be determined by the same rules as though such was its real character.

The possession on which appellants rely to sustain their plea of limitation began in the year 1872, and at that time Mrs. Woodward was a married woman, and so continued until the institution of this action. Under these facts, if the character of possession held by the appellants was such as would put the statute of limitations in motion, it is evident that as to her there can be no bar. William H. Box, one of the children of J. E. Box, died January 30, 1863, leaving one child, who is now Mrs. McClung, who was born August 30, 1861, and married in April, 1877. As to her, limitation would run from the time of her marriage, if the possession of the appellants was such as to support it. It is not claimed that the appellants have ever had any actual possession of the two tracts of land in controversy, which contain, respectively, 25 and 40 acres of land, the same conveyed to Reeves by Mrs. Box in the years 1854 and 1855. They, however, purchased these tracts, and a part of the tract which the executor of the will of James E. Box and his widow conveyed to Reeves, by the deed made in the year 1851. This purchase was by one deed, made in the year 1872; and on that part of the land so purchased, which Reeves had acquired title to by the deed made to him in the year 1851, stood part of a cabin, and perhaps part of a garden, the rest of the cabin and garden being on the land of another person. After the purchase by the appellants, persons occupied the cabin through permission from them, with leave to use the fallen and dry wood. The appellants claim that such a possession of land, which they really owned, operated to give them possession of the two tracts in controversy; and so, the fact that the three tracts were contiguous, and conveyed to them by one deed. The rule is that the true owner of land, in the actual possession of a part, in law is deemed to be in the possession of the entire tract so owned, unless some other person be in the actual adverse possession of a part; but it has never been held that one who has an actual possession of land which he owns will be deemed in law to be in possession of land which he does not own from the simple fact that he may claim under a deed which purports to convey the land to him to which he gets no title, as well as land to which he truly acquires title, even though the tracts purporting to be conveyed be contiguous to that to which title passes. This is well illustrated by the numerous adjudications between claimants of conflicting grants from the government. In such cases, to enable the junior grantee to sustain a plea of limitation, it is not enough that he show that he has had possession of that part of the grant not in conflict, but he must show an adverse actual possession of that part of his grant in conflict with the elder. Mere color of title, unaccompanied by an actual adverse possession of some part of the land to which the color of title relates, is of no efficacy. The reasons for this are manifest. The true owner has the constructive possession or seizin, and his disseizin cannot be brought about without an actual adverse possession. If there be no disseizin, the statute of limitation can have no operation. By force of a statute, one entering upon the land of another without color of title, who holds peaceable and adverse possession, may have a possession which by construction of law will extend to the statutory limit, though his actual possession be of less area; but there can be no constructive possession, even when the claim is under color of title, unless there be an actual possession of some part of the land to which the mere color of title relates. The appellants never actually occupied any part of the land in controversy,

and the statutes of limitation cannot be made operative, under the facts proved, whether the land was of the separate or community estate of James E. Box.

We have not deemed it necessary to consider what would have been the effect of the very equivocal possession on which the appellants rely had it been of the land in controversy, nor to consider what would have been the effect of laying off the tracts into blocks, lots, and streets, leaving the only actual possession claimed on one single block.

For the reasons before given, the judgment will be reversed, and the cause remanded.

EAST LINE & RED RIVER R. CO. v. BRINKER.

(*Supreme Court of Texas.* November 16, 1886.)

1. NEGLIGENCE—PLEADING—GENERAL AND PARTICULAR ALLEGATIONS.

Under an allegation of negligence on the part of a railroad company in failing to prepare, fix, and keep in repair a good, safe, and substantial crossing at a certain place, and the further allegation that the crossing is defective, rotten, and insufficient, it is admissible to show that it is defective by reason of the planks being laid too far apart.

2. JURY—DISQUALIFICATION OF JUROR—WITNESS—EMPLOYEE OF PARTY.

One subpoenaed as a witness in a case by one of the parties, and who had been in the party's employ a year before, is not thereby disqualified to sit as a juror in the case.

Appeal from Hopkins county.

Action for damages for personal injuries alleged to have been received by plaintiff at a point where the defendant's railroad crosses a highway known as the "Sulphur Springs & Pittsburg Road," by reason of the defective condition of the crossing. Plaintiff claimed that in crossing the railroad track on horseback his horse's foot broke through the covering, the horse fell, and threw and injured him. Plaintiff offered evidence that the planks on the crossing were laid too far apart,—three or four inches,—which was objected to by defendant on the ground that, under the pleadings, such a defect as that could not be shown; but the objection was overruled, and the evidence admitted.

One of the jurors had been subpoenaed as a witness for plaintiff, and it was claimed by defendant was in his employ. The verdict was for plaintiff, and a new trial was refused. Defendant appealed.

Whitaker & Bonner, for appellant.

WILLIE, C. J. The petition charges that the injury complained of occurred through the negligence of the railroad company in failing to prepare, fix, and keep in repair, a good, safe, and substantial crossing over the railroad track at the place where it was crossed by the Sulphur Springs & Pittsburg dirt road; and it further charged that this crossing was defective, rotten, and insufficient. The plaintiff was not bound to set forth in his petition with any great particularity the specific acts of negligence which brought about his injury. *Oldfield v. New York R. Co.*, 14 N. Y. 310; *Railroad Co. v. Keely's Adm'r*, 23 Ind. 133; *State v. Railroad Co.*, 52 N. H. 528; *Noyes v. Turnpike Co.*, 11 Vt. 536. Under the general allegations made by him as to the failure to prepare, fix, and keep the crossing in repair, and that it was defective and insufficient at the crossing, he could have introduced any evidence he chose as to the rottenness of the plank of which it was in part constructed, without the specific allegation as to this defect. These allegations pointed out the particular place and thing which were insufficient, and needed repair, and it was not necessary to detail their faults and imperfections. A plaintiff is not ordinarily presumed to know the condition of the track, machinery, cars, and equipage of a railroad, so as to specify what particular defect has

brought about the disaster by which he is injured. A passenger injured, or a wife whose husband has been killed, in a collision, cannot well know whether it was due to the want of a head-light, the imperfection of a brake, or the incapacity of an engineer. To require them to specify the cause or causes of these, or any other accidents produced by the negligence, would, in many cases, be to require an impossibility, and amount to a denial of justice. But such things are or should be known to the railroad company, and it does not require much particularity in pleading to put it on notice what negligence is laid to its charge. The specification in this case of one particular in which the crossing was defective did not confine the plaintiff to proof of that defect alone. The clear and natural construction of the averments are that the crossing had not been properly prepared, fixed, or kept in repair, and that it was rotten, and otherwise defective and insufficient.

The case of *Waldhler v. Hannibal & S. J. R. Co.*, 2 Amer. & Eng. R. Cas. 146, is not in conflict with these views. That case holds that when there is a general and also a specific averment of negligence, and the proof fails to show that the specific act charged caused the injury, but does show that it was caused by an act which might come under the general allegation, the plaintiff cannot recover if the general averment is insufficient. Here the most general averments were far more specific than those made in that case, and were sufficient, as we have seen, and hence the decision adopted is not applicable.

We think testimony as to the defects shown by the witness Elliott were admissible. For the same reasons the charge of the court objected to was correct. The allegations to the effect that the crossing was not properly prepared, and that it was defective and insufficient, might be established by proof of faults in its original construction, as well as of faults existing after it had been prepared, unless the allegation as to the rottenness is to control and restrict all the other allegations. This we have determined to the contrary. In the last case cited above, where the action was for an injury to plaintiff's horses, wagon, and harness, consequent upon a defect in a turnpike, an allegation that the damages were caused "by reason of the road being out of repair, and the badness thereof," was held equivalent to a general allegation of insufficiency, and was supported by evidence of insufficiency in the original construction of the road. *Thomp. Neg.* 1248. This is in accordance with the views already expressed, and those of the trial judge.

The fifth error assigned is not well taken. It was not the intention of the statute to disqualify as a juror any person who might happen to be subpoenaed in a case, if he was not examined as a witness. The juror was not in the employ of the plaintiff at the time of the trial, but had been about a year before that time. How that fact prejudiced him in favor of the plaintiff is not shown, and we are unable to perceive that it would upon general principles. The evidence as to the condition of the crossing was conflicting. It did not even preponderate in favor of the defendant.

There is no error in the judgment, and it is affirmed.

PARKER v. STATE.¹

(Court of Appeals of Texas. October 27, 1886.)

1. CRIMINAL LAW—VERDICT—LESSER OFFENSE—ACQUITTAL.

If a defendant, upon trial for the higher grade of an offense consisting of degrees, is convicted of an inferior grade of such offense, such conviction operates as an acquittal of all the grades higher than that for which the conviction was had, and will bar subsequent prosecution for any of such higher grades.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

2. MURDER—MANSLAUGHTER—CHARGE OF THE COURT.

The former conviction in this case being for manslaughter, it operated as an acquittal of murder of both the first and second degrees; and, under the rule that the charge of the court must be limited to the case on trial, it was error to charge the jury upon murder of either degree. Manslaughter being the offense upon trial, the charge of the court should have been limited to that offense, inasmuch as, though a grade comprehended in a charge of murder, it is nevertheless a different offense than murder, and its definition is not dependent upon murder. See the opinion on the question.

3. SAME.

Moreover, the charge in this case is radically erroneous, in that, having charged the law of murder of the two degrees, and informed the jury that they could not convict beyond manslaughter, the trial court instructed the jury that, if they believed from the evidence that the defendant was guilty of either degree of murder, they could find him guilty of manslaughter. This doctrine is not warranted by the rule that a verdict for an inferior grade will not be set aside because the evidence showed a higher grade of offense.

4. SAME—SELF-DEFENSE.

That a party whose person is unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant is made, by article 573 of the Penal Code, a part of the law of self-defense. Evidence tending to show such an unlawful attack upon the part of the person killed devolves upon the trial court the duty of charging this principle, because it becomes a part of "the law of the case."

5. CRIMINAL LAW—VERDICT—DECIDING BY LOT.

Note the opinion for a suggestion of this court respecting verdicts arrived at by lot, and the duty of trial courts in the premises.

Appeal from district court, Fannin county.

This was the appellant's second appeal from a conviction of manslaughter under an indictment charging him with the murder of John Webb. A term of five years in the penitentiary was the penalty assessed. The questions involved in the opinion do not require a statement of the facts proved.

Taylor & Galloway, for appellant.

In the case of *Baker v. State*, 4 Tex. App. 223, the defendant, having been convicted of murder in the second degree, was again placed on trial after getting a new trial on the first conviction. He complained because the court failed to instruct the jury on the law of express malice, or murder in the first degree, intimating that the defendant should be acquitted if the evidence showed the killing to have been done in express malice. The court declared the law, as laid down in Code Crim. Proc. art. 594, that it is the duty of the court to charge the law applicable to the case as made by the pleadings and evidence. The court further holds that an inappropriate charge should not be given, because such a charge would be likely to mislead and confuse the jury in their deliberations. If a charge of murder in the first degree was inappropriate in that case, when the party was on trial for murder in the second degree, a charge on both degrees would certainly be inappropriate when a party was on trial for manslaughter.

In this case the jury was told, if they found the defendant guilty of murder in the first or second degree, to return a verdict for manslaughter. This charge made it the duty of the jury to investigate the case under all of the degrees of homicide, and, we think, tended to bring the jury to a compromise verdict, as is often the case in murder trials. It is true, the evidence in the case, introduced by the state, showed, if anything, a premeditated homicide. This evidence was proper, and would have been sufficient, under the law, to have convicted the defendant of any of the degrees of homicide; yet the state, relying alone on a conviction of manslaughter, ought not to have the benefit of an investigation of all of the degrees, in order that the jury might bring in a verdict for the lower degrees as a compromise. It is true, the court told the jury that they could not find the defendant guilty of any higher degree than manslaughter; yet the instructions to the jury, to the effect that if they believed he was guilty of murder in the first or second degree to return a verdict of manslaughter, was calculated to impress them that the court believed the de-

fendant guilty of murder, or that there was testimony showing murder in one of the degrees. We therefore think the court committed an error in giving this charge, calculated to injure defendant. Code Crim. Proc. art. 677; *Baker v. State*, 4 Tex. App. 223; *Priesmuth v. State*, 1 Tex. App. 480; Sackett, Instruction, § 4, and authorities.

The second assignment of errors relates to the court's charge on the law of self-defense. On that question we will only call the attention of the court to the fact that the charge on self-defense is imperfect, because it fails to tell the jury that defendant was not bound to retreat if unlawfully attacked. This court has always held that, whenever it became the duty of the court to charge the law of self-defense, this portion of the statute must be given, and we know of no case in which the omission to charge it failed to cause a reversal of the case, whether excepted to or not. Pen. Code, art. 576; *Bell v. State*, 17 Tex. App. 538; *Arto v. State*, 19 Tex. App. 126.

By the third and last assignment of error we attack the verdict because it was decided by ballot or lot, and was not a fair expression of the opinion of the jury. The motion for a new trial shows that the jury could not agree, and reported the fact to the court, when they were sent back to further deliberate,—the court telling the jury that the interests of the country demanded that they come to some conclusion; that they agreed then to take a ballot, and, should a majority of the jury vote that defendant was guilty, then they would return a verdict of guilty, and assess his punishment at two years in the penitentiary, and, if a majority voted that he was not guilty, they would return a verdict of not guilty. This certainly is contrary to the statute. The agreement was made and entered into by all of the jury before the result was made known; and, although five of said jury voted that defendant was not guilty, the jury returned a verdict of guilty because a majority so voted, and because they agreed to abide the result. The county attorney tried to evade the effect of these affidavits by the affidavits of Campbell, Price, Dale, and Ross, to the effect that the verdict was ascertained by ballot, which was in favor of guilty, and that it was satisfactory to the jury, and that they fixed his punishment and returned it into court. These affidavits do not show how the jury stood prior to the ballot, nor why they resorted to this method to get a verdict. When these affidavits were filed, defendant had all of said jurors who signed the affidavits for the state to sign a statement as to how the jury stood when the ballot was taken, and their agreement as to the result of the ballot. Code Crim. Proc. art. 777; *Hunter v. State*, 8 Tex. App. 75; *Jones v. State*, 13 Tex. App. 13.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. 1. It is objected to the charge of the court that it explains the elements of murder of both degrees, when the defendant was on trial for manslaughter only, having on a previous trial been acquitted of murder. It is well settled that when a defendant is on trial for the higher grade of an offense, and is convicted of a lower grade, the conviction operates as an acquittal of all grades of the offense higher than the one of which he is convicted, and he cannot be again tried for the higher grades. *Lopez v. State*, 2 Tex. App. 204; *Cheek v. State*, 4 Tex. App. 444; *Jones v. State*, 13 Tex. 1. In his charge to the jury the judge explained fully murder in the first and second degrees, and manslaughter, but told the jury that the defendant was on trial for manslaughter, and that he could not be convicted of a higher grade of homicide than manslaughter, but that if they believed from the evidence that he was guilty of either murder in the first degree or in the second degree, or of manslaughter, they should find him guilty of manslaughter.

It is made the duty of the trial judge to "deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case." Code Crim. Proc. art. 677. The offense charged against the defendant, and

for which he is on trial, is the case to which the charge must be applicable. *Kouns v. State*, 3 Tex. App. 13; *Stanfield v. State*, 43 Tex. 167. In this case the offense charged against defendant, and for which he was being tried, was *manslaughter*, not *murder*, and only the law applicable to manslaughter should have been submitted to the jury. A charge which extends beyond a plain statement of the law of the case being tried is not such a charge as the law requires, and may or may not be materially erroneous. *Rice v. State*, 3 Tex. App. 451. A charge should meet and be limited by the case on trial, and should never go outside of and beyond it. *Tooney v. State*, 5 Tex. App. 163; *Harrison v. State*, 8 Tex. App. 183. It was not at all necessary to instruct the jury concerning murder for the purpose of enabling them to understand the law relating to manslaughter. Manslaughter is distinctly defined and explained by our Code, and its elements are essentially different from those of murder. Pen. Code, art. 593 *et seq.*; *Jennings v. State*, 7 Tex. App. 350. All that the court was called upon to submit to the jury in this case was the law of manslaughter, because that was the offense charged; that is, the offense for which the defendant was put upon trial. True, the indictment charged murder, but he had been acquitted of that offense, and on this trial was charged with, and on trial for, manslaughter only, and the case must be viewed as if the indictment charged manslaughter only. It was therefore error, we think, to go beyond the law of manslaughter in charging the jury, and was calculated to confuse and mislead the jury, by drawing their attention away from the real issue in the case to issues which were not legitimately before them.

This portion of the charge is still more objectionable, in that it instructs the jury that, if they believe the defendant is guilty of murder in either degree, they will find him guilty of manslaughter. Defendant had been acquitted of murder, and this acquittal was a bar to any further prosecution for that offense, and yet the jury are told that, if the evidence shows defendant to be guilty of murder, they may punish him for said offense, not by finding him guilty according to the evidence, but by calling his offense manslaughter, and finding him guilty of that offense. In other words, the jury were told that, although defendant has been acquitted of murder, and cannot be punished for that offense, *eo nomine*, yet, if they believe from the evidence he did commit murder, they may call it manslaughter, and punish him as for that offense.

It seems to us that this doctrine, if correct, would deprive the defendant, in a great measure, of the benefit of his acquittal of murder. He would still be punishable for an offense of which he had been acquitted, which would be a result which the law does not contemplate or tolerate. It seems to us that, as the defendant has been acquitted of murder, he can only be tried and convicted of manslaughter. If the evidence shows that he is guilty of murder, he cannot be convicted of that offense because he has been tried therefor and acquitted. He cannot be convicted of manslaughter, because if guilty of murder he is not guilty of manslaughter, the two offenses being essentially different, although grades of homicide. It is true that when the indictment charges murder, and the defendant is on trial for that crime, he may be convicted of any grade of homicide; and, if convicted of a lower grade than murder in the first degree, the conviction will not be set aside because the evidence proves that he is guilty of a higher grade than the one of which he is convicted. *Baker v. State*, 4 Tex. App. 223; *Powell v. State*, 5 Tex. App. 234. But here the defendant was not on trial for murder, and could not be convicted of murder, and yet the court tells the jury to convict him if he is guilty of murder,—to convict him, however, not of murder, the offense which the evidence may show him to be guilty of, and for which he is not on trial, but of another offense which he has not committed, to-wit, manslaughter.

There is a marked difference between this case and the case of a defendant

charged with and on trial for murder. Every indictment for murder includes manslaughter, and the jury may acquit of murder, and convict of manslaughter, at their discretion. But manslaughter does not include murder, and a party charged with and on trial for manslaughter cannot be convicted of murder, and especially of a murder of which he has been acquitted. We must hold that the portion of the charge we have been discussing is materially erroneous, and was calculated to injure the rights of the defendant; and, although not excepted to at the time of the trial, it was made a ground for a new trial, and was thus called to the attention of the trial court, who should have granted a new trial because of such error.

2. There is another defect in the charge of the court relating to the law of self-defense. Article 573 of the Penal Code, which provides that a party whose person is unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant, is a part of the law of this case as made by the evidence, and should have been given in charge to the jury. *Bell v. State*, 17 Tex. App. 538; *Arto v. State*, 19 Tex. App. 126; *Hunnicut v. State*, 20 Tex. App. 644. This omission in the charge was not excepted to, nor was it sought to be supplied by a requested instruction at the time of the trial. It is called to the attention of the court for the first time on the motion for new trial. While we might not be called upon to set aside this conviction upon this error alone, still we think the court committed an error in failing to inform the jury of this important provision of the law of self-defense.

3. A serious attack was made upon the verdict of the jury in defendant's motion for new trial. It was charged by defendant that the verdict was arrived at by ballot, with the understanding and agreement among the jurors that a majority of the ballots cast should determine the guilt or innocence of the defendant, and also his punishment at confinement in the penitentiary for two years should he be found guilty. This attack upon the verdict is supported by the affidavits of two of the jurors who tried the case. By the affidavits of several other members of said jury the district attorney attempted to controvert or explain away the affidavits supporting defendant's motion. The motion was overruled by the court, and we shall not inquire into or determine the correctness of said ruling, as it is not necessary to a disposition of the case that we should do so. We will take occasion to remark, however, that a verdict should always be a fair expression of the opinion of the jury, and courts should be careful to protect the sanctity of trial by jury by promptly setting aside verdicts which are shown to have been arrived at by lot, or in any other unfair manner, or which are tainted by improper influences brought to bear upon the minds of the jury.

Because of the error in the charge first mentioned, the judgment is reversed, and the cause is remanded.

MURRAY v. STATE.¹

(Court of Appeals of Texas. June 5, 1886.)

1. JURY—SPECIAL VENIRE IN CRIMINAL CASE.

Special venire which shows the style and number of the case, and which, though in its preliminary recitals it omitted the name of the court or county in which the case was pending, distinctly stated in the mandatory part that the persons named were to be summoned "to be and appear before the honorable district court of Williamson county, Texas, at the court-house thereof, in Georgetown, on the nineteenth day of January, A. D. 1886, then and there to serve as special jurors, as aforesaid, in the above-stated cause," etc., is not obnoxious to the objection that the writ does not show in what case the same was issued, nor in what cause the said proceedings were pending.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

2. SAME—AMENDING RETURN.

It was not error to permit the sheriff to amend his return upon the special *venue facias*.

3. SAME—CODE CRIM. PROC. TEX. ART. 617.

Article 617 of the Code of Criminal Procedure requires no more than that the names of all the jurors summoned under the special *venue* shall be served upon the defendant more than one day before the case is called for trial. The provisions of the said article are not subverted by the mere fact that the certified copy served on the defendant contained other names, which were erased.

4. SAME—INTERPRETATION OF CODE CRIM. PROC. TEX. ARTS. 618-621.

It is an established rule of statutory construction that, "when the particular provision of a statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of a statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory." With respect to this doctrine, this court has established the rule that, "whenever there is reason to apprehend that injury may have resulted to the defendant, especially in a case of felony, from a failure to observe directions given the court by the legislature, the judgment should be reversed." *Held*, that articles 618, 619, 620, and 621 of the Code of Criminal Procedure, relating to the organization of the trial jury in a case of capital felony, are directory only, and the failure of the trial court to conform to them is not reversible error, unless injury to the defendant be shown.

5. CRIMINAL LAW—NEW TRIAL.

Continuance was applied for to secure the attendance of four witnesses. It is shown that two of them appeared in court before the conclusion of the testimony, but were not placed upon the stand by the defendant. The testimony of the remaining two, considered in connection with the evidence adduced upon the trial, does not appear to have been of a character material to the defense. *Held*, that the refusal of the continuance was not cause for new trial.

Appeal from district court, Williamson county.

The death penalty was assessed against the appellant by the verdict, which found him guilty in the first degree, under an indictment which charged him with the murder of Mollie Murray, in Williamson county, Texas, on the eighteenth day of December, 1885. The murdered woman was the wife of the appellant.

The narrative of Grandison Sansom, the son of the deceased, and the stepson of the defendant, strongly corroborated by other witnesses and circumstances, details the main facts in the case. The interim between the murder and the return to the house of the defendant and the Rev. Mr. Williams was spent by the defendant at church. The defendant introduced no evidence. Grandison Sansom testified that he was the son of the deceased, Mollie Murray, and the stepson of the defendant. He was 11 years old. The witness was sick on the afternoon of December 18, 1885, and went to bed just before sundown, in the house, in the town of Taylor, in Williamson county, in which his mother, the deceased, and her husband, the defendant, then lived. Soon after supper was eaten by the inmates of the house, which was soon after dark, the defendant left the house to go to town. At that time a lamp was burning on a table standing in the room occupied by the witness. When the deceased finished clearing off the table, she arranged to take a bath in the shed room, which was used as a kitchen. That room adjoined witness' room on the north, the two being separated by a plank partition, and connected by a door. The witness lay on his bed, in the south-east corner of a large room, and could not see his mother from that point while she was bathing in the kitchen. After some time, and while the deceased was still bathing, the defendant came back, passed through the witness's room into the kitchen, and beyond the view of the witness. Witness presently heard the defendant say to the deceased: "You have been untrue to me. Who is it you are keeping in Round Rock and Georgetown?" The defendant, a moment later, said to deceased: "Get out of that bath, and sit down in that chair. I am going to kill you." Deceased replied, "I will mind you," and a moment later, "Don't kill me." This appeal was followed by two blows, struck, the witness thought,

with a pistol. The sound of the blows was followed by a louder noise. When the defendant and the deceased commenced talking in the kitchen, the witness covered his head with the bed-clothes, and could not see in the kitchen. After the noises described, some one (the defendant, as witness believed) came into his room from the kitchen, and extinguished the light that was still burning. The witness did not uncover his head. When the light was blown out the person went back into the kitchen, and the witness heard the opening and closing of the back door leading out from the kitchen. Some time after this the defendant returned to the house with the preacher, the Rev. J. C. Williams. Witness had not yet recovered from his fright, and had not uncovered his head. During the time intervening between the closing of the kitchen door and the arrival of the defendant and the preacher the witness heard a noise in the kitchen which sounded like the moving of feet over the floor. Witness did not move from his bed, and did not know what had happened to his mother until the preacher and defendant reached the house. Witness could not tell how long after the light in his room was blown out it was until the defendant came back to the house with the preacher, but no one came into the house during the interval. Witness was awake throughout that interval, and heard no other noise in the house than the raking of feet over the kitchen floor. After the arrival of the defendant and the preacher, when the lamp was lighted, witness saw his mother lying in the kitchen where she had been bathing. She was unable to talk, and died about 10 o'clock on the next morning. Witness told Mrs. Foster, on the night of the killing, that he did not see the defendant on that night, and that he did not know who assaulted his mother. He was afraid to tell Mrs. Foster anything else at that time. But when, on the same night, he was taken to Mrs. Burke's house, he told Mrs. Burke and Melinda Bishop the facts to which he has testified on this stand, and that the defendant assaulted his mother. Defendant had a razor in the house at the time, and likewise owned an axe, which was kept on the place except when borrowed by neighbors.

John W. Parker and Fisher & Townes, for appellant. Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. A motion was made to quash the special *venire* summoned to try the case—*First*, because said writ does not show in what case the same was issued, nor in what cause the said proceedings were pending; and, *second*, because the return of the officer upon the said writ is insufficient, in that it does not show the diligence used by said officer in his efforts to find the jurors not served.

The first objection is not borne out by the record, because the writ of special *venire* which was issued in the case shows the style and number of the case, and, while it may be true that in the preliminary recitals the name of the court or county in which the case is pending is omitted, it is distinctly stated in the mandatory part of the writ that the persons named are to be summoned "to be and appear before the honorable district court of Williamson county, Texas, at the court-house thereof, in Georgetown, on the nineteenth day of January, A. D. 1886, then and there to serve as special jurors, as aforesaid, in the above-stated case," etc. This is in substantial compliance with the provisions and requirements of our statutes in regard to such writs. Code Crim. Proc. arts. 605, 608.

With regard to the second objection urged in the motion to quash said writ, it is shown by the sheriff's return that seven names of the persons whom he was required to summon had been stricken from the list by him; but he failed to state in his return why this was done, and, if because they had not been summoned, then the return was defective in failing to state the diligence that had been used to summon them, and the cause of the failure to summon them as is required by law. Code Crim. Proc. art. 614. This

motion to quash the special *venire* was overruled, and, upon motion of the district attorney, the sheriff, over objections of the defendant, was permitted to amend his return upon said writ in reference to the particular indicated; and the defendant reserved an exception to the ruling of the court allowing said amendment. There was no error in this action of the court, the return of the sheriff being amendable, and no possible prejudice to the defendant being shown. *Washington v. State*, 8 Tex. App. 377; *Sterling v. State*, 15 Tex. App. 249.

After the amendment of the return of the sheriff, the appellant moved the court that he have one day's service of the copy of said special *venire* as amended before he should be compelled to go to trial. He had already been served with a copy of the special *venire* more than one day before he made his aforesaid motion to quash the same, but he contended that the certified copy furnished him was not, in fact, a true copy of the names summoned, as shown in the amendment made by the sheriff. This objection was not well taken. The certified copy served on the appellant, it is true, did contain the names of the seven jurors who had not been summoned, but their names were obliterated by having a pencil mark drawn through them. The names of all the persons summoned under the special *venire* were served upon the defendant more than one day before the case was called for trial, and that is all that the statute requires. Code Crim. Proc. art. 617.

It is insisted that the court committed a radical error in failing to comply with the requirements of the statute as to the mode and manner of selecting and organizing the jury from and out of the special *venire* as summoned; that the court, in proceeding to impanel the jury, did not have the names of those summoned as jurors called at the court-house door, and require such as were present to be seated in the jury-box; nor did the court afford the defendant an opportunity to apply for attachments for those not present, (Code Crim. Proc. art. 618;) nor did the court call up and swear or have sworn all those present, and test their qualifications, or hear their excuses, or afford appellant any opportunity of knowing who were present in obedience to the special *venire facias*, (Code Crim. Proc. arts. 619-621;) but, on the contrary, the mode adopted for the organization of the jury was that prescribed by article 640 of the Code of Criminal Procedure, without complying with any of the requirements of the statute as provided in the articles above named.

The name of each individual juror was called in the order that it appeared on the list, and he was separately tested as to his qualifications by the court, the district attorney, and the appellant, and this method was pursued, over the objections of appellant, until the panel of the jury was completed. Appellant's objection is that the mode of impaneling the jury as pursued by the court was in direct contravention of the provisions of the statute, and deprived this appellant of certain important rights accorded him by law. He insisted that the purpose and intent of articles 618-621 of the Code of Criminal Procedure was that all those summoned on the special *venire* should be sworn in a body, and all excuses heard and determined, and their qualifications ascertained, and absentees noted, so that the defendant in a capital case will only have a panel of qualified jurors, without legal excuse, in actual attendance, upon whom to expend his challenges, and from whom to select his jury; that the mode adopted by the court of organizing the jury deprived him of those important rights and necessary privileges, and he was compelled to pass upon each juror tendered him without possibly knowing who of those remaining upon the list was disqualified, had excuses, or were absent.

It is provided by statute that "when any capital case is called for trial, and the parties have announced ready for trial, the names of those summoned as jurors in the case shall be called at the court-house door, and such as are present shall be seated in the jury-box, and such as are not present may be fined by the court a sum not exceeding fifty dollars, and, at the request of

either party, an attachment may issue for any person summoned who is not present, to have him brought before the court." Article 618, Code Crim. Proc.

"Art. 619. When those who are present are seated in the jury-box, the court shall cause to be administered to them the following oath: 'You, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its directions, touching your service and qualification as a juror, so help you God.'

"Art. 620. The court shall now hear and determine the excuses offered by persons summoned, for not serving as jurors, if any there be, and, if an excuse offered be considered by the court sufficient, the court shall discharge the person offering it from service.

"Art. 621. A person summoned upon a special *venire* may be excused from attendance by the court at any time before he is impaneled, by consent of both parties."

These are the preliminary steps provided by the law for the preparation of the special *venire*, so that a jury may be selected therefrom; and there is no doubt but that they should be followed, and that it would be better in practice, in this as in all cases where the mode of procedure has been prescribed for the state, to follow the rules as adopted for the government and conduct of the trial of her citizens. It is to be presumed that such rules have been adopted for some wise purpose. In this instance the learned judge has seen fit to ignore the rules thus prescribed, though his attention was attempted to be called to them by the objections of counsel for defendant, and his action was promptly excepted to at the time, as shown by defendant's bill of exceptions in the record. That his action is in contravention of the statute cannot be denied. If it is erroneous, then the judgment must necessarily be reversed. His action is inevitably erroneous, if the statutes quoted are mandatory. If not, then the action, while it establishes a patent irregularity, is not a reversible matter. Are the statutes mandatory or directory?

"In respect to statutes," says Mr. Cooley, "it has long been settled that particular provisions may be regarded as *directory merely*; by which is meant that they are to be considered as giving directions which *ought* to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them." Again, the same learned author says: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute." Cooley, Const. Lim. (4th Ed.) 89, 93.

In the well-considered case of *Hurford v. City of Omaha*, the court, among others, lays down the following rule as a safe guide in the interpretation of statutes relating to the question under consideration, namely: "That when the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory." 4 Neb. 336.

This court, in the case of *Wilkins v. State*, without attempting to lay down definite rules for determining whether a statute is mandatory or directory, adopted as a safe and sound conclusion the remarks of Judge MOORE in the case of *Campbell v. State*, 42 Tex. 591, to the effect that, "whenever there is reason to apprehend that injury may have resulted to the defendant, especially in a case of felony, from a failure to observe directions given the

court by the legislature, we think, unquestionably, the judgment should be reversed." 15 Tex. App. 420.

In the case we have under consideration, the statutes quoted above relate entirely to matters of procedure, and are directory; and if it were possible that an injury could result from a non-observance of such rules, then no such injury is shown in this record, because the jury, as impaneled to try the case, was selected from the original special venire, which was not exhausted in the selection, and the selection was made in conformity with article 640, Code Crim. Proc., (*Charles v. State*, 13 Tex. App. 658,) which is the mode prescribed for the final selection of the jury which is to try the case.

Another error assigned is that the court overruled defendant's application for continuance. Four witnesses were named in the application. Two of them appeared in court before the testimony was closed, and they were not called by defendant to testify. As to the other two, even if it be conceded that proper diligence to secure their attendance is shown, then their proposed testimony, viewed in the light of the other testimony in the case, does not appear to be material, and consequently no error is made manifest in the action of the court.

No complaint is made of the charge of the court to the jury. It presented the law plainly, fully, and fairly. As to the evidence, no unprejudiced mind can say that it does not amply support the verdict and judgment which condemns this defendant to death for the cruel and inhuman murder of his own wife. There is no reversible error in the record, and the judgment is therefore in all things affirmed.

BALDWIN v. STATE.¹

(Court of Appeals of Texas. June 23, 1886.)

1. LICENSE—OCCUPATION TAX—INDICTMENT.

The Illustrated Police News and the Police Gazette are publications specially enumerated in the statute as among those the sale of which cannot be pursued as an occupation without the payment of the tax levied therefor, and it was not necessary that the indictment should further describe them than by name.

2. CONSTITUTIONAL LAW—HOLDING LAW VOID.

Quere, whether the courts of this state can go behind a statute which is valid upon its face, and inquire into the particular authority by virtue of which it was enacted.

3. SAME—LEGISLATIVE POWER.

Legislative power, except where the constitution has imposed limits upon it, is practically absolute; and, where the limitations upon it are imposed, they are to be strictly construed, and are not to be given effect, as against the general powers of the legislature, unless such limitations clearly inhibit the act in question. See the opinion for the rule of statutory construction stated in different terms.

4. SAME—PASSAGE OF LAWS BY SPECIAL SESSION OF LEGISLATURE.

In this case it is urged that the act of May 4, 1882, levying an occupation tax upon persons who engage in the sale of the Illustrated Police News and the Police Gazette, etc., is unconstitutional, and in violation of section 40 of article 3 of the constitution of this state, in that it was enacted at a special session, and was not designated by the governor as a subject of legislation for which the legislature was convened in special session. *Held*, that this objection is not well taken. The proclamation of the governor convening the legislature in special session announced the purpose, among others, "to reduce the taxes, both *ad valorem* and occupation, so far as may be found consistent with the support of an efficient state government." The purpose so announced embraced the whole subject of taxation, and authorized any and all such legislation upon that subject as was deemed necessary by the legislature. See the opinion *in extenso* on the question.

Appeal from district court, Bexar county.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

The opinion discloses the nature of the case. A fine of \$750 was the penalty imposed.

W. W. Walling and Brennen & Bergstrom, for the appellant, traversing the doctrines announced in the opinion.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. It is charged in the indictment that the defendant pursued and followed the occupation and business of selling, and offering for sale, the Illustrated Police News and the Police Gazette, without first paying the tax upon such occupation, etc. Defendant excepted to the sufficiency of the indictment, because it did not allege that the papers sold or offered for sale were illustrated papers. This exception was properly overruled. The Illustrated Police News and the Police Gazette are papers which are specifically named in the statute, and it was not, therefore, necessary to further describe them in the indictment. If the prosecution had been for selling, or offering to sell, a publication not specifically named in the statute, but of like character with those so named, then it would have been essential to allege in the indictment the character of such publication, and that it was illustrated. Article 4665, Gen. Laws Seventeenth Leg. Sp. Sess. 18.

It is contended by counsel for defendant that the section of the article of May 4, 1882, which levies an occupation tax upon persons who engage in the sale of the Illustrated Police News and the Police Gazette, etc., (Gen. Laws Seventeenth Leg. Sp. Sess. 18, art. 4665,) is unconstitutional, because it was enacted at a special session of the legislature, without authority, in that the governor did not, in his proclamation convening said legislature, nor by any other means, designate or present to said legislature, as a subject for legislation, the tax in question; and that, therefore, the law levying the said tax is without authority, and was enacted in violation of section 40, art. 3, of the constitution, which reads as follows: "When the legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling such session, or presented to them by the governor."

This court is asked to declare that the legislature, in enacting the law in question, acted without authority, in violation of the mandatory provision of the constitution above quoted. It is a question well worthy of serious consideration whether a court in this state can go behind a statute which is valid upon its face, and inquire into the particular authority by virtue of which it was enacted. *Usener v. State*, 8 Tex. App. 177; *Central R. Co. v. Hearne*, 32 Tex. 546; *Blessing v. Galveston*, 42 Tex. 641. We will not now determine this question, as it is not necessary to the final disposition of the case that we should do so.

We will concede, for argument sake only, that it is within the power of this court, and its duty likewise, to examine into and determine the authority of the legislature to enact the law. Looking, then, to the proclamation of the governor convening the legislature, we are clearly of the opinion that it confers such authority. One of the purposes of convening the legislature in special session is stated in said proclamation to be "to reduce the taxes, both *ad valorem* and occupation, so far as it may be found consistent with the support of an efficient state government." This, it seems to us, embraces the whole *subject of taxation*, and authorizes any and all such legislation upon that subject as may be deemed necessary by the legislature. To so legislate as to *reduce the taxes*, and at the same time *provide for the support of an efficient state government*, in our opinion, includes the power to levy taxes upon property and occupations not taxed before. It might be wholly impracticable to accomplish a *reduction* of taxes, and at the same time maintain the state government, without the exercise of such power. All the governor could properly do was done. He called the attention of the legislature to the sub-

ject upon which, in his opinion, legislation was desired. That subject was *taxation*. It was not necessary, nor would it have been proper, for him, in his proclamation, to have suggested in detail the legislation desired. It was for the legislature to determine what the legislation should be. Legislative power, except when the constitution has imposed limits upon it, is practically absolute; and, when limitations upon it are imposed, they are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question. Cooley, Const. Lim. 204.

It was said in *Railway Co. v. Riblet*, 66 Pa. St. 164: "If the act itself is within the scope of legislative authority, it must stand, and we are bound to make it stand, if it will, upon any indictment. * * * Nothing but a clear violation of the constitution, a clear usurpation of power prohibited, will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." See, also, Cooley, Const. Lim. 223.

We think a fair, reasonable, and correct construction of the proclamation authorized the legislation in question. Both the legislature and the governor must have so construed the proclamation, or the law would not have been enacted or approved.

We have found no error in the conviction, and the judgment is affirmed.

PIERCE v. STATE.¹

(Court of Appeals of Texas. June 25, 1886.)

MURDER—INDICTMENT.

Indictment to charge the offense of murder must charge, not merely that the accused murdered, but that he *killed*, the deceased.

Appeal from district court, Freestone county.

The indictment sought to charge the appellant and one John Shields jointly with the murder of Wade W. Patterson, on the fourth day of January, 1867. The appellant, being alone upon trial, was found guilty of murder in the first degree, and his punishment was assessed at a life-term in the penitentiary.

No appearance for the appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. This appeal is from a conviction of murder in the first degree. The indictment charges that "Dave Pierce did, with malice aforethought, murder Wade Patterson, by shooting him, the said Patterson, with a gun." This court, in the case of *Strickland v. State*, 19 Tex. App. 518, held a similar indictment fatally defective, because it did not directly charge that the accused *killed* the deceased. That decision is conclusive of this case. Because the indictment is insufficient to support a conviction for murder, the judgment is reversed, and the prosecution is dismissed.

JACKSON v. STATE.¹

(Court of Appeals of Texas. November 27, 1886.)

1. CRIMINAL PRACTICE—CHARGE OF THE COURT.

Article 677 of the Code of Criminal Procedure requires the trial court distinctly to set forth in the charge to the jury the law applicable to the case as made by the evidence.

2. SAME—REVERSAL FOR ERROR.

Error in a charge of the court, if promptly excepted to, and saved by proper bill, requires of this court the reversal of a conviction, without inquiry as to the effect such error may have had upon the trial. Code Crim. Proc. art. 685.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

3. SAME—NEW TRIAL—EXCEPTIONS.

If no exception was reserved to the error when it was committed, the next place when it can be availed of is on the motion for new trial, wherein it is provided by statute, (Code Crim. Proc. art. 777,) as a sufficient ground for new trial, that "the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant."

4. SAME—PRACTICE ON APPEAL.

The rule governing this court, in cases wherein an erroneous charge is neither excepted to nor assigned as a ground for new trial in the court below, is as follows: "If there is a material misdirection of the law as applicable to the case, or a failure to give in charge to the jury the law which was required by the evidence in the case, and such error or omission was calculated, under all the circumstances of the case, to prejudice the rights of the accused, this court should, for either cause, reverse the judgment."

5. INCEST—QUESTION FOR JURY.

See the opinion in *extenso*, and the statement of the case, for evidence adduced upon a trial for incest held to demand of the trial court a charge to the effect that the jury were the exclusive judges of the facts proved, and of the weight to be given to the testimony; and note the circumstances under which the omission of the said charge becomes fatal, although not excepted to, nor made a ground in the motion for new trial.

Appeal from district court, Washington county.

This was a conviction for incest, the indictment alleging the criminal act to have been committed with the step-daughter. Five years in the penitentiary was the penalty assessed.

The substance of the testimony of Ada Bland was that she was the step-daughter of the defendant by his marriage with her mother. On their way home from a neighbor's house, on the day alleged in the indictment, the witness and the defendant being alone, the defendant made an indecent proposal to witness, which the witness rejected. Thereupon defendant threatened to kill witness if she did not yield, threw her down, and accomplished his purpose, notwithstanding the protest of the witness. The scene of the rape, for such the witness pronounced it to be, was but 50 yards from the public road, and in full view of the house of the neighbor they had recently left. Witness made no outcry, nor did she report the outrage upon her until after the defendant had made several attempts, at different times to repeat it, and threatened to turn witness and her mother out of his house. In the course of time a child was born to the witness as a result of this enforced carnal act. That child was the child of the defendant, the only male with whom she had ever had carnal intercourse. Witness was a negress, and the defendant a negro. Defendant was much blacker than the witness, and the witness' child was of much lighter color than witness. Several witnesses testified that Ada Bland's reputation for chastity was very bad. The evidence disclosed that Ada's child was perfectly formed and healthy at birth, and Ada fixed her period of gestation at about seven months.

Harvin & Keefer, for the appellant, assailed the sufficiency of the evidence to support the conviction, and maintained the propositions of law announced by the court. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. Appellant appeals from a conviction for incest, the alleged crime being charged to have been committed with his step-daughter. She was the main, and in fact the only, witness who testified to the facts pertaining to the commission of the imputed crime. We will not say that her testimony is improbable or untrue, but it certainly has failed to impress us with such cogency as to its truth that we can confidently rely upon it with unhesitating belief. Without recapitulating the facts deposed to, the salient features, in substance, are that the carnal act was committed by force, and without her consent, within about 50 yards of a public road, from a hundred to a hundred and fifty yards from a house upon a hill from which the parties could be seen; that there was no outcry or alarm made by the prosecutrix; she did not tell

her mother or anybody else about it. She never had carnal intercourse with the defendant but the one time, and no one else except defendant had ever had carnal connection with her; that the act was committed on the tenth of November; that her child was born on the twenty-ninth day of the following June, seven months and nineteen days after; was well-formed, mature and healthy; that the defendant is almost black, the prosecutrix brown, and the child a yellow baby, of lighter color than the mother. In addition to this testimony, the state produced four witnesses, who only proved that the prosecutrix was the daughter of the wife of defendant, and that he and the mother had been legally married. One witness for the defense testified that he knew the reputation of the prosecutrix for chastity in the community in which she lived, and that it was bad. There was no other evidence adduced on the one hand or the other.

Now, upon this state of facts, what was the plain, clear, and unmistakeable duty of the court, under the statute which requires that in his charge to the jury he shall distinctly set forth the law applicable to the case? Code Crim. Proc. art. 677. Most clearly it was that, after instructing them as to the law of the particular crime, he should have told them, in view of the peculiar features of the case we have enumerated, and which thus stand out in such bold relief, either that they were the exclusive judges of the facts, (Code Crim. Proc. art. 676;) or, better and more pertinent still, that they were "the exclusive judges of the facts proved, and of the weight to be given to the testimony," (Code Crim. Proc. art. 678.) If ever there was a case calling loudly for an instruction in conformity with these statutory declarations, in our opinion the case here presented is one. We search the charge in vain for any such instruction; and we pause here to remark that, in all our varied experience with criminal trials, we cannot recall a single instance in which some such instruction was not given the jury, though in many cases, perhaps, it was really unnecessary to do so, there not being the slightest suspicion as to the credibility of the witnesses, or weight of the testimony.

But in this instance the charge was not excepted to as given, nor was this singular omission called to the attention of the court either by special instruction or in the motion for a new trial. In such condition of the record, what is the rule to govern the action of this court? Error in a charge, if promptly excepted to, and a bill of exceptions saved thereto, will necessitate a reversal of the judgment for the error, without inquiry as to the effect such error may have had upon the result of the trial. Code Crim. Proc. art. 685; 21 Tex. App. 436, and authorities cited. When no exception has been reserved at the time, then the next place, when the error can be availed of, is on the motion for new trial, wherein it is provided by statute as a sufficient ground that "the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant." Code Crim. Proc. art. 777. When the matter is not called to the attention of the court in either of the modes mentioned, then the true rule is as stated in *Blam v. State*, 16 Tex. App. 34, to the effect that, "if there is a material misdirection of the law as applicable to the case, or a failure to give in charge to the jury the law which was required by the evidence in the case, and such error or omission was calculated, under all the circumstances of the case, to prejudice the rights of the defendant, this court should, for either cause, reverse the judgment; citing *Bishop v. State*, 43 Tex. 390; *Lewis v. State*, 18 Tex. App. 401.

Now, in the case under consideration, without being told that they were the exclusive judges of the weight of the testimony, and the credibility of the witnesses, we can well imagine that the jury might have felt bound by the evidence, no matter how much soever they might have doubted or disbelieved the witnesses. Under the peculiar attitude of this case, we believe the court committed a fatal error in omitting to instruct the jury as to their preroga-

tive in passing upon the weight of the evidence and credibility of the witnesses, and that appellant, in all probability, has been seriously prejudiced thereby; and for this error the judgment is reversed, and the cause is remanded.

Ex parte KENNEDY.

(Court of Appeals of Texas. February 9, 1887.)

1. CONSTITUTIONAL LAW—POLICE POWER—LOCAL OPTION.

The local option law being within the scope of the police power of the state, it does not "take, damage, or destroy" private property for public use, within the meaning of section 1 of the Texas bill of rights.¹

2. ELECTIONS—NOTICE—INCONSISTENT STATUTES.

Where one article of the statute makes it the duty of the proper authority to order an election not less than 15 nor more than 30 days after an order therefor, and another statute requires the notice of the election to be posted at least 20 days before the election, the latter prevails.

3. SAME—PREREQUISITES TO BE STRICTLY COMPLIED WITH.

Unless every prerequisite of the law relating to the election, its mode and manner of determining the will of the people, be strictly complied with, the election is void.

Appeal from Hunt county.

E. W. Terhune, for relator. *James H. Burts*, Atty. Gen., for the State.

WHITE, P. J. In *Ex parte Lynn*, 19 Tex. App. 293, while it was admitted that strong reasoning might be adduced in favor of the proposition that the local option law was unconstitutional, yet it was said "there is a strong and almost uniform array of authorities which unequivocally declare that laws such as our local-option law are within the scope of the police powers of a state, and do not take, damage, or destroy private property for public use, within the meaning of that provision of the organic law, (section 1, Bill of Rights,) and do not infringe upon any other provision of constitutional law."

It is insisted that the local option law is inoperative on account of irreconcilable inconsistency in two of its provisions, to-wit: Article 3229, Rev. St., makes it the duty of the court to order the election to take place not less than 15 nor more than 30 days after the order, while article 3230 requires the clerk to post a copy of this order at least 20 days before the election. We apprehend that the last article will control the apparent inconsistency, and that no election would be attempted to be held unless the order had been posted 20 days beforehand.

Again, it is insisted that there is no penalty prescribed for a violation of local option which can be enforced. It is true our Code denounces the penalty against any person selling intoxicating liquors after the voters have determined that "the sale or exchange" shall be prohibited, (P. C. art. 378;) and it is also true that an election can only be held to prohibit a "sale," (Rev. St. art. 3227;) and that if the election were ordered to prohibit "the sale and exchange," or "the exchange," it would be void, (*Steele's Case*, 19 Tex. App. 428;) yet when a penal law prohibits two or more acts, (*e. g.*, a sale and an exchange), the one valid and constitutional, and the other not, it may and will be held valid and constitutional, and can and will be enforced as to that portion which is valid and constitutional, (*Holley v. State*, 14 Tex. App. 506.)

It is also claimed that the election was invalid because of the five notices required by law to be posted two were posted in one precinct of the county, and one of those at a gin, which was not a public place. It would unquestionably be a better practice, where the election is for an entire county, to have the posting of the notices distributed in different precincts, and in a manner so as to afford the greatest publicity possible; but there is no statute regu-

¹See note at end of case.

ating the matter. All that is required is that "the clerk shall post, or cause to be posted, at least five copies of said order at different public places in each county." Rev. St. art. 3230. So the places are public and different is all that is necessary. In this case the gin objected to is shown to have been a public place.

A most serious objection is urged to the validity of the election from the fact that no election whatever was held, nor was an opportunity afforded the electors to vote, in one precinct of the county at said election. There were 24 election districts in Hunt county. One of these precincts (No. 6) was called Durham's. It was 18 miles from town, and at the November general election, 1886, a little over a month prior to the local option election, there were 129 votes cast for that precinct at said box. Preparatory to the local option election it is shown by the statement of facts that no notice of the election of any kind was posted in justice's precinct No. 6, the one in which Durham's voting place is situated, and no writ of election or copies of form of returns, or any authority to hold the election, of any kind, was ever delivered to the presiding officer of said voting place; and no such writ or authority or forms were delivered to any voter residing nearest said election precinct or voting place. Now it is expressly provided by the local-option law that the commissioners' court of the county "shall appoint and qualify the proper officers, in accordance with the election law," and that "the officers holding said election shall in all respects not herein specified conform to the existing laws regulating elections." Rev. St. arts. 3230, 3232. Such election must be held in conformity with the general election laws, except where it is otherwise provided in the local option laws.

Under the general election laws it is provided that "the county judge or county commissioners ordering an election shall issue writs of election, wherein shall be particularly stated the question to be voted upon, and the day of election; and a copy of the form of election returns furnished by the secretary of state shall accompany each writ." Rev. St. art. 1681.

"Art. 1682. The writs of election, and copies of the forms of returns, as provided for in the preceding article, shall be delivered to the sheriff, who shall, previous to the day of the election, deliver the same to the presiding officer of each election precinct in which the election is ordered to be held; and, in case there be no presiding officer in any such election precinct, the writ and form shall be delivered to the qualified voter of such election precinct who resides at or nearest to the voting place in such precinct."

No writ for the election was ever delivered by the sheriff in accordance with this provision of the law, and, as stated above, no election was held at said voting place in precinct No. 6, on December 11, 1886, when local option was voted upon in Hunt county. The returns of the election showed that local option was carried in the other precincts of the county by a majority of 112 votes.

As stated, at the previous November election, Durham's box, or precinct No. 6, cast 129 votes. Had there been an election held on local option at that box, and all these votes had been cast against prohibition, then local option would have been defeated in the county. Now, what is the law?

Mr. Cooley says: "Where time and place for an election are fixed or prescribed by law, every voter must take notice of the law, and deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty. But this would not be the case if either the time or place were not fixed by law, so that notice becomes essential for that purpose." Cooley, Const. Lim. (4th Ed.) 759.

In his work on Elections, McCrary says: "It is doubtless perfectly true that where the election has been held at the proper time and the proper place, and the electors have had notice and participated in it, the want of such notice as the law provides will not render it void. But if it appear that due

notice has not been given, and that a portion of the electors have been thereby deprived of the right to vote, and particularly if the number thus deprived is sufficient to have changed the result if they had voted on one side or the other, in such cases the election is clearly void." Section 117.

In *McKune v. Weller*, 11 Cal. 49, it is held that an important distinction is to be observed between general and special elections. The time, place, and manner of holding the former being fixed by law, the electors may, and, indeed, must, take notice of them; but this is not the case with special elections, in which all the prerequisites of the law must be complied with. *McCrary, Elect.* § 120. See, also, *State v. Young*, 4 Iowa, 561; *Barry v. Lauck*, 5 Cold. 588; *Secord v. Foutch*, 44 Mich. 89, 6 N. W. Rep. 110.

Mr. Cooley says: "That one entitled to vote shall not be deprived of the privilege by the action of the authorities, is a fundamental principle; and, although the failure of one election precinct to hold an election, or to make a return of the votes cast, might not render the whole election a nullity, where the electors of that precinct were at liberty to vote had they so chosen, or where, having voted, but failed to make return, it is not made to appear that the votes not returned would have changed the result, yet if any action was required of the public authorities preliminary to the election, and that which was taken was not such as to give all the electors the opportunity to participate, and no mode was open to the electors by which the officers might be compelled to act, it would seem that such neglect, constituting as it would the disfranchisement of the excluded electors, *pro hac vice*, must, on general principles, render the whole election nugatory; for that cannot be called an election or the expression of the popular sentiment where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded." Cooley, *Const. Lim.* (4th Ed.) 776, 777.

It will thus be seen that though the five notices required by the local option law may be held sufficient as notice of said election, yet the failure to do anything else, or to comply with any other requisite of the law, that may be essential in furtherance of such election according to the laws, will, if the election be a special one, render it nugatory and void, if thereby electors sufficient to have changed the result were deprived of the right to vote at said election. When a special or local election is to be held, then all the requirements of the law must be substantially, at least, if not literally, complied with. If officers whose duty it is to send out or deliver election writs can decline and refuse to do so as to one precinct, they could as well do so as to all but one, which they might know would vote their own sentiments, and thereby deprive an honest majority of the right to vote upon a matter of gravest moment to their interests.

It is unnecessary to discuss other questions so ably argued and briefed by counsel on both sides.

We are of opinion, on the facts exhibited in this record, that the election for local option in Hunt county, on the eleventh of December, 1886, is, for the reasons we have given above, an absolute nullity, wherefore the judgment in this case rendered by the court below is reversed, and the prosecution dismissed.

NOTE.

CONSTITUTIONAL LAW—PROHIBITORY LEGISLATION. A liquor license law, the apparent scope of which is not to prohibit the sale of intoxicants, but to regulate it, with a view to obtaining a revenue, is not unconstitutional, as abridging the right of a citizen to pursue a lawful employment. In *re Bickerstaff*, (Cal.) 11 Pac. Rep. 393. A state may absolutely prohibit the manufacture and sale of intoxicating liquors, *Foster v. State*, 5 Sup. Ct. Rep. 97, 3 Pac. Rep. 534; *State v. Bradley*, 26 Fed. Rep. 289; or of any other article, *Powell v. Com.*, (Pa.) 7 Atl. Rep. 913; In *re Brosnahan*, 18 Fed. Rep. 62; *People v. Cipperly*, (N. Y.) 4 N. E. Rep. 107; *Butler v. Chambers*, (Minn.) 30 N. W. Rep. 308.

Such legislation is not in conflict with the provisions of the fourteenth amendment to the federal constitution, *State v. Bradley*, 26 Fed. Rep. 289; In *re Brosnahan*, 18 Fed. Rep. 62; *Butler v. Chambers*, (Minn.) 30 N. W. Rep. 308; nor is it a denial to any per-

son of the equal protection of the laws, *State v. Bradley*, 26 Fed. Rep. 289; nor a deprivation of property without due process of law, *Tanner v. Village of Alliance*, 29 Fed. Rep. 196; *State v. Bradley*, 26 Fed. Rep. 289; *Weiler v. Calhoun*, 25 Fed. Rep. 865; *In re Brosnahan*, 18 Fed. Rep. 62; *People v. Cipperly*, (N. Y.) 4 N. E. Rep. 107.

It is police regulation, *Tanner v. Village of Alliance*, 29 Fed. Rep. 196; *People v. Cipperly*, (N. Y.) 4 N. E. Rep. 107; *Butler v. Chambers*, (Minn.) 30 N. W. Rep. 308; as is also a provision requiring every licensed vendor to remove all obstructions from his window, to a clear view of the interior from the outside, on Sunday, etc., *State v. Doyle*, (R. I.) 4 Atl. Rep. 764; and one for the confiscation of intoxicating liquors kept and intended for unlawful use, *State v. Four Jugs, etc.*, (Vt.) 2 Atl. Rep. 586.

An ordinance to prohibit ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail, is not unconstitutional, as depriving any person of his property. It does not deprive any one who has previously engaged in such business of his property. He may sell his stock in trade in any way he can, except in such a way as will make him a keeper of such a place. *Tanner v. Village of Alliance*, 29 Fed. Rep. 196. But it has been held that, in so far as the Kansas constitutional amendment, prohibiting the manufacture of beer except for medicinal, scientific, and mechanical purposes, and the statutes passed in pursuance thereof, deprive parties of the use of their property, acquired previous to the adoption of the amendment, without compensation, they deprive them of their property without due process of law, within the meaning of the fourteenth amendment to the constitution of the United States, and are void, *State v. Walruff*, 26 Fed. Rep. 178; and that a petition for the removal of a proceeding for an injunction under the Iowa prohibition law, which sets forth facts showing that the defendant in such proceeding had vested property rights at the time the law went into effect which the injunction would operate to destroy, raises a question under the fourteenth amendment to the constitution of the United States, depriving a person of property without due process of law, giving the United States circuit court jurisdiction, *Kessinger v. Hinkhouse*, 27 Fed. Rep. 883; *Mahin v. Pfeiffer*, 27 Fed. Rep. 892.

An act providing that whenever any person is seen to drink in such house or shop, outhouse, yard, or garden, belonging thereto, any spirituous liquors or wines forbidden to be drank therein, it shall be *prima facie* evidence that such spirituous liquors or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein, and that on any trial for such offense such occupant or agent may be allowed to testify respecting such sale, is a constitutional exercise of the general power of the legislature to prescribe rules of evidence and method of proof. *City of Auburn v. Merchant*, (N. Y.) 8 N. E. Rep. 484.

The section of the Kansas prohibitory law which provides that the judgment for fine and costs for the violation of that law shall be a lien upon the premises where the intoxicating liquors were sold is not unconstitutional, as working a forfeiture, as the fine and costs are imposed, not upon the owner of the premises, but upon the person who violates the law, and the owner is simply a surety for their payment. *State v. Snyder*, 8 Pac. Rep. 860; *State v. Pfefferle*, 7 Pac. Rep. 597; *Harden v. State*, 5 Pac. Rep. 212.

A local-option law, providing that it should go into effect in any county after the people, by a popular vote, had so decided, is within the legislative discretion, and is not delegating the powers of the legislature to the people of the counties. *Weil v. Calhoun*, 25 Fed. Rep. 865.

BARRET v. SHELBYVILLE NAT. BANK and others.

(*Supreme Court of Tennessee.* February 17, 1887.)

NATIONAL BANK—COLLECTING USURIOUS INTEREST—FORFEITURE—WHO CAN ENFORCE—JUDGMENT CREDITOR.

The right of action against a national bank for collecting usurious interest, given by Rev. St. U. S. § 5198, to the person paying it "or his legal representatives," is not available to a judgment creditor of such person. *TURNER, J.*, dissenting.

Appeal from Bedford county. In chancery.

Ivie & Myers, for plaintiff in error. *Bearden & Bates*, for defendant.

SNODGRASS, J. The complainant is a creditor of Barret, Landis & Co., whose demand against them had (when the amended bill was filed in this cause, February 7, 1879) been reduced to judgment. The object of the bill and amended bill was to subject interest taken by the defendant bank of Barret, Landis & Co., upon the allegation that it was usury. The interest alleged to have been charged covered a period from the ——— day of ———, 1876, to the ——— day of ———, 1878, at the rate of 12 per cent. per an-

num, and amounted to several thousand dollars. It was also alleged that Barret, Landis & Co. were insolvent, and had made an assignment for the benefit of creditors; assets assigned amounting only to \$10,000, and the debts to \$1,000,000. The claim of complainant is of the right to recover, and appropriate to the satisfaction of this judgment, double the amount of interest taken of the debtor by the national bank, in violation of the provisions of section 30 of the banking act of 1864, under which act the Shelbyville National Bank organized and did business, (section now included in the Revised Statutes of the United States, §§ 5197, 5198;) and also, under state law, to recover the amount of usury so taken in violation of the laws of Tennessee.

The latter claim is not now insisted upon, as in this state, since the filing of the bill in this cause, the question has been settled that no such recovery can be had in the state courts. *Hambright v. National Bank*, 3 Lea. 40; overruling *Steadman v. Redfield*, 8 Baxt. 337, and following *Farmers' Nat. Bank v. Dearing*, 91 U. S. 29-37.

The issue is therefore narrowed to a single question, the right of a judgment creditor of an insolvent debtor to subject the forfeiture provided for in section 5198 to satisfaction of his judgment and its settlement, and depends upon the construction of said section of the Revised Statutes of the United States. That section is in the following language: "The taking, receiving, reserving, or changing a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his *legal representatives*, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States, held within the district where such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

By the terms of this section, the relief granted is confined to the debtor or his *legal representatives*, to be obtained by either only in an action in the nature of an action of debt, commenced within two years from the time the usurious transaction occurred. It does not, therefore, extend to the creditor of the debtor, as he is in no sense the debtor's legal representative; nor does it give to the creditor an action in equity to subject the forfeiture to the satisfaction of his debt. The right not being given, it cannot be supplied by intendment. No latitude of construction is permissible of a statute providing a forfeiture as a penalty for its violation, and a remedy for its recovery. He who seeks to recover the amount forfeited must be the person authorized to sue, and must bring the action provided for. No other can have the redress, nor can it be obtained in any other action. These are familiar principles, and need no citation of authority to sustain them.

The direct question as to right of creditor to sue, involved in this cause, has not been before the supreme court of the United States, so far as we are advised; but the statute in question has been often before that court in kindred aspects, and in each the plain intimations of the court have been that it was susceptible only of the construction which we have given it.

The chancellor dismissed this bill, and the commission of referees report in favor of affirmance of his decree. On exceptions opening the question now discussed, this court, at its last term, heard the case, and, speaking through Judge TURNER, disapproved the report of the commission, and reversed the decree of the chancellor. The defendant bank petitioned for a rehearing,

which was granted, and a reargument ordered at this term. Disagreeing with our predecessors, we are of the opinion that the decree and report were correct. The report is therefore approved.

Decree affirmed, and the bill dismissed, with costs.

TURNER, J., (dissenting.) I adhere to the opinion delivered at a former term, and file it as a dissent.

Complainant claims to be the creditor of Barret, Landis & Co. to the amount of about \$10,000; that his debtors are insolvent, and have made an assignment. He charges that the Shelbyville Bank was established under the banking act of the United States of 1864; that Barret, Landis & Co., between the years 1876 and 1878, did a large amount of business with the defendant bank; that the bank received from them several thousand dollars of usurious interest, the rate being 1 per cent. per month, in violation of the fiftieth section of the act of congress. He seeks to be substituted to all the rights, claims, and forfeitures that Barret, Landis & Co. have, under the provisions of the act of congress, to recover of the bank by reason of the taking, etc., of said usurious interest; that, in any event, he is entitled to recover of the bank the amount of usury collected contrary to the laws of Tennessee; an amended bill was filed charging a judgment on the debt. The prayer conforms to the allegations of the bill.

There were motions to dismiss and demurrers, which were overruled. The same defenses are relied on in the answer and are: That no recovery can be had under the statutes of Tennessee; that by section 50 of the act of congress the right to recover is confined to the party paying the usury, and his legal representative; and that a creditor is not such representative.

The first question is settled in favor of the defendant in *Farmers' Nat. Bank v. Dearing*, 91 U. S. 34; followed by this court in *Hambricht v. National Bank*, 3 Lea, 40.

Section 30 of the act of congress of 1864, which is section 5198 of the Revised Statutes, is as follows: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the corporation taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings under this title may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which such association is located, having jurisdiction in similar cases."

The question to answer is, can a creditor of the borrower recover? Is he a legal representative, in contemplation of the act? The construction to be given to the statute must depend upon its class. Of the one before us Justice SWAYNE says: "The thirtieth section is remedial as well as penal, and is to be liberally construed, to effect the object which congress had in view in enacting it." 91 U. S. 35.

In *Oates v. National Bank*, 100 U. S. 244, construing an act of congress, the court says: "The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction; and we should discard any construction that would lead to absurd consequences. We ought rather, adopting the language of Lord HALE, to be 'curious and subtle to invent rea-

sons and means' to carry out the clear intent of the law-making power, when thus expressed."

The statute makes the amount that may be recovered from the usurer a debt. The plain purpose and intent is to reimburse the borrower to the extent of the unlawful payment. The enactment is merely the declaration of a common-law right, with a prescription of the form of action in which the recovery may be, and the extent of that recovery. If the statute had stopped short at fixing the rate of interest which might be taken, and declaring the excess unlawful, then the payer would be the creditor of the payee to the extent of the unlawful payment which might be recovered in an action of *assumpsit* for money had and received. If it had stopped with the provision that party paying might recover, etc., there could be no question of the right of an assignee or executor or trustee or administrator to recover, nor of the right of a creditor to impound by attachment or garnishment, and appropriate the fund to the payment of a debt.

The receiver of the usury is a trustee for the borrower, and a court of chancery, upon inherent principles, will make him disgorge for the benefit of creditors. The usury in the hands of the lender, or, now appropriately, the amount paid unlawfully, is as much a part of the estate of the borrower as his goods and chattels in possession, or his choses in action, evidenced by notes, accounts, or promises to pay. Whenever one has in his possession, or has converted in any way the money of another, no matter how obtained, to his use, the law implies a promise to pay, and upon that implied promise debt or *assumpsit* is maintainable. The conversion, by whatever unlawful means, does not strip the estate of the true owner of its right. While the fund is in law the property of the borrower, or his right to sue for its conversion exists, it is subject to condemnation for the payment of his debts. If, then, the borrower or his creditor or assignee could have recovered, if the right to sue had been given alone to him, why should the addition of the words, "or his personal representatives," be construed to restrict to the borrower himself while in life? Would not such interpretation lead to the "absurd consequences" warned against in 100 U. S., already quoted? To hold that the borrower may alone control a part of his estate, subject to appropriation in the payment of his debts, in a way to defeat these debts, by a voluntary disposition of such part in direct violation of every rule of equity and good conscience, would be to hold that congress had provided the debtor with sure agencies to hinder and defeat his just creditors. The declaration of the statute that the borrower may recover the amount paid in violation of its provisions, is a declaration that the receiver of that amount is the debtor to the borrower; that he holds as trustee the moneys of the borrower, or has wrongfully converted them to his own use.

The debtor defendants are insolvent, and have made an assignment not embracing the *choses in action* sued for here. For what reason the omission occurs does not appear. The question is, shall this debt due to the insolvent, and which is certainly assets for the payment of debts, be denied to creditors simply because a bankrupt debtor fails or refuses to sue? It certainly was not the intention of the legislature to restrict the right of recovery to the narrow limits contended for. On the contrary, we are of opinion the term "legal representative" was intended to and does mean any one who may, for a good cause, represent the interest of the original borrower; as, for instance, a purchaser from him for value, an assignee in trust for the payment of debts, or a pledgee. Such is the principle of the holding of Judge DILLON in *Crocker v. First Nat. Bank of Chetopa*, Thomp. N. B. Cas. 320, 321, that it was a purpose of the law to repair the loss of the borrower, or reimburse his estate; and that an assignee in bankruptcy is, in respect of such claim which has injuriously affected and reduced the estate in bankruptcy, the legal representative of the bankrupt, within the meaning of the statute.

This suit may be properly said to be the suit of the debtor firm. It is party defendant to the bill seeking the relief and asking the account. A recovery will discharge *pro tanto* its debt. A recovery is, in fact and legal effect, its recovery, repairing its loss, and reimbursing its estate. On chancery court is the jurisdiction, and this suit is the mode prescribed by the act.

The decree is reversed. Exceptions to report of referees allowed, and the cause remanded. The bank will be charged with twice the amount of interest paid to or received by it in the usurious transaction with Barret, Landis & Co., within two years before the filing of the bill, and will be credited with reasonable expenses in procuring exchange, and by any just and valid debt it may have owned on Barret, Landis & Co. at the date of filing the bill, and which is set up by the answer, and sustained by the proof. As we have already seen the usury laws of the state cannot be applied, and, under the act of congress, a judgment is not necessary to a recovery by a creditor of the borrower. Therefore the demurrer to original bill should have been overruled.

TURNER v. TURNER.

(*Supreme Court of Tennessee.* February 5, 1887.)

1. MALICIOUS PROSECUTION—PLEADING.

The declaration in an action for malicious prosecution must aver want of reasonable or probable cause.

2. APPEAL—REFUSAL OF NEW TRIAL BELOW—PREPONDERANCE OF EVIDENCE.

The fact appearing upon appeal that the trial judge, although refusing to set aside the verdict, thought that it was against the preponderance of evidence, *held*, that the judgment should be reversed.

Appeal from circuit court, Wilson county.

W. H. Williamson, Martin & Beard, and Gribble Brantley, for plaintiff.
Goleday & Goleday & Stakes, for defendant.

SNODGRASS, J. There were two counts in the declaration in this case,—one for false imprisonment, the other for malicious prosecution. There was a demurrer to the latter count, because it did not contain an averment of want of reasonable or probable cause, and stated no cause of action. The demurrer was overruled. The action for malicious prosecution is only intended to apply to "cases where a criminal accusation is made against an innocent man, through malice, and in the absence of a fair and reasonable probability of its truth." *Raulston v. Jackson*, 1 Sneed, 134. In such case the declaration must contain this averment. *Evans v. Thompson*, 12 Heisk. 534. There is a very clear and well-settled distinction between the two cases, and the averment necessary in declaration in each case. New Code, § 3649; *Herzog v. Graham*, 9 Lea, 152.

The second count in the declaration in this case stated no cause of action, and the demurrer was improperly overruled.

Another error complained of is that the verdict appears not to have met the approval of the circuit judge, although he allowed it to stand.

This objection is also well taken. The circuit judge did not believe that the preponderance of evidence was in favor of the verdict. It should for this reason have been set aside. The law applied by this court to sustain a judgment founded upon the verdict of a jury, where there is any evidence to support it, is based mainly upon the consideration that the circuit judge has approved the verdict because satisfied with it, and not because he has approved it although dissatisfied with it. The rule, and the reasons for it, are well stated in the case of *England v. Burt*, 4 Humph. 401, 402, and need not be repeated here. In that case the judgment was allowed to stand because the circuit judge only stated "he did not know whether, if he had been of the jury, he would have considered the evidence sufficient," etc. But here it

clearly appears that the judge thought the preponderance was against it, and merely deferred to the judgment of the jury. This must not be allowed. Otherwise this court would sit in each case in the relation of the circuit judge to each verdict and trial, and he would be but the medium through which the case was passed to us for consideration, requiring this court to act under the rule operative upon the circuit judge to weigh the evidence, and determine where the preponderance was, instead of, under the rule long settled by this court, to determine the case by affirming his judgment when it was upon a verdict sustained by any legal evidence which was sufficient to authorize it. We have held at this term that where, in an action of damages for cost, the circuit judge had expressed dissatisfaction with the *amount* of the verdict, we would not reverse, because, notwithstanding such dissatisfaction, it was his duty to let such verdict stand, unless it was so excessive as to indicate passion, prejudice, corruption, or other improper influence operating to produce it, of which we could judge from the record as well as he; but the rule now asserted was emphasized in that case, and where the dissatisfaction is not with the *amount*, but the *fact*, of the verdict, it will not be allowed to stand.

The judgment will be reversed, and the case remanded.

Defendant in error will pay the cost of appeal.

LOGAN CO. NAT. BANK v. TOWNSEND.

(Court of Appeals of Kentucky. February 10, 1887.)

1. TRIAL—VERDICT—WHEN IT MUST FIX THE EXACT AMOUNT.

Civil Code Ky. § 329, providing that a general verdict that either party is entitled to recover money of the adverse party must assess the amount of recovery, does not apply where the amount is not made an issue of fact or left to the jury, but involves simply an arithmetical calculation according to the uncontroverted allegations and figures appearing in the pleadings.

2. PRINCIPAL AND AGENT—RATIFICATION BY ACCEPTING THE BENEFITS.

Although its cashier may not have had authority to make a purchase of certain bonds, yet the bank having afterwards appropriated the bonds to its own use, it cannot thereafter repudiate the authority of the cashier to make the purchase in a suit by the vendor of the bonds on the contract.¹

3. NATIONAL BANKS—INVESTING IN SECURITIES CONTRARY TO LAW.

Where one sells bonds to a national bank at a certain price, the bank agreeing to resell the bonds to the vendor at the same price or less, but, the bonds subsequently appreciating in value, the bank refused to resell them, *held*, in a suit by the vendor for the breach of contract, the bank cannot escape liability by setting up that it had no authority, under the national bank act, to buy the bonds, as it might have discharged its obligation by returning the bonds, and receiving back the purchase money; and to permit it to retain the bonds would be to allow it to profit by its own violation of the act.

Appeal from circuit court, Logan county.

Browder & Edwards, for appellant. *John S. Rhea* and *Wm. Lindsay*, for appellee.

LEWIS, J. Appellee states in his petition that in June, 1879, he sold and delivered to appellant bonds of the county of Logan of the face value of \$12,800, for which it paid him at the rate of 68½ cents on the dollar, and, as a further consideration, agreed to replace the bonds, upon demand, at the same price or less; that he has offered to repay the amount so paid to him therefor, and demanded the return of the bonds, which appellant refused to deliver, and hence he sues for a breach of the contract, and asks judgment in damages for the amount of the difference between the price of 68½ cents, paid by him, and the par value of the bonds, which he avers they were worth when the demand was made. Appellant denies it purchased the bonds, or made the agreement to replace them, as alleged in the petition.

It seems to be established that, at the time mentioned, appellee sold the

¹ See *Nichols v. Shaffer*, (Minn.) 30 N. W. Rep. 383, and note.

bonds, at the price and upon the terms stated, to H. Barclay, Jr., who was the cashier of appellant, the bank, and the issues of fact are whether he did so on his individual account or for appellant. Upon these issues the jury returned the following special findings: "Did Townsend sell the bonds to the defendant, the bank, or to Hugh Barclay, Jr.? *Answer.* To defendant bank. Q. What was the contract made at date of sale? A. That defendant would replace the bonds to plaintiff at the price paid at the time, or less." They also returned the following general verdict: "We, of the jury, find for the plaintiff." And thereupon the court rendered judgment for the sum of \$4,032.

As the testimony of both appellee and Hugh Barclay, Jr., tends to sustain the special as well as the general verdict, we cannot say they are palpably against the evidence, and are not, therefore, authorized to disturb them.

It is contended that the court erred, to the prejudice of appellant, in rendering judgment for \$30 in excess of the amount proved. The amount for which the judgment was rendered is the precise sum of the difference between the amount paid to appellee at the rate of 68½ cents on the dollar and the par value of the bonds; and, although the evidence shows some of the bonds were paid for at the rate of 69 cents on the dollar, which would make about the difference of \$30 mentioned, yet the court had to be controlled by the uncontroverted allegations in the petition in respect to the amount paid.

Section 929 of the Civil Code provides: "If, by a general verdict, either party be entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery." But this section was clearly not intended to apply when the amount of recovery is not made an issue of fact, or left to the discretion of the jury.

In this case, after the issues of fact were settled by the jury, the amount of recovery did not depend upon the discretion of either the court or jury, but upon a simple arithmetical calculation according to the basis fixed by the pleadings; for by subsection 4, § 126, allegations concerning value or amount of damage, accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise to pay such value or damage, such as was contained in the petition in this case, need not be proved unless traversed.

It is contended by counsel that there are three distinct grounds, upon each of which the demurrer to the petition, as well as the motion for a peremptory instruction to the jury, ought to have been sustained. These we will now consider.

1. The contract is void for want of mutuality, and for want of sufficient consideration. The contract, as stated in the petition, and about the nature and terms of which it seems to us there is no room for controversy, was fully executed by appellee, but only in part by appellant; and it is for a breach of the executory part this action was brought; and, as there was nothing more to be done by appellee to entitle him to the right to demand a full performance by appellant of what it agreed to do, there can arise no question of a want of mutuality; for the consideration for what remained to be done, as well as what had been done by appellant, had already passed from him, and been received by it. It is not a pertinent inquiry whether either the consideration of the contract was sufficient, or, as has turned out, it was a judicious one. It was made at the instance of appellant or of its cashier, and, as we must presume, with the expectation of profit; and if the bonds had been kept, instead of being sold by appellant, no loss would have resulted from restoring them upon the demand of appellee, while a greater than the legal rate of interest would in the mean time have been realized on the amount invested in them.

2. The next ground is that the contract is not within the scope of the cashier's powers, and consequently not binding on the bank. The special finding

of the jury reduces the discussion of this question to very narrow limits,—in fact, precludes appellant from denying the authority of the cashier to make the contract; for if appellee sold the bonds to appellant, the bank, it necessarily follows they were appropriated and used by it; and having thus derived, or elected to avail itself of, whatever benefit might flow from the contract, it cannot now in good faith repudiate the contract, or any part of it; nor deny the authority of the cashier to make it.

3. The last ground is that the contract is *ultra vires* the corporate authority of the bank, in direct violation of its charter, and consequently is no such an obligation as will charge the bank, or make it to any extent, either in law or conscience, liable in damages or otherwise for breach of the conditions. It seems to us that, if the proposition be conceded, it would not avail appellant; for, if it had no authority, under its charter, to purchase the bonds, it cannot in justice and conscience refuse to abide by the judgment in this case, which involves nothing more than the return of the bonds, and receipt of what it paid for them. To do less cannot be justified without permitting it to profit by its own wrong in violating the law of congress under which it exists.

Probably according to a fair construction of the national bank act the power is not expressly given to appellant to purchase and deal in bonds of the character of those in question, but neither is it expressly prohibited by the act to do so. And there is a proper and well-recognized difference between "the case of an engagement made by a corporation to do an act expressly prohibited by its charter or some other law, and a case of where legislative power to do the act has not been granted." See *Hitchcock v. Galveston*, 96 U. S. 341, and numerous authorities there cited. In that case the following from *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, was quoted with approval: "Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party, relying on the promise and in execution of the contract, to expend money and perform his part thereof, the corporation is liable on the contract."

If the special findings of the jury in this case be taken as true, there needs no argument to show that the rule there laid down applies to the contract we are considering; and to adopt the opposite of that rule would invite a disregard of the provisions of the national bank act, as well as fraud and bad faith towards those dealing with a corporation existing under it.

It is not stated in argument or pleaded that appellee has waived his rights under the contract sued on, or that he delayed for an unreasonable length of time in demanding performance by appellant; and, as the rulings of the lower court upon the pleadings, as well as regards the instructions to the jury, are consistent with the views expressed in this opinion, the judgment must be affirmed.

STEWART v. HOSKINS and others.

(Court of Appeals of Kentucky. February 12, 1887.)

EQUITY—SALES—TITLE OF PURCHASER WHERE JUDGMENT IS APPEALED FROM AND REVERSED.

Where a judgment directing land to be sold free of lien is appealed from, and is reversed, but, no *supersedeas* having been executed, and the land has been sold in the mean time, *held*, as the judgment was reversed because erroneous, but not void, the purchaser at the sale acquired good title, and the successful appellant, who was claiming a lien on the land, is not entitled to it, even though the plaintiff in the action was the purchaser, but he is entitled to a personal judgment against the plaintiff (as such, but not as purchaser) for the amount of his claim.

Appeal from circuit court, Knox county.

This action was instituted by appellant, William Stewart, to subject land of Levi Hoskins to the payment of a judgment against said Hoskins in favor of appellant.

Wm. Lindsay and Isaac A. Stewart, for appellant. *J. W. Rodman*, for appellees.

PRYOR, C. J. Levi Hoskins died, leaving a last will, and surviving him his widow and three children. By his will his estate or land was divided equally between his children; and two of them, Levi and John, purchased the interest of their sister, making them the owners of the entire land, subject to the dower interest of their mother. John also claims to have purchased the interest of his brother, Levi, and to be the sole owner of the land in controversy. The facts conducing to show the purchase present this state of case: The father of John and Levi, after making his will, seems to have surrendered his control over his property, and permitted his children to use and dispose of it as if they held the land by purchase from him. He permitted or consented to the sale by the daughter; and Levi, being anxious to obtain the loan of \$1,000, borrowed the money of John Hoskins, his brother, and executed to him a writing by which he secured him in the loan by giving him a lien on his interest in this land, John agreeing also to support his father and mother. That writing was executed in the year 1868, and was consented to by the father, but was never recorded. The appellant in the present action, William Stewart, holding a claim against Levi Hoskins, reduced it to judgment; had an execution issued, and returned no property found, and one subsequently issued that was levied on the land; filed his suit in equity to have the one-half interest of Levi Hoskins sold to satisfy his judgment. To that action, John, Levi, and all the parties in interest were made defendants. It is alleged by Stewart that John Hoskins had advanced to Levi in some way \$1,000, and had taken a lien on the land to secure it, but how he does not know, and John is called on to answer, and state the nature of his claim.

In 1876, after this suit had been filed, Levi executed to John a bond purporting to be an absolute sale of the land by Levi to him, and executed, as they say, in pursuance of the real purpose and meaning of the writing executed in the year 1868. The first writing is only a mortgage, and the last evidences an absolute sale. The proof conduces to show a purpose to sell in 1868, when the writing of that date was executed; but this view of the transaction is so much at variance with the writing itself that it must be held to be, what its terms plainly import, a mortgage, and the sale in 1876, made after the equity of the appellant had attached, cannot affect the rights of the appellant.

The writing of 1868 is as follows:

"In consideration of one thousand dollars paid in hand, and the maintenance of father and mother, I let John Hoskins till my land, and charge him no rent, and I am not to pay any interest on said money. The said John Hoskins has a lien on my land for the one thousand dollars until paid.

[Signed]

"LEVI HOSKINS.

"September 2, 1868."

When this contract was made or loan effected, the father, who was invested with the fee, was living, but he consented to the arrangement. John was in possession under the purchase or mortgage, supporting his father and mother, and continued in the possession until this action was instituted and judgment rendered, paying the taxes, and, as between the parties, was regarded as the absolute owner. The father, consenting to the transaction, could not have defeated the lien of John on the land to the extent of the money advanced, and at the death of the old man the inheritance passed to Levi, subject to this incumbrance.

When this action by William Stewart, the present appellant, was instituted, he knew of the existence of the lien, and called on the appellee John Hoskins to make discovery. John Hoskins filed an answer to the petition of Stewart, setting up his lien or claim under the two writings of 1868 and 1876; and, when filed, a general demurrer was sustained to the answer, for the reason that it constituted no defense, and a judgment rendered subjecting one-half the land to the payment of the appellant's (Stewart's) judgment against Levi. From that judgment an appeal was prosecuted by John Hoskins to this court, and the judgment reversed; this court adjudging that the answer presented a defense to the action. While the appeal was being prosecuted, the land was sold, and purchased by William Stewart, the sale confirmed, and a conveyance made to him by the commissioner.

On the return of the case, the present appellee, John Hoskins, moved to set aside the sale, and cancel the conveyance. That motion was properly overruled. The land had been sold under a judgment holding there was no lien, and the purchaser took it free of that incumbrance upon it. See *Yocum v. Foreman*, 14 Bush, 494. The right to the lien, however, was litigated on the return of the case, and very properly, as John Hoskins had no remedy against the appellant, William Stewart, until his lien was established. Levi Hoskins was insolvent; and if, by the litigation between the appellant and John Hoskins, the latter was adjudged to have a prior lien, then the appellant, having appropriated to his own use, or rather having acquired title to the land from a judgment that was erroneous, but under a valid sale, must account to the appellee John Hoskins for the value of the land bought, to the extent of the lien. If the land is not worth the lien, then the value is all that can be recovered.

The chancellor below, instead of rendering a personal judgment, determined that John Hoskins had a prior lien, and subjected the land to that lien, when it had already been sold free of that incumbrance. A judgment may be erroneous; but, the court having jurisdiction of the subject-matter and the parties, all sales under it, if valid otherwise, will pass title. The remedy to prevent the sale is by a *supersedeas*, but none seems to have been executed in this case. The party who has been deprived of his property or his lien on land by an erroneous judgment is not without remedy against his adversary who has acquired title to the property under the judgment. He can require him to account for the value of the property thus obtained, and such should have been the judgment below. The appellee John Hoskins having been deprived of his lien on the land by the purchase made by the appellant, he is entitled to recover of the appellant the amount of his lien, with the interest, in a personal judgment against him; it appearing from the record that the land was worth \$1,500 at the time of appellant's purchase. It is not a lien on the land because it was sold free of the lien.

As John Hoskins is insisting, since the return of the cause, that the sale of 1868 was a purchase, and desires the land, the appellant may, if he sees proper, reconvey the land to the appellee John Hoskins, as this is the right asserted by the latter; but, if he fails to do so, a personal judgment must be rendered against him, and upon the payment of the debt by the appellant the chancellor will require John Hoskins to assign to the appellant, without recourse, the judgment against Levi Hoskins.

The judgment enforcing a lien on the land in favor of John Hoskins is reversed, as no lien exists, and cause remanded for proceedings consistent with this opinion. *Yocum v. Foreman*, 14 Bush, 494.

ANDERSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. February 15, 1887.)

CONSTITUTIONAL LAW—JURISDICTION OF COURTS—EFFECT OF LEGISLATION.

A state constitution providing that the circuit courts of the state shall have original jurisdiction of all criminal offenses, those courts cannot be deprived of such jurisdiction except by legislation, and, the instant such legislation is repealed or expires, the jurisdiction of the circuit revives. So, while Magoffin county was in the Sixteenth judicial district, a criminal court was established for that district, and was given exclusive criminal jurisdiction for the district, and appellant was indicted for murder; but, before his trial, the county was put in another district, but the act, although repealing the criminal court of the Sixteenth judicial district as to Magoffin county, did not, in express terms, restore criminal jurisdiction to the Magoffin circuit court. *Held*, the latter court had jurisdiction, nevertheless, to proceed with the trial of the indictment.

Appeal from circuit court, Magoffin county.

Wood & Day and *W. W. McGuire*, for appellant. *P. W. Hardin*, for appellee.

BENNETT, J. Under an indictment for the murder of Procter Arnett, the appellant was tried and convicted, and sentenced to the state penitentiary for life. The lower court having overruled his motion for a new trial, he has appealed to this court. According to the testimony of several witnesses, Procter Arnett, on the first Monday in August, 1885, came from the direction of a lively stable, and stopped near the corner of the court-house yard fence, in the town of Salyersville, and was looking across the street; that appellant came over the stiles at the upper corner of the court-house, and came into the street, and when within 30 yards of Arnett, and while Arnett was standing in the position above indicated, fired upon him with a pistol, and wounded him in the abdomen, from which wound he died during that evening. These witnesses also swear that they were in plain view of Arnett; that they saw him when he came to the place, and while he was standing there; and that when shot he threw both hands down to his abdomen, and that he had no pistol, and was making no demonstration towards appellant whatever. Other witnesses swear that Arnett first presented a pistol at appellant and snapped it, and made use of threatening language. It also appears from the evidence that appellant, and several others arrayed on his side, and the deceased and Calloway Howard, on the other side, were, just a short time before the killing, engaged in a fight with pistols in another part of town. Which was to blame in that fight, the proof does not clearly demonstrate, nor is it material to decide. Some witnesses fix the blame on one side, and some fix it on the other. But, according to the testimony of the witnesses for the commonwealth, the deceased had ceased to fight, and had become separated from the appellant, and was standing still and unarmed, and appellant coming up with him made an unprovoked attack upon him. And, while it is true that the appellant's witnesses contradict the witnesses for the commonwealth, yet the jurors were the sole judges of the credibility of the witnesses, and the weight their evidence was entitled to. The jury, in the exercise of this right, believed that the witnesses for the commonwealth gave the true version of the affair, and found the appellant guilty of murder, and fixed his punishment at confinement in the penitentiary for life.

We are not prepared to say that the weight of the evidence is against the finding of the jury; on the contrary, their verdict seems to be in accordance with the evidence.

The court instructed the jury upon the law of murder, manslaughter, and self-defense. The instructions upon these subjects were full, correct, and complete. Indeed, the instruction upon the law of self-defense is very favorable to the appellant. We are also of the opinion that the court did right in refusing the instructions asked by the appellant.

We can see no error to the substantial right of the appellant committed by the court in admitting evidence to go to the jury. We are also of the opinion that the facts and circumstances, as developed in the record, show a strong case of conspiracy on the part of appellant and his co-defendants.

While Magoffin county was in the Sixteenth judicial district, a criminal court was established for that district. That court was given exclusive jurisdiction of all criminal matters arising in the district. While the criminal court was in existence in Magoffin county, the appellant was indicted; but before his trial and conviction Magoffin county was put in the Thirteenth judicial district, and the criminal court for Magoffin county was repealed, but the act repealing the criminal court as to Magoffin county did not, in express terms, restore criminal jurisdiction to the Magoffin circuit court. It is now contended that the Magoffin circuit court had no jurisdiction to try the appellant. This position cannot be sustained, for the reason that the circuit courts of the state, by the constitution of the state, have original jurisdiction of all criminal offenses. And these courts cannot be deprived of that jurisdiction except by direct legislation. And when once deprived of their jurisdiction, by legislation, that deprivation of jurisdiction continues so long, and only so long, as the legislation is in force; and when that legislation is repealed or expires, then, by virtue of the constitutional provision, *eo instante* the jurisdiction of the circuit court is restored.

The judgment of the lower court is affirmed.

JONES v. COMMONWEALTH.

(Court of Appeals of Kentucky. February 17, 1887.)

GAMING—INDICTMENT—CRAP-BOARD.

Gen. St. Ky. c. 47, art. 1, § 6, punishing any one who shall set up, exhibit, or keep for himself any faro-bank, gaming table, or contrivance used in betting, an indictment under this statute merely averring that the contrivance by which or upon which the money was won or lost was commonly called a "crap-board," without alleging that such a contrivance was ordinarily used for purposes of gaming, is not sufficient, or within the prohibition of the statute.

Appeal from circuit court, McCracken county.

Appellant was indicted for setting up, carrying on, and conducting a contrivance used in betting, described as what is commonly called a "crap-board" and dice, whereby money was bet, won and lost.

T. E. Moss, for appellant. *P. W. Hardin*, for appellee.

PRYOR, C. J. The case of *Com. v. Monarch*, reported in 6 Bush, 298, is conclusive of the questions made in this case. It is essential that the facts constituting the offense should be set forth in the indictment, and the mere averment that the contrivance by which, or upon which, money was won and lost, was commonly called a "crap-board," is insufficient, as it does not appear that such a board or contrivance was ordinarily used for the purposes of gaming. It must be a contrivance for gaming, as the mere use of an ordinary chess or checker board for the one betting, upon which money might be won and lost, is not within the prohibition of the statute, in the absence of an averment and proof that it was a gaming board, and used for that purpose.

Judgment reversed, and remanded for a new trial consistent with this opinion.

JONES v. LANGDON.*(Court of Appeals of Kentucky. February 12, 1887.)***VENDOR AND VENDEE—BOND FOR TITLE—OBLIGEE MAKING GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS—OBLIGOR RECEIVING BACK THE BOND.**

Where the owner of land gave a bond for title, and, the obligee in the bond making an assignment for the benefit of creditors, the owner of the land undertook to cancel the transfer by receiving back the bond, and releasing the purchase money, *held*, he did not thereby reinvest himself with title, and he could not recover of a trespasser for cutting and carrying off timber from the land.

Appeal from circuit court, Pulaski county.

This is an action by appellant, Allen Jones, to recover damages of appellee, James Langdon, for cutting and taking away timber from land which appellant claimed to own.

O. H. Waddle, T. Z. Morrow, and W. C. Curd, for appellant.

LEWIS, J. As appellant was not in possession of the land from which the timber was taken, it was incumbent on him to show title in himself in order to recover damages therefor. He claims under Sutton, to whom a patent for 300 acres, whereon the timber grew, was issued in 1856, to whose assignor a head-right certificate was issued, in virtue of which an entry and survey were made about the year 1804. Appellee offered in evidence a patent issued to Fitzpatrick & Stewart, in 1835, for 1,300 acres, covering the 300 acres, under a treasury warrant in virtue of which an entry and survey were made in 1834. But he does not trace his title to the patentee. It is not necessary to determine whether the patent to Fitzpatrick & Stewart is, under the act of 1815, inferior to the one to Sutton, or whether, under the act of 1835, it is, as counsel contends, absolutely void; for it appears that in February, 1880, appellant sold the 300 acres of land to J. M. Clark & Co., and executed to them a covenant to convey the title, and soon thereafter, and before the cutting of timber complained of, J. M. Clark & Co. conveyed the land to Henry Mack, in trust for the benefit of their creditors. It is shown that appellant afterwards canceled, or attempted to cancel, his trade with Clark & Co., by releasing the purchase money, and receiving back his title-bond. He also offered to show that one Lewis bought up the most of the debts on Clark & Co., and purchased of the trustee all the real and personal property of Clark & Co., and took possession of the same; but the evidence as to the purchase of the debts and property by Lewis was excluded by the court. The title having been conveyed to Mack, the trustee, clearly appellant had no right to maintain the action; for it was not in the power of Clark & Co. to reinvest him with the title, and, even if the assignee did sell to Lewis, as it was attempted to be shown, and the sale had been evidenced by writing, which does not appear, that did not invest appellant with the title, or the right to maintain this action.

As this record appears to us, the lower court did not err in giving the peremptory instruction to the jury, and the judgment must be affirmed.

BULLOCK v. FALMOUTH & CHIPMAN HALL TURNPIKE ROAD CO.*(Court of Appeals of Kentucky. February 15, 1887.)***1. CORPORATIONS—SUBSCRIPTION TO STOCK OF UNINCORPORATED COMPANY—CONSIDERATION—ESTOPPEL.**

Where one, prior to the incorporation of a turnpike company, subscribes a certain amount to its capital stock, to be paid when the incorporation is completed and work begun, in an action, brought after the incorporation and the commencement of the work, to collect the subscription, *held* the subscription was not a mere voluntary donation, but was enforceable, having been made in consideration of receiving

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a property right as stockholder in the road; and other persons having subscribed on the faith of that subscription, and work having been commenced, the subscriber was estopped to deny the subscription.

2. STATUTE OF FRAUDS — CONTRACTS TO BE PERFORMED IN A YEAR — SUBSCRIPTION TO STOCK.

A verbal subscription to the stock of a company, to be paid when the company is incorporated, is not within the statute of frauds, (Gen. St. Ky. c. 22, § 1,) providing that no action shall be brought to charge any one upon any agreement which is not to be performed within one year, unless the agreement is in writing. The statute refers to such contracts as are not to be performed within a year from the making of them, not to such as *may* be performed within that time.

Appeal from circuit court, Pendleton county.

C. H. Lee, Geo. R. McKee, J. T. Simon, and O'Hara & Bryan, for appellant.
Leslie T. Applegate, for appellee.

BENNETT, J. The appellant and others, believing that the construction of a turnpike road from Falmouth to Chipman Hall, in Pendleton county, would be beneficial to their private interest, as well as that of the public, agreed to incorporate themselves, under chapter 56 of the General Statutes, into a company for the purpose of constructing the road. Pursuant to this agreement, articles of incorporation were drawn up, and signed and acknowledged, by appellant and others. The company was organized thereunder as the Falmouth & Chipman Hall Turnpike Road Company, and within a short time thereafter commenced constructing the road. The means necessary for the construction of the road was to be furnished by subscriptions to its capital stock. Many persons did subscribe to the capital stock, by signing their names, together with the amount they wished to subscribe, to a subscription paper. The appellant, prior to the incorporation of the company, agreed verbally to subscribe \$1,000 to the capital stock of the company, for the purpose of constructing the road; the sum to be paid as soon as the company was organized, and the construction of the road commenced. After the company was incorporated and organized, the appellant often recognized his liability to pay the \$1,000 as soon as the work of constructing the road was begun; and, after the work of constructing the road was begun, he promised to pay the \$1,000. But afterwards, when the construction of the road had been pushed nearly to completion, the appellant, for the first time, refused to pay the \$1,000. Thereupon the appellee brought suit in the Pendleton circuit court against the appellant for its recovery. The trial of the cause resulted in a verdict by the jury in favor of the appellee for the whole amount claimed. The lower court overruled appellant's motion for a new trial, and rendered judgment against him, upon the verdict of the jury, for the amount claimed. He has appealed to this court.

The case of *Twin Creek & Colemansville Turnpike Road Co. v. Lancaster*, reported in 79 Ky. 552, was upon the following state of facts: "We, the undersigned, for the purpose of constructing a turnpike road from ——— to ———, promise and agree to subscribe the amounts set opposite our respective names to the capital stock of a company to be organized for the purpose, and to pay the same in such installments as may be called for by the proper officers of such company. And we further agree that our said subscriptions may be subject to a call of ten per cent. as soon as such a company or corporation is completed or organized." This court held in that case that the association formed under the General Statutes was nothing more than a private corporation; and, although the improvement contemplated was for the public good, yet the profits arising from the use of the road inured to the benefit of the stockholders; and the contract or subscription, entered into prior to the organization of the company, created such an obligation as rendered the subscribers liable for their subscriptions. The court also said: "The purpose of signing the subscription was to enable the subscribers to organize and form a corporation that

would inure to the benefit of all. It was, in fact, a mutual agreement, by which each subscriber pledged himself to the other to pay a certain sum of money, in order to perfect the organization and complete the enterprise. A subscriber or partner in an intended undertaking, subscribing an agreement to take measures to carry out the same, cannot discharge himself from liability, or repudiate the concern to which he may have pledged himself."

This case is like that case in nearly every essential particular, except in this case the appellant's agreement to subscribe was verbal. In this case, as in that, the agreement to subscribe was not intended as a mere voluntary donation: But the agreement to subscribe was intended to effect an organization for the purpose of building the road; and when the organization was effected, and the construction of the road commenced, the money was to be paid and used in completing the road, which, when finished and opened to the use of the public, would advance the private interest of appellant and his associates, as well as the interest of the public. Now, the company having been organized upon the faith of appellant's agreement to subscribe \$1,000 to the capital stock, and others having subscribed to the stock upon the faith of that agreement, and the work of constructing the road having been commenced, upon the faith of that agreement, it is too late for the appellant to withdraw from the agreement. To do so would be a fraud upon the rights of his associates, who embarked in the enterprise, and put their money therein, upon the faith of his promise. Also, under the circumstances of this case, the appellant's agreement being verbal makes no difference. He is bound by it as much so as if the agreement had been in writing; because the agreement to pay the \$1,000 was not intended as a mere voluntary donation, but was an agreement to pay \$1,000 to be used in the construction of the road, when the company should be organized, and the work thereon commenced. He was (upon this payment) to have, in common with his associates, a property right in the road to the extent of \$1,000, and receive his proportion of profits arising from the earnings of the road. So the consideration for the agreement was valuable, and, there being nothing in the statute of frauds requiring such an agreement to be in writing, it is as binding upon him as if it had been in writing.

Also the contention that the agreement comes within the provision of the statute of frauds which requires contracts, not to be performed within a year from the making of them, to be in writing, is not well taken; for the reason that the statute refers to such contracts as are not to be performed within a year from the making of them, and not to such contracts as may be performed within a year from the making of them. Here the organization of the appellee company, and the beginning of the construction of the road, could be performed within a year from the time of appellant's agreement.

Where a company is authorized to issue its capital stock, and put it upon the market for sale; and a person wishing to purchase the stock, as stock, merely as a judicious investment, agrees with the company to purchase so much of the stock at an agreed price; and the company, without having delivered the stock or tendered it to the purchaser, sues for the recovery of the agreed price,—then the rule is that the company cannot maintain such an action, because the company still holds the property, and the law will not permit it to withhold the property from the purchaser, and recover the agreed price of it. In such a case, the company's remedy would be confined to an action for the recovery of such damages as it might have sustained, such as the loss of a bargain by reason of the purchaser's failure to comply with his contract. This rule was correctly stated in the case of *Mt. Sterling C. Co. v. Little*, 14 Bush, 431. But the rule, by inadvertence, was incorrectly applied to the state of facts before the court. The same rule announced in the case of *Twin Creek & Colemanville Turnpike Road Co. v. Lancaster*, *supra*, and approved in this case, should have been applied to the facts of that case;

and to the extent that the opinion in that case was made to apply to the facts of it, it is overruled.

The instructions given by the lower court to the jury correctly stated the law of the case.

The judgment of the lower court is affirmed.

HAHN and another v. TRUSTEES OF TOWN OF BELLEVUE.

(*Court of Appeals of Kentucky.* February 15, 1887.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ABUTTING PROPERTY OWNERS—LIABILITY OF TOWN.

Where a town made a contract for the improvement of its streets, by which the contractor was to look to the abutting property owners for compensation, and in no event to the town, except for the cost of making intersections where the streets crossed, each party supposing at the time that the town had power to bind the property owner by such contract, but, the work being completed, and some of the property owners refusing to pay, it was decided, in a suit brought against them, that the town had no power to make the contract, and they were not liable. The town also refusing to pay, the contractor brought this suit against it, asking that he be allowed to remove all the improvements made. *Held*, if he had tendered back the money paid by the city for the street intersections, and the sums paid by the property owners who had paid, he might have recovered, as a municipal corporation obtaining property under a contract which it had no power to make cannot refuse compensation, and yet retain the property.

2. SAME—STATUTE OF LIMITATIONS.

The act of the town in making the contract, and afterwards assessing the property, and continuing to assert its power to bind the property holders until the court decided that it had no such power, does not constitute fraud, actual or constructive, as against the contractor; and Gen. St. Ky. c. 71, art. 3, § 6, providing that in actions for relief from fraud the cause of action shall not be deemed to have accrued until the discovery of the fraud, does not apply.

Appeal from chancery court, Campbell county.

John S. Ducker, for appellants. *T. P. Makibben*, for appellees.

HOLT, J. The appellants, Hahn and Trapp, entered into a contract, in 1875, with the appellees, the trustees of the town of Bellevue, for the improvement of a street, both parties being then under the mistaken opinion that the charter of the town gave the power to impose the cost thereof upon the abutting property. By the contract, the appellants were to look alone to the assessments upon the abutting property owners, and in no event to the town, for their compensation, save as to the cost of intersections with other streets, which the town was to pay. The steps looking to the collection of the assessments were, under the charter, to be taken by the town. The appellants furnished the material and did the work. Some of the abutting lot-owners paid their assessments without question. Others failing to do so, the town brought suit to compel it; and this court, on June 16, 1880, decided that the charter of the appellee did not give the power to improve a street at the expense of the property owners. Thus they were released. The appellants then sued the town for the balance due them, but this court, on March 8, 1884, held that no implied promise upon its part to pay for the work arose by reason of the non-liability of the lot-owners. This decision was based upon the rule that corporations cannot be held liable upon implied promises by reason of benefits received, and it is founded upon the fact that corporations, as creatures of the statute, have no powers, save those given by the law which brought them into existence. The appellants, on April 25, 1884, brought this action, seeking a judgment under which they can remove the material used by them in the construction of the street, save at the intersections with other streets, and excepting also that portion of it, and to its center, in front of the lots of those who paid their assessments. Their right to maintain such a suit is denied. It is also pleaded in defense that a public nuisance would

thereby be created; that it would not only destroy the value of the intersections and the work fronting on the lots of those who paid their assessments, but also the adjoining sidewalks; that, when this action was brought, more than five years had elapsed since the completion of the work, and that limitation therefore bars it.

It was said by the supreme court of the United States in *Marsh v. Fulton Co.*, 10 Wall. 676: "The obligation to do justice rests upon all persons, natural and artificial; and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." It strikes the mind at first blush that this is true, and that a municipal corporation, obtaining property under a contract which it had no power to make, cannot hold it, and yet refuse compensation. The appellants have, however, received pay for the intersections. Some of the assessments have also been paid to them, and at least one adjoining property owner who has paid his assessment is resisting a recovery upon the same grounds, substantially, as those presented by the town. No offer to refund or tender of the amount thus received has been made by the appellants. If this had been done, we should be inclined, in obedience to the dictates of justice, to permit a recovery by the appellants, did not the plea of limitation stand in the way.

By our statute, an action for the recovery of personal property, or upon an implied contract, must be brought within five years; but it further provides that, if relief be sought upon the ground of fraud, the cause of action shall not be deemed to have accrued until its discovery. It is not claimed that there was any actual fraud in this instance, but that the conduct of the appellee amounted to constructive fraud; that, by making the contract, suing for the assessments, and continuing to assert its power to do all this until the decision of this court on June 16, 1880, it estopped itself from relying upon the lapse of time; and that the statute did not begin to run until the opinion of this court was rendered, when, for the first time, it was discovered that the town had no such power.

It is true that the saving in the statute applies to cases of constructive fraud. *Cotton v. Brown*, MS. opinion, (March 25, 1882.) This is because, in such cases, the party ought not in conscience to avail himself of the lapse of time. Legal or constructive fraud, however, includes such acts as, although not originating in any evil design or intention to perpetrate a fraud, yet, by their tendency to deceive or mislead others, or to violate private or public confidence, are forbidden by law. Here, however, the injured party was in law bound to know and take notice of the want of power upon the part of the corporation. They were bound to know it equally with the town trustees. This being so, they cannot now avoid the effect of "the statute of repose," upon the ground that the assertion by the trustees of a power, which in point of fact had not been conferred upon them, amounted to a constructive fraud. They have no right, under such circumstances, to say that they were misled or deceived, or their confidence abused. If so, it resulted as much from their own neglect and fault as that of the other party, who was actuated by no fraudulent design.

We appreciate the hardship of this case, and, if within our power, would relieve it; but can only suggest that the natural obligation upon all to do justice should prompt the appellees, as a matter of right and fair dealing, to procure from our legislature an enabling act, under which it can pay to the appellants whatever may be justly due them. Judgment affirmed.

EDMUNDS v. LEAVELL'S ADM'R.

(Court of Appeals of Kentucky. February 10, 1887.)

1. MORTGAGE—ACKNOWLEDGMENT BEFORE DEPUTY-CLERK—CERTIFICATE.

A mortgage having been acknowledged before a deputy-clerk, and the principal clerk, in writing out the certificate, failing to set forth the facts, and include the indorsement of acknowledgment made on the mortgage by the deputy, *held*, the mistake may be corrected, and the lien under the mortgage is good.

2. LIS PENDENS—MORTGAGOR ACQUIRING GREATER INTEREST IN LAND.

A pending action to enforce a mortgage is notice to all purchasers, who become such during the pendency of the action, of the mortgagee's rights. So, where a husband and wife join in mortgaging her land, and, she dying, her interest descended to her sons, from one of whom the husband bought his interest, *held*, the interest so purchased was liable, along with the husband's estate by curtesy, to the mortgage; especially as it appeared that the mortgage contained a clause of general warranty.

Appeal from circuit court, Barren county.

This action was brought by appellee, Thomas Leavell, against appellant, W. H. Edmunds, to enforce a mortgage executed by said Edmunds, and Amanda, his wife, to Leavell. The plaintiff alleged that the deputy-clerk before whom the mortgage was acknowledged by the married woman had made the proper memorandum thereon, but that the clerk, through ignorance or carelessness, had omitted it from his certificate, and plaintiff relied on the act of May 10, 1884, as curing this defect, although the act was passed subsequently to the bringing of this suit. That act provides that "no conveyance of real estate heretofore made by a married woman shall be adjudged void because of a failure by the county clerk to incorporate in his certificate to such conveyance the indorsement of acknowledgment which may have been made by his deputy thereon. Where acknowledgments to conveyances of real estate have heretofore been taken by a deputy-clerk, and a memorandum thereof indorsed by him on such conveyance, and a certificate of such acknowledgment has been afterwards written out by the principal clerk and signed by him as having been done by such deputy, such conveyance and certificate, and the recording thereof, shall be held to be valid, although the memorandum of the deputy may not have been copied into said certificate." 1 Acts 1883-84, p. 177. Plaintiff also alleged that, at the time the mortgage was executed, the defendant, Edmunds, and his wife had living issue of their marriage, and, the wife having died since, said defendant was entitled to a life-estate in the land as curtesy, which it was alleged was subject to the mortgage. It was also alleged that, upon the death of the wife, she left two children, C. M. and William Edmunds, as her only heirs, and that C. M. Edmunds had conveyed to W. H. Edmunds, his father, his undivided one-half interest in remainder in this land, which interest plaintiff claims is also subject to the mortgage; Edmunds and wife having conveyed the land with covenant of warranty. It appeared also that W. H. Edmunds had afterwards mortgaged to a third party part of the land conveyed to him by C. M. Edmunds. William Edmunds, the other child, and owner of the other one-half, sold his interest to Sammia Edmunds, the second wife of W. H. Edmunds, the father. The court below adjudged that the land was subject to appellee's mortgage, and that mortgage was a prior lien on the land to those incumbrances subsequently made by W. H. Edmunds. The defendant, Edmunds, appealed.

Porter & McQuown, for appellant. *J. W. Jones and Richards & Hines*, for appellee.

PRYOR, C. J. The mortgage executed by the *feme covert*, Mrs. Edmunds, was acknowledged before a deputy-clerk, and that instrument recorded, with the certificate of the principal clerk that the acknowledgment had been made in that way, but he failed to embody the memorandum made by the deputy

in his (the clerk's) certificate,—a technical omission, that is to deprive the grantee of title when the mode of acknowledgment appears upon the instrument itself. The statute, however, so provides. Now, it is alleged in this case that the clerk, through neglect or ignorance, had failed to copy the memorandum made by the clerk in his certificate; and, while he asks that the defect be remedied by a subsequent curative statute, he also asks for all the relief to which he is entitled. During the pending of the action to foreclose the mortgage, the *feme* having died, certain transfers were made of the land by her heirs that it is claimed operate to defeat the equity that appellee had to enforce the mortgage as against the original grantor. The action being, at the time of the transfers, a pending action, to subject this land to the payment of the mortgage debt by reason of the mortgage, was notice to all purchasers of the right of the appellee to enforce the mortgage lien by reason of any equity growing out of the execution of the mortgage. The mortgage constituted the lien, and the action to foreclose it was a *lis pendens* as to those who purchased during the pendency of that action. Besides, it appears from the record that, at the death of Mrs. Edmunds, who owned the fee in the land, she left two children, one by the name of C. M. Edmunds, who, together with his father and mother, were the joint obligors in the note to Leavell, which the mortgage was given to secure. After his mother's death, he sold his one-half interest in the land to his father, save and except a lien which Thomas Leavell had upon the same. The father had executed the mortgage in conjunction with his wife, with a clause warranting the title, and becomes to be the one-half owner by a subsequent conveyance from his son, subject to this lien of Leavell's. The father is in no condition to resist the foreclosure of the mortgage, nor will he be allowed, under the circumstances, to set up title in himself to defeat the claim of the appellee. In fact, under the prayer for general relief, the whole land was subject to this debt as a prior lien, and the mistake or oversight of the clerk should have been corrected; but, as the relief has been granted upon other grounds equally as tenable, the judgment must be affirmed.

LEWIS, J., not sitting.

JAMES' ADM'X v. TRUSTEES OF HARRODSBURG.

(Court of Appeals of Kentucky. February 14, 1887.)

1. MUNICIPAL CORPORATION — LOT-OWNER — BLASTING ROCK CAUSING INJURY TO PASSER-BY.

Where the owner of a town-lot was engaged in blasting stone thereon in such manner that a piece of stone was thrown over into the street, so as to injure one who was passing by, *held*, the person so injured could not recover of the city for the injury, on the ground that it had permitted the owner to carry on his blasting operations. Although a city may have full power to pass an ordinance to abate nuisances, yet its failure to exercise such power gives no cause of action against the city.¹

Appeal from circuit court, Mercer county.

P. B. Thompson and T. C. Bell, for appellant. O. S. Poston and R. P. Jacobs, for appellee.

PRYOR, J. The appellant's intestate was seriously injured by a stone thrown by a blast of powder that was made on the lot of one of the residents of the town, preparatory to the erection of a building upon it by the owner. An action was instituted by the person injured against the town of Harrodsburg, in which it is alleged that the excavation was made on the lot by the consent of the city, and the blasting of stone permitted for several days; the stones falling in the streets of the city, so as to endanger the lives of its citizens, and of those passing, and finally one of the stones striking the plaintiff

¹See *Hubbell v. City of Viroqua*, (Wis.) 30 N. W. Rep. 847.

on the foot, crushing it, rendering him a cripple for life. It is alleged that the blasting, as it was conducted, was a nuisance, and so known to the officers of the city government, and they neglected to abate it, or to take any steps for the protection of those passing against the danger. The plaintiff died, and the action is now in the name of his personal representative, who has appealed from a judgment sustaining a demurrer to the petition, and dismissing the action. It is not alleged that the nuisance was committed under or by the direction of the trustees of the town, or that the town had any interest in the lot, or the excavation that was being made upon it. The lot formed no part of the public streets or alleys of the town, was not used as a park or pleasure ground by the town, and the town was in no manner connected with the wrong, except in consenting to the erection of the building. It is not alleged that the building or excavation was a nuisance, or endangered the lives of the people, but it is averred only that the mode of blasting the rock, conducted by the owner, or those in his employ, was dangerous to the passers-by, and resulted in the injury complained of.

The legislative power of the town may have authorized the abatement of nuisances, and the imposition of penalties by the authorities on those who create a nuisance on their own lots, and yet we are aware of no rule that would make the town liable in a civil action for a failure to pass ordinances for the suppression of such nuisances, or to enforce those laws through the proper officer when enacted. The public streets of the town, under the immediate control of the trustees or the municipal authorities, must be kept unobstructed; and, when an injury results to the citizen by reason of a neglect of duty in this regard by the proper authorities, a civil action may be maintained; and so of other property within the corporate limits, and belonging to the corporation. Here an action is attempted to be maintained by a private citizen against the town because of the negligent conduct of the owner on his own lot, in making an excavation by the use of powder, that has become dangerous to the adjoining property, or to persons passing on the street adjacent. The town might have notified the owner to cease blasting, but the failure of the owner to comply with the request would not make the town liable for failing to take such action as was necessary to abate the nuisance. The town may have had no ordinance on the subject, and the remedy, if adopted, not adequate to suppress the wrong, and still, for the failure of either the legislative or judicial department of the town to perform its duty in this regard, no action would lie. The owner would be liable to an indictment at the instance of the public, and also to an action by the party receiving a private injury by reason of the wrong, but, as to the town, no liability would exist. The power of a town or city to suppress or abate a nuisance, like all other powers, is derived solely from the legislature, and that a town is responsible for not abating a nuisance, both to the public and to the private citizen who has received a special injury, may, as a general rule, well be conceded; but in all such cases the injury complained of must arise either from the neglect of the town in the attempt to discharge a public duty for the benefit of the public, such as improving its streets, digging its public wells, or erecting other public works, or in omitting to keep such improvements in a condition that protects the public or the private citizen from danger. In all such cases the town, if a nuisance is caused by the neglect of its officers, or by others on its public grounds, is answerable in damages, either to the state, or the citizen, or both, when a special injury occurs to the latter.

The erection of improvements within a city being ministerial, the work must be done in an ordinarily skillful manner, and if not, and an injury results to the citizen, the town will be responsible; but for neglecting, through its officers, to discharge certain official acts,—that is, to abate a nuisance on private property, caused by the act of the owner alone,—no responsibility exists for a special injury.

In the case of *Davis v. City Council of Montgomery*, reported in 51 Ala. 139, the house of the plaintiff was burned down by sparks from a steam-engine used by the proprietor of an adjoining lot. Although the engine might have been abated as a nuisance under the city charter, and the authorities had been notified of the danger, it was held that no recovery could be had. The doctrine contended for in this case is that the town is bound to abate all nuisances within its limits, or be responsible in damages to those who may be injured thereby. This rule cannot apply to a municipal corporation. The power to abate a nuisance may be expressly given, but the failure to provide the means of removing the nuisance, or the omission of its officers to remove it when the means are provided, gives no cause of action to those who are injured by this neglect of duty. The party creating the nuisance is liable in a civil action, and may be indicted for the offense. The charter of a town or city usually gives it the power to open streets, alleys, etc., and to take control of and the custody of those streets, as well as the public buildings and public squares, and therefore it becomes the duty of the authorities to remove nuisances, and to prevent all obstructions in its public thoroughfares calculated to endanger the lives of those who are upon them.

In the case of *Parker v. Mayor, etc., of Macon*, reported in 39 Ga. 725, a dwelling had been destroyed by fire, leaving the walls of the building on the edge of the sidewalk. The wall was in such a condition as made it liable to fall at any moment, and injure those passing on the street. It did fall, and injured the plaintiff, who sued and recovered damages. The result in that case was made to depend on the duty of the city to keep its sidewalks and streets in a condition of repair that would render them safe for those passing. It was argued in that case that the wall was private property, but the court held that it was the duty of the city to remove anything hanging over the sidewalk which would probably work an injury to those passing. That case was likened to the case of a pit dug at the edge of the street, with no protection to prevent those passing from falling or stepping over. Both were regarded as obstructions to the public way, and, the city having the control of the streets like an individual, could not create the nuisance, and should not, by reason of its charter contract, neglect the important duty of keeping such a way safe for those passing over it. Here the stones constituted no obstruction to the street, although the lives of those passing were endangered. The city had neither the custody nor control of the private property, and is no more liable for the special injury than if sky-rockets shot from the grounds of the owner had caused the town to burn up, or had injured those upon the streets, or, as in the case from Alabama, where the sparks from the engine had destroyed the house of a neighbor. There is a manifest distinction between the case before us and that of *Parker v. Mayor, etc., of Macon, supra*. In the last-named case the duty was imposed upon the party in possession, with the absolute control of the streets for the public use, of keeping them in repair, and it was as much its duty to remove the wall as it was to have taken the *debris* from the street after the fall. The charter obligation bound it to discharge this duty. In the case before us the town was empowered to legislate in regard to all nuisances, and the omission to provide a remedy against the owner of private property permitting the nuisance, or to execute an ordinance passed to prohibit such a nuisance, and to abate it, is made the foundation of the action. The failure to take legislative action, or to enforce the law when enacted, by entering upon the private estate of the citizen, and staying the manner of the execution of the owner's work upon it, gives no cause of action against the city. The failure to exercise that governmental power, whether legislative or judicial, is not within the class of cases or the rule by which the liability of the town is to be determined.

The judgment below is affirmed.

BEAN and others v. HOFFENDORFER and others.*(Court of Appeals of Kentucky. February 17, 1887.)***1. EQUITY—SALES, SETTING ASIDE—DECREE.**

Civil Code Ky. § 521, (Myers' Code, 582,) providing that a judgment shall not be vacated until it be adjudged that there is a valid defense to the action in which the judgment is rendered, is not intended to make the power of the court to vacate, after the expiration of the term, an order confirming a judicial sale, dependent upon the existence of a valid defense to the cause of action or claim sued on. The judgment and order confirming the sale are distinct and independent of each other; the one may stand, although the other is set aside.

2. SAME—INADEQUACY OF PRICE.

Even if it be a true rule that, when time is allowed to redeem land sold at judicial sale, mere inadequacy of price is no ground of exceptions to the sale, yet the rule does not apply where two lots are improperly sold, when either may be worth, and at a fair sale would bring, more than enough to satisfy the judgment, leaving the other lot unincumbered.¹

Appeal from Louisville chancery court.

This action was brought by appellants, Bean and others, as heirs at law of Isaac Smith, against appellee Hoffendorfer, to set aside a deed made to Hoffendorfer for land bought at judicial sale, which land belonged to said Isaac Smith. They alleged that the land, consisting of two city lots, was sold to pay a street-improvement claim against it, at an enormous sacrifice; that, though Smith was served with process in the case, he was a lunatic at the time; that no one defended for him, nor did his condition appear of record; that he had the right to redeem the lots within three years after the sale, but died without exercising the right, and they, as his heirs, bring this suit to set aside the deed and sale, and to have the right to redeem adjudged them, although the three years for redemption have expired. The lower court dismissed the petition, and the heirs appealed.

For the original opinion in this case, see 2 S. W. Rep. 556.

F. P. Straus, J. R. M. Polk, and D. M. Rodman, for appellants. Lane & Burnett, for appellees.

LEWIS, J. It was not intended by section 521 of the Code (Myers' Code, 582) to make the power of the court to vacate, after the expiration of the term, an order confirming a judicial sale, dependent upon the existence of a valid defense to the cause of action or claim sued on. If it had been, no sale of real property under a valid judgment could, after confirmation, be set aside for any cause, however unjust, unfair, or even fraudulent, it might be. The question as to the validity of the sale is distinct from that in regard to the judgment under which it is made; for, though the judgment be reversed or vacated, it does not necessarily follow that the sale, if already confirmed, will be set aside, and, on the other hand, there may exist grounds for setting aside a sale which do not affect the judgment. If, then, Isaac Smith, or any one for him, could, being present, have presented a valid defense to the motion to confirm the report of sale, his heirs at law may, for the cause mentioned in subsection 7, § 518, now make the same defense, without calling in question the judgment for the sale. His defense would have been that the two lots were sold at an enormous sacrifice, for much less than the value of either of them, and that, by reason of his unsoundness of mind, he was ignorant of the pendency of the action against him, of the judgment, and of the sale; and, if such defense had been made, the court would undoubtedly have set aside the sale.

But it is argued that, when time is allowed to redeem, inadequacy of price is no ground of exception to a judicial sale. Even if that rule was correct,

¹See note to former opinion, 2 S. W. Rep. 556; *Carden v. Lane*, (Ark.) 2 S. W. Rep. 709.

it could not be applied in every case without working injustice; for there may be a case where the defendant is unable to redeem, and consequently interested in having the property sold for a fair price; or a case like this, where two lots of land are improperly sold, when either of them may be worth, and at a fair sale would bring more than enough to satisfy the judgment, leaving the other unincumbered. Though appellants in their petition did not, in terms, pray to have the order confirming the sale vacated, they did ask that the judgment in the original action, and all the proceedings under it, be declared void; that the deed to appellees be canceled, and the title and possession of the property be restored to them; and they stated all the facts necessary to constitute the cause mentioned in subsection 7 for setting aside the sale. The plaintiffs in the original action were not made parties to this, consequently the only issue made is with appellees, and the only relief sought, or that can be granted, is against them, which involves vacating the order confirming the sale, and cancelling the deed, and restoration of the title upon the conditions mentioned in the original opinion. Petition overruled.

LOUISVILLE & N. R. CO. v. COMMONWEALTH and others. (Four Cases.)

Appeals from Circuit Court, Lincoln County.

SAME v. SAME.

Appeal from Circuit Court, Warren County.

SAME v. SAME.

Appeal from Circuit Court, Marion County.

(Court of Appeals of Kentucky. February 17, 1887.)

1. TAXATION—ASSESSMENT—OMITTED PROPERTY—PENALTY—RAILROADS—LIMITATIONS.

Where a railroad fails to list its property for county taxation, and the sheriff reports it to the county court as delinquent, that court has power, under Gen. St. Ky. c. 92, art. 5, §§ 20-23, to direct its clerk to assess the road; but, more than five years having elapsed since the year for which the tax is claimed, the court has no right to impose the fine and triple tax, under section 20. That, being a penalty, is barred after five years, under Gen. St. Ky. c. 71, art. 3, § 2, barring an action for a penalty after the lapse of five years.

2. SAME—FAILURE TO RETURN PROPERTY—APPEAL.

In a statutory proceeding in the county court against a railroad, to compel it to list its property for taxation, the court directed its clerk to make the assessment, and the railroad appealing to the circuit court, where the evidence was heard anew, and the appeal dismissed, *held*, this was a virtual affirmance of the county court judgment, and the railroad could not complain that the circuit court had not disposed of the case on its merits.

3. SAME—ASSESSMENT—RAILROADS—COUNTY COURT.

Since the enactment of the statute of March 17, 1876, (1 Acts Ky. 1876, p. 78,) entitled "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the county court," there can be no question that railroads are liable for county taxes. But the act contains no provision authorizing the county court to make the assessment; the assessor only is authorized to make it. The county court is, however, given such power under Gen. St. Ky. c. 92, art. 5, § 23.

4. SAME—STATUTORY CONSTRUCTION.

Gen. St. Ky. c. 92, art. 5, §§ 20-23, providing for the compulsory assessment by the county court of the property of persons failing to list it with the assessor, but act of March 17, 1876, (Acts 1876, p. 78,) providing for equal and uniform taxation by counties of railroads, and failing to include the provision about compulsory taxation, *held*, this cannot be considered an intentional *casus omissus* by the legislature, as the effect would be to relieve all railroads from taxation unless they voluntarily submitted to it.

5. SAME—FAILURE TO LIST PROPERTY—SUMMONS.

Gen. St. Ky. c. 92, art. 5, § 25, providing that the sheriff shall report to the county court any one who fails to list his property for taxation in any year, *held*, the summons issued on the information need only state the failure to list, and not the other facts required, where the assessor gives the information under sections 21 and 22. But the sheriff, in reporting delinquents, is not confined to those becoming such during his term of office.

6. SAME—STATUTE OF LIMITATIONS.

Gen. St. Ky. c. 92, art. 5, § 23, authorizing the county court, in a proceeding against a tax-payer for failing to list his property, to direct its clerk to assess the property, *held*, the tax-payer cannot rely on lapse of time as a bar to the proceeding.

Bawntree & Lisle, Wm. Lindsay, Hill & Alcorn, Mitchell & Dubose, H. W. Bruce, and Porter & Porter, for appellant. *W. H. Julian, J. C. Sims, Spalding & Thompson, Carpenter & Miller, and A. Duvall*, for appellees.

HOLT, J. These cases involve like questions, and will therefore be considered together. To this end a brief history of them is necessary. The Warren and Marion county cases are proceedings to compel the appellant, the Louisville & Nashville Railroad Company, to list its property in those counties for the years 1876 and 1877, for county taxation; while in the Lincoln county cases it is sought to enforce a triple tax and fine against the appellant for its failure to list its property for those years for such purposes. In the Marion county case the sheriff reported in writing to the county court clerk that the appellant had failed to give in a correct list, while in the other case he reported that it had failed to list its property altogether. In the Warren and Marion county cases a summons was thereupon issued against the appellant to show cause, if any it had, why its property should not be listed; and, the matter having been heard by the county court, it directed its clerk to list the property, but rendered no judgment for triple tax, or any fine. In the Marion county case this judgment was, upon appeal to the circuit court, sustained. In the Warren county case the appeal from the judgment of the county court, after the introduction of testimony, and upon hearing by the circuit court, was dismissed.

It is urged that this action by the latter court must be reversed, because, as the case upon appeal had to be tried *de novo*, the appellant had a right to its decision upon the questions at issue, and a dismissal of the appeal left the county court judgment in full force. It was, however, a virtual affirmance of it; and although the proceeding was, for the most part, styled in the name of the Warren county court, yet, as required by the statute, the summons was in the name of the commonwealth. The summons in each of the Lincoln county cases required the appellant to show cause why a judgment for a triple tax and a fine of not exceeding \$100 should not be rendered against it for failing to list its property. The county court rendered a judgment in each case for the triple tax and a fine of \$100. The circuit court, upon appeal, reversed these judgments, and remanded the cases to the county court, with directions to it to render judgments requiring the appellant to list its property; and, if it thereupon failed to do so, then to render judgments for the triple tax and fine. The appellant has appealed to this court from the action of the circuit court because it so remanded the cases. Upon their return to the county court, it required the appellant to list its property; and, it failing to do so, the court then rendered judgments for the triple tax and fine. Upon appeal, they were affirmed by the circuit court, and the appellant has also appealed from these judgments.

Since the enactment of the law of March 17, 1876, (1 Acts 1876, p. 78), entitled "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the county court," there can be no question as to the liability of railroads for county taxes. There is no reason why they should be exempt from this common burden. They enjoy the protection of the county government, the county thus furnishing the consideration for the taxation. They receive the benefit, and in return the duty of aiding in the support of the local authority is created. If they escape, others must bear more than their just proportion of the burden. The act *supra* contains no provision, however, for an assessment of the property of a railroad through the county court. Under it, only the assessor can make it; and no authority ex-

ists for these proceedings unless it be found in article 5, c. 92, Gen. St. It provides:

"Sec. 20. If any person fail or refuse to give a list of his taxable property, when legally called upon for that purpose by the assessor or his assistant, or give a false or fraudulent list, or refuse to give the amount he is worth, as required by the first article of this chapter, he shall be fined not exceeding one hundred dollars, and be subjected to the payment of three times the amount of the tax upon the estate by the county court.

"Sec. 21. The assessor, at the time he returns his tax-book, shall also return the names of all delinquents described in the preceding section, and shall, as to fraudulent delinquents, state in what the falsehood or fraud consists.

"Sec. 22. The county clerk shall issue a summons in the name of the commonwealth, in which shall be stated the offense, in general terms, against each of the delinquents, returnable to the next term of the county court, which shall hear and determine the case, upon giving to the defendant the right to have a jury to try the facts, if demanded before the trial is begun, which jury shall be composed of housekeepers, and summoned by the sheriff. If the defendant be found guilty, the court shall enter judgment for the fine, and triple tax, and costs. The court shall fix the value of the taxable property upon which to impose the triple tax from their own knowledge, upon the statement of the defendant, made upon oath, or upon such other evidence as it may be enabled to obtain; and execution shall issue for the fine, triple tax, and costs. The fine and tax shall be certified by the clerk to the auditor, and accounted for by the sheriff as other public moneys.

"Sec. 23. The county court, before a judgment is rendered against a delinquent, may, if it is satisfied that the defendant was not willfully in default, *direct its clerk to take the list of taxable property of such delinquent in the manner prescribed by law.* The lists aforesaid shall forthwith be certified to the sheriff and auditor, to be charged to the sheriff, and accounted for by him as other revenue. In such cases the county court may excuse the delinquent from the payment of the fine and triple tax, upon payment of the costs of prosecution.

"Sec. 24. It shall be the duty of the county attorney to prosecute under the preceding section 22, and, if he does so, shall be allowed thirty percent. of the fine for his services.

"Sec. 25. When it shall be known to the sheriff that any person has failed to give in a list of his taxable property in any year when it shall be liable to taxation, he shall report such person to the county clerk, *to be dealt with.* fined, and taxed as delinquents reported by the assessor. No sheriff or assessor shall be liable to cost in proceedings against delinquents reported by them.

"Sec. 26. Any person who has failed to give in his list of taxable property because he was not called upon by the assessor, may, after the assessor has returned his tax-book, list the same with the county clerk at any time before the first day of October, who, on taking the same, shall be governed by the law regulating the duty of the assessor."

It was held in the case of *Lincoln Co. Court v. Louisville & N. R. Co.*, 3 Ky. Law Rep. 436, that the above provisions of the statute were applicable to railroads.

The legislature, by an act approved April 3, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies, for taxation and for taxing same," changed the mode of assessing the property of railroads. It, by its terms, repealed all existing laws as to the assessment and taxation of such property, and, at the date of this enactment, the taxes now in question had never been assessed. It is therefore now said that all mode of procedure as to unassessed taxes of a prior date was gone. It was

held otherwise, however, in the case last cited; and it cannot reasonably be supposed that the legislature so intended.

It is urged, however, that the provisions of the General Statutes above cited do not authorize a proceeding for a compulsory assessment, but only for a penalty for a failure to list; and that, as the act of 1876 did not provide for it, there is a *casus omissus* in the law as to compelling assessments for the years now in question. This position of the appellant, in connection with the further one that any penalty for its failure to list its property in 1876 and 1877 is now barred by time, would tend largely to defeat equal taxation; and this cannot be presumed to have been the legislative intention, and especially so in view of its declaration as embodied in the title of the act of 1876. An assessor cannot take a list after the expiration of the time fixed by the statute for the return of his books. If, therefore, he has for any reason, or in any way, omitted it, and if the county court can under the statute only fine a party, and not have his list taken, then, if time has barred the imposition of a fine, he goes free of the common burden, unless he voluntarily chooses to shoulder his part of it.

Certainly the legislature did not intend that the public right should be lost by the neglect of the public agent, or that the performance of his duty to his government by the property owner should be left merely to his willingness or caprice. Let us see, however, if they have in fact so left it. These proceedings are based upon the information given by the sheriff, and are authorized solely by section 25, *supra*, of the General Statutes. A distinction should be drawn between this provision and section 20, *Id.* The latter provides for the imposition of a triple tax and fine when the person fails or refuses, upon demand of the assessor, to give in his list, or gives a false or fraudulent one, or refuses to tell what he is worth. A summons based upon it should, in general terms, describe the offense. It should state, as was held in *Evans v. Com.*, 18 Bush, 269, whether it be for giving a false or fraudulent list, or a refusal of the person to state what he is worth, or a failure or refusal, upon demand, to give in any list whatever; and, if these proceedings were founded upon this section, the lower court should have sustained the motion which was made in each case to quash the summons.

The offending under section 25 is, however, confined to a mere *failure* to list; and this is all, therefore, that a summons issued under it need charge. There is a satisfactory reason for this difference. In the one case the assessor reports the character of the failure, thereby enabling the clerk when he issues the summons to specify it; in the other, the sheriff has not the same opportunity as the assessor to know this, and is therefore required to report merely a failure to list, and this is all that the clerk has upon which to act. In such a case, however, the statute provides that the delinquent is "to be dealt with, fined, and taxed as delinquents reported by the assessor." If reported by him, the delinquent is liable to a judgment for the triple tax and fine; or if, in the opinion of the court, the default be not willful, it may "direct its clerk to take the list of taxable property of each delinquent in the manner prescribed by law." If, for any reason, the triple tax and fine cannot be imposed, although the delinquent may be in willful default,—as if, for instance, limitation prevents it,—then the action of the court should be the same as if it had found the party in default, but not willfully so. It should, in such a case, adjudge the cost against the delinquent; and as the right to coerce an assessment is not affected or barred by lapse of time, and no cause of action arises until the assessment is made, it should direct its clerk to take the list. *Louisville & N. R. Co. v. Com.*, 1 Bush, 250; *McAlister v. Same*, 6 Bush, 581; *Lincoln Co. Court v. Louisville & N. R. Co.*, *supra*.

This was the course pursued in the Warren and Marion county cases.

The constitutionality of the law conferring upon our county courts the power to assess delinquents is now, by reason of judicial construction, be-

yond question. The law of 1819, (M. & B. 1873,) as well as the provisions of the Revised Statutes of 1852, relating to tax delinquents, were in substance similar to those of the General Statutes above cited; and in the case of *Pennington v. Woolfolk*, 79 Ky. 13, the court appears to have regarded them as sustaining the construction we have given to the present law. The sheriff in reporting delinquents is not confined to those thus offending during his term of office. Section 25 of the statutes above cited provides that he shall do so when it shall become known to him that any person has so failed "in any year." The reason for this is obvious. As the assessor cannot report them after he has returned his assessment, it follows that if the sheriff were confined to those delinquent during his term of office, that many would escape taxation altogether. In the Lincoln county cases, however, more than five years had elapsed from the time when the appellant rendered itself liable for the triple tax and fine.

Gen. St. § 23, art. 1, c. 29, provide: "Prosecutions by the commonwealth to recover a penalty for a violation of any penal statute or law, and an action or procedure at the instance of any person to recover any such penalty, shall be commenced within one year after the right to such penalty accrued, and not after, unless a different time is allowed by the law imposing the penalty." Section 2, art. 3, c. 71: "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability; an action for a penalty or forfeiture, when no time is fixed by the statute or law prescribing the same, * * * shall be commenced within five years next after the cause of action accrued."

We think the statute, so far as it authorizes a judgment for a triple tax and *fine* against a delinquent, is penal in its nature. The wording of the law so implies. The summons issues in the name of the *commonwealth*. The statute says that "the *offense*" must be stated in it in general terms. If the delinquent is found "guilty," judgment is to be rendered against him. The county attorney is required "to *prosecute*," and, if he does so, is allowed 30 per cent. of the *fine* for his services. *Chiles v. Com.*, 4 J. J. Marsh. 578; *Eoans v. Same*, 13 Bush, 269.

It is unnecessary to decide, however, whether the cases fall within the one or the five years limitation statute, because, in either case, a recovery of the triple tax and fine is barred by the lapse of time.

The judgments in the Marion and Warren county cases are affirmed, but those in the Lincoln county cases are reversed for further proceedings consistent with this opinion.

GILPIN v. HORD and others.

(Court of Appeals of Kentucky. February 17, 1887.)

1. APPEAL—SUPERSEDEAS BOND—JUDGMENT IS AFFIRMED AS TO SOME, AND REVERSED AS TO OTHERS.

Where, a judgment having been obtained against several jointly, they all appeal from it, and all supersede it by the execution of a *supersedeas* bond, the judgment afterwards being reversed as to all but one, *held*, this did not release the obligors on the *supersedeas* bond, even though the appellant, as to whom the judgment was affirmed, was insolvent. The fact that the superior court, to which the case was first appealed, on affirming it as to one appellant, and reversing it as to others, fails to award the 10 per centum damages allowed by Civil Code Ky. § 764, upon the *supersedeas* bond, does not show that that court regarded the *supersedeas* bond as discharged by reason of the reversal as to all but one appellant.

2. SAME—DAMAGES UPON AFFIRMANCE.

In order to hold the sureties on *supersedeas* bond bound for the payment of the judgment superseded and affirmed on appeal, it is not necessary that the court, upon affirming, should award the 10 per cent. damages allowed by Civil Code Ky. § 764, which provides that, upon the affirmance or dismissal of an appeal from a

judgment for the payment of money, the collection of which has been superseded, 10 per cent. damages on the amount superseded shall be awarded against the appellant.

Appeal from circuit court, Lewis county.

G. T. Halbert and A. H. Parker, for appellant. E. C. Phister, for appellees.

BENNETT, J. The appellant obtained a judgment in the Lewis circuit court against H. T. Warder, as sheriff of Lewis county, and others as his sureties, for the sum of \$800, together with interest thereon and costs. The sheriff, Warder, and his sureties, jointly appealed the cause to the superior court. The judgment of the circuit court was superseded by the appellees, as the sureties of all the defendants, by executing a *supersedeas* bond in the usual form. The superior court affirmed the judgment of the lower court as to the sheriff, Warder, but reversed the judgment as to his sureties. Upon the return of the cause to the lower court, the appellee caused execution to be issued against Warder on the judgment, which was returned with the indorsement thereon, "No property found." Thereafter appellant instituted this action against the appellees, as sureties on the *supersedeas* bond, for the purpose of recovering the amount of the judgment superseded.

The appellees contend that, as the judgment which they superseded was reversed as to all of the appellants except one, they are discharged from liability on the *supersedeas* bond. We cannot concur in this position. The judgment appealed from was a joint judgment against all of the appellants. They jointly appealed, and the *supersedeas* bond was executed by the present appellees on behalf of all of them. Therefore the effect of the bond was to suspend the whole judgment, and to suspend the plaintiff's right to proceed against the defendants, either collectively or individually, to enforce the payment of his judgment. But for the suspension of his right by the act of the appellees, he could have proceeded against any one of the defendants to enforce the payment of his judgment; but the appellees suspended his right to proceed against any one of the defendants individually, or all collectively. The judgment was affirmed as to one of the defendants, against whom the plaintiff's right to proceed was suspended by the appellees covenanting to pay the judgment in case it was affirmed by the superior court. The mere appeal from a judgment does not suspend the right of the successful party to enforce the satisfaction of it. That right can only be suspended by superseding the judgment. The object, then, in executing a *supersedeas* bond, is twofold: (1) That the appellant may have the judgment of the lower court reviewed without running the risk of the enforcement of the judgment during the pendency of the appeal, which might result disastrously to his interest; (2) the successful party being deprived of his right to enforce the judgment during the pendency of the appeal, the sureties agree to pay him the amount of the judgment in case it is affirmed. Therefore the consideration which upholds the bonds is the depriving of the successful party of his right to enforce the satisfaction of his judgment, not only as against all of the parties who have superseded, but as against any one of them. Therefore, to hold that the reversal of the judgment as to only a portion of the appellants discharged the sureties in the bond from the payment of the judgment, which was affirmed as against the other appellants, would strike down the consideration of the bond, to-wit, the suspension of the appellee's right to proceed against any one of the appellants to enforce the satisfaction of his judgment. This we cannot do.

The fact that the appellant against whom the judgment was affirmed was insolvent, and the other appellants, who were discharged by the reversal of the judgment as to them, were solvent, (which latter fact was the inducement for the sureties superseding the judgment,) cannot enter into the question of

their liability to the appellee; because his right to proceed against the insolvent appellant was suspended by the sureties, and, in consideration of that fact, they agreed to pay the judgment rendered against him, if it was affirmed.

The foregoing views are sustained by the case of *Young v. Ditto*, 2 J. J. Marsh, 72. In that case Young obtained a decree against Ditto for \$171, against Kelso for \$198, and a joint decree against both for costs. Ditto having appealed, and his appeal having been dismissed, Young brought suit on the appeal-bond, which suspended the whole decree. The court said: "If all appeal, and execute a joint bond, *each* will be responsible for the whole amount. If only one execute the bond, he must stand bound for the whole. The appeal is not from a part of the decree, but from the whole of it. It suspends the whole. * * * As, therefore, by the appeal of Ditto, the creditor was prevented from enforcing his decree against Kelso, Ditto is liable for the amount decreed against Kelso; and it is immaterial whether Kelso is solvent or insolvent."

The fact that the superior court, upon the affirmance of the case as against the sheriff, did not award 10 per cent. damages on the judgment superseded, does not show that the court regarded the *supersedeas* bond as discharged by reason of the reversal of the case as to the other appellants. The omission, as frequently occurs, was merely an oversight. Besides, in order to hold the sureties on a *supersedeas* bond bound for the payment of the judgment superseded, it is not necessary that the court, upon the affirmance of the case, should award damages. The 10 per cent. which the successful party is entitled to, upon the affirmance of the judgment, is intended as, in a measure, compensatory for his trouble and delay in obtaining the benefit of his judgment; and, whether the 10 per cent. damages is awarded or not, his right to hold the sureties to the *supersedeas* bond bound for the judgment, interest, and cost superseded nevertheless exists.

The petition and amended petition set up a cause of action upon the *supersedeas* bond. It is true that the petition alleges that the sheriff superseded the judgment by executing the bond, with the appellees as his sureties, and fails to allege that the other appellants caused the bond to be executed. But the fact appears in the preceding part of the petition that a joint judgment was obtained against the sheriff and his sureties, and that they jointly appealed to the superior court, and that the case was affirmed as to the sheriff, and reversed as to the sureties. The body of the bond is also substantially set out in the petition, and the bond itself was filed with the petition. So, looking at all of the allegations of the petition in reference to the facts which led to the taking of the bond, the conclusion is inevitable that the bond filed is the bond described in the petition. Also, the appellant who supersedes a judgment is not required to sign the *supersedeas* bond. The allegation that he did sign it must therefore be regarded as surplusage. Then, the allegation being regarded as eliminated from the petition, it appears that the sheriff superseded the judgment by causing the bond to be executed; and, as it was sought to make the appellees liable on their bond on account of the fact that the judgment had been affirmed as to the sheriff, it was unnecessary to add that the sheriff's co-appellants also caused the bond to be executed, for the reason that the allegations of the petition identified the bond filed as an exhibit with reasonable certainty as the bond which the sheriff and his co-appellants caused to be executed.

For the foregoing reasons the judgment of the lower court is reversed, with directions to overrule the demurrer to the appellant's petition and amended petition, and to sustain the demurrer to the appellees' answer, and for further proceedings consistent with this opinion.

v.8s.w.no.3—10

PHILLIPS v. QUEEN and others.

(Court of Appeals of Kentucky. February 19, 1887.)

ESTOPPEL—HABERE FACIAS POSSESSIONEM—MORTGAGE FORECLOSURE—HOMESTEAD—JUDGMENT ON MOTION—HUSBAND AND WIFE.

A writ of *habere facias possessionem* having been awarded against the mortgagor in a foreclosure proceeding, he moved to quash the writ on the ground that he was entitled to, but had not been allowed, a homestead in the mortgaged land. The motion to quash was overruled, and he and his wife thereupon brought an action to enjoin the execution of the writ, and to have homestead allotted. *Held*, the judgment upon the motion to quash the writ is a bar to any further claim to homestead. It is immaterial that the wife was not a party to that proceeding. The husband is the housekeeper and owner of the homestead right, if it exists; and, when the question is decided, either by suit or motion, it cannot be relitigated by reason of the wife joining with him in a second proceeding.

Appeal from circuit court, Nelson county.

John D. Wickliffe, for appellant. *E. E. McKay*, for appellees.

HOLT, J. The appellee Joseph Queen became surety for Queen & Co. to the appellant, Mary E. Phillips, on a note dated January 16, 1866, but which he claims not to have signed until some time subsequent to June 1, 1866, when the homestead law took effect. His house and lot was sold on July 14, 1873, and purchased by the appellant under an execution which issued upon a judgment obtained upon the note. She, having obtained a sheriff's deed to the property, brought a suit on October 13, 1873, for the possession; and on November 5, 1873, recovered a judgment by default therefor. The appellee at the same term of court, however, appeared, tendered an answer, and moved to set aside the judgment. The court regarded the pleading as insufficient, and overruled the motion. The appellee then appealed to this court, but, upon hearing, the appeal was dismissed. He then, and on October 7, 1874, brought an action for a new trial; but dismissed it upon the filing of a demurrer to the petition. In May, 1878, he gave a notice, and moved the court which had awarded the writ of *habere facias possessionem* to the appellant to quash it. One of the grounds upon which the motion was based was that he was entitled to a homestead in the property. After a hearing, it was overruled. He then, together with his wife, brought this action, enjoining the execution of the writ of possession, and asking that they be allowed a homestead. The appellant relies upon the above proceedings in bar of the action. Her answer also sets up a purchase of the property by her at a tax sale on April 12, 1874. The appellees demurred to the answer. The lower court, carrying this demurrer back to the petition, held it to be insufficient, and dismissed the action. This court reversed this ruling, because there is an averment in the petition that the levy and sale had been set aside. Upon the return of the cause, the demurrer to the answer was sustained, and a judgment rendered enjoining the enforcement of the writ, and adjudging a homestead right to the appellee. Of this the appellant now complains.

It is unnecessary to pass upon the sufficiency of the defense based upon the tax title, or to decide whether any of the judicial proceedings, aside from the motion to quash the writ of possession, constitute a bar to the prosecution of this suit, since, in our opinion, the judgment upon said motion does so operate. In it the right to a homestead was raised. The court had jurisdiction to and did decide that the appellee Joseph Queen was not entitled to it. If it had entertained a different opinion, it could in that proceeding have awarded it to him. It matters not that the wife was not a party to it. The husband is the housekeeper and the owner of the homestead right, if it exists. She, at most, only holds in conjunction with him, and there is such a unity of claim that, if he makes the question of homestead right before a court having jurisdiction to decide it, and it is determined either by suit or motion, then it cannot be

relitigated by reason of her joining with him in a second proceeding. Public policy and individual right require this rule. It prevents vexatious litigation, and upholds judicial action, the desired end of which is to give repose. A judgment upon a motion is as effective as any other judgment, by way of a bar to a second proceeding upon the same matters.

Judgment reversed, with directions to overrule the demurrer to the answer, and for further proceedings in conformity to this opinion.

RAWLINGS and others v. BIGGS.

(Court of Appeals of Kentucky. February 22, 1887.)

1. WAY—PROCEEDING TO OPEN—DAMAGES—VERDICT OF JURY.

Gen. St. Ky. c. 94, art. 1, § 8, providing that, where any person shall make application to the county court to have a new road opened for the benefit of the public, a writ of *ad quod damnum* shall be awarded, if desired by the owner of the land, and a jury impaneled to fix compensation for the land taken, *held*, the inquest as to the value is binding on all parties, the county as well as the owner, and cannot be assailed except for some irregularity that would render the proceeding erroneous; if the proceeding is regular, the value and damages as fixed by the jury are conclusive.

2. SAME—APPORTIONING COST BETWEEN COUNTY AND APPLICANT.

Gen. St. Ky. c. 94, art. 1, § 17, providing that, upon an application to open a new public road, the county court may require the applicant to pay part or all of the costs, or the county to pay part or all of such costs, *held*, the county judge is vested with a large discretion in such cases, and, in determining the question, may look to the financial ability of the county as well as that of the applicant, and the justice of requiring the applicant to pay the whole cost when the opening of the road is as beneficial to others as to the party applying.

3. SAME—APPEAL—VERDICT.

Where the action of the county judge, upon an application to open a new public road, is appealed from to the circuit court, the latter court cannot pass on the amount of damages as fixed by the jury in the county court. The circuit court may establish, or refuse to establish, the road, but cannot make the establishment thereof to depend on the payment of a larger sum than that fixed by the jury.

Appeal from circuit court, Greenup county.

B. F. Bennett, for appellants. *E. F. Dulin*, for appellee.

PRYOR, C. J. This is an appeal from the judgment of the circuit court, dismissing an appeal from a judgment of the county court refusing to establish a public road on an application of the appellants, and also an appeal from previous judgments rendered in the case that are final. The statute provides that a writ of *ad quod damnum* shall be awarded if desired by the owner of the land, and a jury impaneled to fix the compensation for the land taken, additional fencing necessary, and the damage to the residue beyond the peculiar benefits to the residue from the establishment of the road. This provision of the statute is intended to apply when the owner or proprietor declines to accept the value fixed by the court, or when the owner, as a matter of right, demands the writ. This inquest as to the value is binding on all the parties, the county as well as the owner, and cannot be assailed except for some irregularity that would render the proceeding in the county court erroneous. If the jury should fail to make the inquiry provided by the statute, the proceedings would be liable to objection, or if the panel should be composed in part of those who were related to the parties, or was not a jury of freeholders. In such cases the motion to set aside the verdict, and have another jury impaneled, should be entertained; but where the proceedings are regular, and the statute complied with, the value and damages as fixed by the jury must prevail, for this reason, among others: the power to pass upon the question of damages by the court is denied, and the owner given the right, that cannot be denied him, of having a jury ascertain the damages.

When the report, inquest, and other evidence is heard, the court shall determine whether or not the road shall be established. Section 11, c. 94, Gen. St. The value fixed upon the land may be too high, in the opinion of the court, and for that reason the application will be refused; but no investigation can be made by the court as to the value, with a view of fixing a different estimate, or of setting aside the inquest, when there is no irregularity in the proceeding. When the case is heard, the court, by virtue of the seventeenth section of the statute, (page 763, Gen. St.,) may open the road at the cost of the applicant, or require him to pay a part of the cost only, or the county may be required to pay all the cost. The cost includes the sum to be paid the owner as well as the officer's fees, and such other cost as pertains to the proceeding. The county judge is necessarily invested with a large discretion in the exercise of his judgment in such cases. He may look to the financial condition of his county, as well as to the ability of the applicant to pay the damages, and the justice or injustice of requiring him to pay the cost, when the opening of the road is as beneficial to others as to the party applying.

The objection to this case is that the judge of the circuit court, to whom was submitted the law and the facts, has undertaken to pass on the question of damages, and disregarded the verdict of the jury on the writ of *ad quod damnum*. Each party has had his day in court on that question, and unless there was some provision in the statute for a trial *de novo*, and the impaneling of another jury, the damages have already been ascertained. The proceedings in the circuit court are purely appellate in this proceeding under the General Statutes, and the circuit court must either establish or decline to establish the road upon the evidence before the county court, and with this evidence is the verdict of the jury fixing the damages. He cannot make the establishing of the road depend on the payment of a larger sum than that fixed by the jury. He must either affirm or reverse the case; and if the county court declines to open the road, and the circuit court should be of a different opinion, he will reverse the case, with directions to pay to the owners the compensation fixed by the jury; the amount to be paid, in whole or in part, by the applicant, or the whole by the county, as the county court may in its discretion adjudge. For these reasons the judgment of the circuit court dismissing the appeal is reversed, and also the judgment prior thereto establishing the road on condition that the applicant pay a greater sum in damages than the jury awarded. When the case returns, the viewers having reported and an inquest had, the circuit judge, upon the evidence, including the inquest and report, will proceed to affirm or reverse the judgment of the county court refusing to establish the road, and for proceedings consistent with this opinion.

MAYSVILLE & MT. STERLING TURNPIKE ROAD CO. v. RATLIFF.

(Court of Appeals of Kentucky. February 22, 1887.)

1. TURNPIKES—NEW TOLL-GATES—RIGHTS OF LAND-OWNERS.

A turnpike company has the right to abandon a toll-gate established at a particular point on its road, and erect a new gate at a different point; and although the new gate is set up between appellee's entrance to his farm and the neighboring town, so that he must now pay toll both in going to or coming from the town, or open a new entrance to his farm, *held*, he cannot recover damages of the turnpike company on this account.

2. SAME—RIGHT TO ERECT GATES.

A turnpike company, being authorized by its charter to acquire land for its road 45 feet wide, 16 feet of which was to be covered with stone, and used for travel, *held*, it may erect a toll gate within the 45 feet without rendering itself liable for obstructing the highway, provided it leaves 16 feet covered with stone free for travel.

3. SAME—LOCATION OF GATES.

The charter of a turnpike company authorizing it to erect a toll-gate upon the completion of five miles of road, with the proviso that no one should be erected nearer than one mile from any town on said road. *Held*, there was nothing requiring the gates to be precisely five miles apart.

Appeal from circuit court, Bath county.

J. S. Hurt, W. R. Patterson, and C. W. Goodpaster, for appellant. H. L. Stone, for appellee.

LEWIS, J. Appellant being the owner of a turnpike road extending from Maysville, through Sharpsburg, to Mt. Sterling, and entitled by its charter to collect tolls thereon, had for many years a toll-gate designated "No. 8," at a point on its road about two miles north of Sharpsburg; but, having commenced the erection of another gate at a point nearer to, but more than a mile from, Sharpsburg, with the avowed purpose of collecting tolls there, and abandoning gate No. 8, appellee brought this action, and obtained an injunction restraining it from erecting and maintaining a gate, or collecting tolls, at any place on its road adjoining or opposite appellee's farm, between No. 8 and a point one mile north of Sharpsburg; and by the judgment appealed from that injunction was perpetuated.

It is contended for appellee that the injunction is proper, because appellant was endeavoring to perform an illegal act, which inflicted special injury to appellee, aside from the general public, and the erection of the toll-gate on appellant's road obstructed the public highway, and created a public nuisance, peculiarly damaging to appellee. To maintain this action, it must appear that the erection of a toll-gate between No. 8 and a point one mile north of Sharpsburg would be a public nuisance, and, in addition, that appellee would suffer a special injury distinct from that suffered by the public. *Cosby v. Owensboro, etc., R. Co.*, 10 Bush, 291. But a toll-gate is not *per se* a nuisance, and, before the one appellant proposes to erect can be so considered, it must appear to be an unlawful obstruction of the turnpike road as a public highway; for, if the erection of the gate at the place and for the purpose proposed is warranted by law, it is not a public nuisance, nor would the special injury complained of by appellee, even if it existed, avail in this action.

It appears that the western line of his land begins at a stake 25 feet east of the center of the road, and between the new gate and Sharpsburg; running thence northward, along the east side of the road, 80 poles, to a stake between the new gate and gate No. 8; and that the present way from his dwelling-house intersects the turnpike also between the two gates; so that the erection of the new gate will compel him either to pay toll in going to Sharpsburg, which he has not heretofore done, or else make a new way from his dwelling-house to the turnpike, between the new gate and Sharpsburg. We have thus the complaint, urged as one of the causes of action, and attempted to be sustained by proof, that the erection of the new gate will compel appellee to undergo the expense of making a new way by which to avoid paying for the use of appellant's road. We are unable to see how the erection of the new gate will in any way infringe appellee's rights, or inflict upon him any civil injury; far to the extent he uses the road he ought to pay. Nor has he any right of action for a possible and indeterminate injury, that may result from the proximity of the new gate to his land; for the same ground might be relied on by every other person owning land adjacent to a turnpike road, and thus prevent the change of any toll-gate, however urgent or proper such change might be.

Gate No. 8 is situated opposite the grounds of the Bath County Fair and Trotting Association, to which there is an entrance from each side of the toll-gate, whereby the large number of persons attending the annual meetings are enabled to avoid the payment of toll, though having the use, and

benefit of appellant's road for four or five miles each way; and it seems the principal object in erecting the new gate is to compel those at least coming from the direction of Sharpsburg to the fair grounds to pay toll. Under its charter, appellant has the right to demand toll of all those traveling on its road, in vehicles or on horseback, but no toll can be collected except at a gate. It would therefore seem manifest that the company should have the election to place their gates so as to most effectually and certainly collect what they are legally entitled to; for not only do those who purposely evade the payment of toll, by going around the gates, deprive the company of what they justly owe it, but lessen the ability of the company to keep its road in proper repair, in which the public is interested, and upon which the existence of the franchise depends.

To say that a toll-gate, once established, shall never be changed, whatever may be the improvement or change in the country where the road is located, or however necessary it may be in order to enable the company to collect toll from those who use its road, is unreasonable and unjust; because the object of a change when made is to more surely collect tolls from all who use the road, and of that no one has the right to complain. By section 5 of the charter appellant has the right to acquire land upon which to erect toll-gates and houses for gate-keepers; but no power is given to acquire land for that purpose except by purchase, though the power is conferred to have sufficient land, stone, and gravel condemned for the construction and repair of the road. Nor does appellant now seek to take any land for such purpose, but is proceeding to erect the gate entirely upon the land of the company; and the only question about which it seems to us there is any room for argument is whether the toll-gate can be erected in the manner proposed without being an obstruction. By the original charter, the company was authorized to acquire land for its road 60 feet wide, 30 of which was to be graded, and 18 feet macadamized; but by amendments to the charter it was authorized to reduce the width to 45 feet, of which 24 feet is for the grade and 16 feet for stone. Whether the change has ever been made does not appear.

It seems to us the legislature evidently intended to authorize the company to erect gates within the limits prescribed; otherwise it would have been without authority to erect such gates at all. Moreover, the gate and toll-house must of necessity be within that boundary for the convenience of the public as well as to prevent persons from passing through without paying toll. In our opinion, the company has the right to erect the new gate upon its own right of way, so as to leave the portion covered with stone free for travel, without rendering itself liable for obstructing the highway.

It seems that the site of the proposed new gate is less than five miles of the one south of Sharpsburg, in the direction of Mt. Sterling; but there is more than the distance of ten miles between the new gate and the second one towards Mt. Sterling. By the charter the company was authorized to erect a gate upon the completion of five miles, with the proviso that no one should be erected nearer than one mile from any town on said road. There is no provision requiring the gates to be precisely five miles apart, nor would it be practicable, in any event. Whatever doubt there may be as to the meaning of the charter on this subject is removed by subsection 1, § 3, c. 110, Gen. St., which authorizes gates to be at a less distance apart than five miles, though the toll must be always proportioned according to the distance. In our opinion, appellant has the legal right to change the location of gate No. 8 to any point on its road between that place and Sharpsburg, not nearer than one mile of that town, and may erect gates upon its own land, provided the part of the road used for travel is not obstructed. Wherefore the judgment is reversed, and cause remanded, with direction to dissolve the injunction, and dismiss the petition.

HARLAN'S HEIRS v. ARTHUR.

*(Court of Appeals of Kentucky. February 17, 1887.)***LOST RECORD—RETURN BY SHERIFF OF EXECUTION NOT RECEIVED BY CLERK.**

An execution for costs issued from the clerk's office of the court of appeals, but the return upon it of the sheriff to whom it was addressed was never received there. The sheriff claiming that, after levying upon and selling land under it, he inclosed his return to the clerk's office, the court of appeals is asked to appoint a commissioner under Gen. St. Ky. c. 72, § 4, providing that, if the records or papers of any court shall be destroyed, lost, or obliterated, the court may appoint a commissioner to supply them. *Held*, the statute does not apply, as the application is not to supply a lost record, but to make a record that never existed in that court. The fact of a writ having been issued from a court, directing its officer to execute it, does not make his mode of executing it a part of the records of the court from which it issued. The remedy in such case is in a court of original jurisdiction, where the equitable title may be set up, and a deed executed upon proof of the facts.

Appeal from circuit court, Greenup county.

This was a motion to supply a lost execution. The execution was issued from the clerk's office of the court of appeals for appellees' costs in case of *Arthur v. Harlan's Heirs*, was levied on land, and land sold in satisfaction of same. The execution and return were never returned or recorded in the clerk's office from whence it issued. This is a motion to appoint commissioners to supply them.

B. F. Bennett, for Harlan's Heirs.

PRYOR, C. J. It is conceded that the execution issued from the clerk's office of this court, and this fact appears from the records of the office, but the party making this motion proposes to show that after the execution left the office it was levied on land, the land advertised and sold, and purchased by the plaintiff in the execution. The sheriff says he inclosed it to the clerk, but no record appears of that fact, or that such a paper ever reached the office.

It is provided by section 4 of chapter 72 of the General Statutes that "if the records or papers of any court shall be lost, destroyed, defaced, or obliterated, such court shall appoint a commissioner, who shall have power and authority to fix on a convenient place to meet and sit from time to time, giving reasonable notice thereof." When a case under this statute goes before the commissioner, he is required to ascertain from the proof what the record was that has been lost or destroyed or mutilated in this office. He finds that an execution issued that has never been returned, and that fact can be established by the record itself, without the aid of the commissioner; but the plaintiff in the motion proposes to go further, and show that after the execution left the office the sheriff levied it on land, advertised the property for sale, and the plaintiff purchased it. Such a record was never in this office. He is not supplying a lost record from this court, but is making up a record that was never a part of the records of this court. An action made by an officer or an execution that had never reached this court cannot be said to have been in this court, and a part of its records; but if filed here in this court with the return upon it, or the return entered upon the execution book that has been destroyed, then the record may be supplied. The remedy, it seems to us, is in a court of original jurisdiction, where the equitable title may be set up, and a deed executed, if the facts are established. We do not understand that the fact of an order or writ having been issued from this court, or any other court, directing its officer to execute the command or order, makes his mode of executing it a part of the records of the court from which it issued, so as to permit proof of its having been a record lost from the court, under the provisions of the statute with reference to lost records. The proceeding to establish the existence of the loss in such a case is in a court having jurisdiction

to supply the loss of written instruments, and not before a commissioner to supply a record that has been lost from the clerk's office. It is making a record in such a case that was never in this court, and not supplying one that had been a part of its records, and lost or destroyed. The statute only provides for a public notice, showing that it must apply only to that which has constituted a part of the public records, and has been lost or destroyed. Besides, a commissioner has to be appointed to take the proof, whose term of office is to continue for one year, and his services to be paid out of the county levy. *Quære*, does not this act apply to the courts inferior to this court, and to cases where the record-book or the records have been destroyed so as to affect the entire public, and not to the loss of a single paper that may be supplied by the notice to the adverse party, and proof taken?

BEADLES and others v. McELRATH and others.

Appeal from Circuit Court, Graves County.

SAME v. LEET and another.

Appeal from Circuit Court, Caldwell County.

(Court of Appeals of Kentucky. February 19, 1887.)

1. EVIDENCE—GAMBLING IN "FUTURES"—PAROL EVIDENCE.

Parol evidence is admissible to show that a written contract, regular in form, and purporting to be for the purchase and actual future delivery of cotton, was in fact entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price and the price on a future named day; but, the terms of the contract implying good faith, the burden of proof is on the party resisting to show the illegal purpose.

2. CONTRACT—DEALING IN "FUTURES."

Where appellants made a contract to buy for appellee a certain quantity of cotton for future delivery, and it appeared that appellants were members of the New Orleans Cotton Exchange; that they had bought in the year preceding this contract 300,000 bales of cotton, and were under contract to take 60,000 bales, worth \$200,000, at the time of this contract, while they were worth only \$75,000, *held*, these circumstances showed the cotton contracted to be bought for appellee was on speculation only, and no future actual delivery was intended; the contract was therefore against public policy and void, notwithstanding a rule of the exchange provided that actual delivery of the cotton might be exacted.¹

W. W. Tice and Wm. Lindsay, for appellant. *Robertson & Robbins, Hargis & Eastin*, and *C. L. Baudle*, for appellees.

PRYOR, C. J. These two cases were argued and will be considered as one case. The appellants, Beadles, Wood & Co., were cotton brokers, engaged in buying and selling cotton on commission, as they allege, in the city of New Orleans. They instituted these actions in the court below against the appellees for large sums of money said to have been advanced by them for the appellees in the purchase and sale of cotton on the cotton exchange in the city of New Orleans. The appellees, by way of defense, allege, in substance, that the claim set up by the appellants originated by reason of certain transactions between them and appellants in the purchase and sale of cotton on speculation, and under contracts that were not to be performed for the delivery of the cotton, and the payment therefor, at the maturity of the contracts; that they were dealing in futures, by which they were to pay in money the difference by reason of wagering bargains by which no cotton was sold or delivered, and none intended to be delivered, when the contracts were executed. They also allege that Beadles, Wood & Co. were dealing largely in cotton on their own account or for others, and that, having made contracts in which the appellees had no interest, similar to those made with the appellees, they were unable to

¹See note at end of case.

meet their obligations with members of the cotton exchange, with whom they contracted, and, under the rules of the exchange, those contracts were all declared forfeited, including the contracts said to have been made for the appellees; that the forfeiture took place before their contracts matured, and in that manner they were deprived of any right to recover, without fault on the part of either the appellants, or of those with whom they contracted for their benefit. A jury, by special findings, determined the issue in the case of McElrath & Co., and the judge, on a submission of the law and facts to him, determined the case of Leet & Meadows.

The one case, that against McElrath & Co., was decided for the defendants because of its vicious consideration, it being a gambling transaction; and the other, that of Leet & Meadows, on the ground that the forfeiture of the contracts was caused by the insolvency of the appellants, who were unable to comply with their contracts, and caused the loss to the defendants,—the judge further holding that the contract was not a wagering contract, or against public policy. The cases were determined in different jurisdictions, but were heard together in this court. The judgment in each case was rendered for the appellees. The appellants, having denied that the contracts were invalid, relied on certain rules of the cotton exchange, from which it appears that such contracts can be enforced for the delivery of the cotton, and further established by the testimony that the contracts were made subject to the rules of the cotton exchange, and should not, therefore, be regarded as wagering contracts. The contracts being in writing, it is further maintained that parol proof is inadmissible to vary their terms. By the rules of the cotton exchange, the delivery of the cotton may be exacted, and the testimony conduces to show that the appellees entered into the contracts with the knowledge that by its terms those rules were to determine its legal effect. In fact, the jury trying this case, in response to special interrogatories, have so said by their verdict.

In this case it, then, plainly appears that contracts legitimate on their face, containing stipulations plain and easily understood, by which the cotton purchased is required to be delivered, have been declared vicious, in the one case at least, upon parol testimony showing that such was not the real purpose and intention of either party to the contract; the real purpose being, in fact, to speculate only on the rise and fall of prices, as has been determined by the special findings of the jury in the particular case. If the written contract and the rules of the cotton exchange are to control the decision of this case, then the facts and circumstances by which the real nature of the various transactions were brought to light should have been excluded from the jury, and a judgment rendered for the appellants, the plaintiffs below. The question simply is whether a contract, legal and proper in form, can be avoided by a proper pleading; and shown to be in fact a contract vicious in its character, and contrary to public policy; a contract legal on its face, but when explained by the facts and circumstances connected with its performance, only a gambling transaction. The rule is well established that parol evidence is not admissible to restrict, enlarge, or contradict the terms of a written contract where there is no ambiguity in its meaning; but when facts are alleged showing the existence of fraud, or that the contract was entered into as a device to avoid what would otherwise be a vicious consideration, as is in substance alleged in this case, this rule has no application.

The rule, says Mr. Greenleaf, "is not infringed by the admission of parol evidence showing that the instrument is altogether void, or that it never had any legal existence, either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter." Again: "Parol evidence may be offered to show that the contract was made for the furtherance of objects forbidden by law, whether it be by statute, or by an express rule of the common law, or by the general policy of the law," etc. 1 Greenl. Ev. (14th

Ed.) 360, 361. So, in this case, although by the rules of the cotton exchange the cotton was to be delivered, and the contract made with the appellees expressly stipulated the delivery at a particular day in the future, still, if this was a mere device to avoid the effect of a contract that the parties really made, and if expressed in terms would have been vicious, and without consideration, we perceive no reason why such facts may not be pleaded and proven, and the recovery on that account denied. That a contract of sale may be made for the future delivery of produce, or any article of personal property, will not be controverted; and that such a contract, by the agreement of parties, or by the regulations connected with the boards of trade in the country, may be transferable from one to the other, will be conceded; but when entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price of the cotton and its market price on the day, if a contract in good faith, the cotton was to be delivered, then the contract becomes a mere wager, and neither party to it can recover. If a contract in good faith, it is binding; but when assailed as having been entered into to cover up the real intention of the parties, by making that appear legitimate which is really a gaming transaction, the defendant will be permitted to introduce parol proof to establish his defense.

Such a contract will be presumed to be valid when unexplained, because it shows by its terms an actual purchase and sale, and the burden is on the defense to show the illegal intention of the parties. As said by AGNEW, J., in the case of *Kirkpatrick v. Bonsall*, "the law does not condemn such transactions, providing the intention really is that the commodity shall be actually delivered and received when the time for delivery arrives." 72 Pa. St. 155. In *Barnard v. Backhaus*, 52 Wis. 593, 6 N. W. Rep. 252, and 9 N. W. Rep. 595, that court went further, and held "that, for the sale and delivery at a future day of grain for a fixed price, it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery of the grain, and not as a cover for a gambling transaction."

It seems to us that the terms of the written contract imply good faith, and the burden should rest on the defense to show the illegal purpose. It becomes necessary, therefore, to examine the nature of the transactions between these parties, in the light of the testimony before us, with a view of determining the validity of those contracts. By the rules of the cotton exchange, no one but a member can make contracts for the purchase and future delivery of cotton. Therefore the broker, being a member when purchasing, must necessarily purchase of a member of the exchange; and in this manner they make large contracts by either purchasing or selling cotton for future delivery, and assign so much of the contract to each customer as the broker may have received orders to purchase or sell. He receives orders to purchase from A., B., C., and D., living in Kentucky, to purchase 2,000 bales for each, and a like number of orders from A., B., C., and D., living in Tennessee. The broker enters the exchange, and purchases of one or more members 16,000 bales of cotton in his (the broker's) own name, and then on his books assigns, or by contract passes, to each one of his eight customers, 2,000 bales of cotton, at the price for which he purchased; the purchasers depositing such a margin as is required by the rules of the exchange. If the broker should receive a telegram from one of the parties in Kentucky to sell his 2,000 bales before the time of delivery, and one of his customers from Tennessee should want to purchase an additional 2,000 bales, he then transfers on his books the cotton of the Kentucky customer as sold to the Tennessee customer, at that day's prices. All dealers are to keep up their margins as the fluctuations in prices demand, as this is determined by the rules of the exchange. The speculator in futures from this mode of dealing, whether for actual delivery or not, has in fact made a purchase of cotton, but can never ascertain with whom the contract was made. The broker may inform the exchange for whom he is

purchasing, but this gives no right of action against any one but the broker. The broker is insisting that he is the mere agent of the purchaser, and entitled to his commission, and, when told by the purchaser that the 2,000 bales of cotton must be delivered at the maturity of his contract, it is then ascertained that the broker has purchased 16,000 bales of cotton of one or more members of the exchange in his own name, and, the margin not being kept up, the entire contract is forfeited, and the moneys already advanced on the margin gone to the vendor of the cotton.

In February, 1882, the appellants, being purchasers of near 60,000 bales of cotton, notified the exchange that they were unable to comply with their contracts. The forfeiture took place, and this was before the maturity of the contracts with the appellees; but it is now insisted that, if the margins had been kept up, the contracts would have remained in force. Suppose the margins had been forwarded to the appellants: from the testimony in this case, the appellants have purchased cotton exceeding in value more than \$200,000, and the margin being called for, and not deposited, the whole contract went with the insolvency of the firm that took place in February, 1882. These appellants were in fact selling to the appellees, and were not their agents. They purchased large quantities of cotton in the exchange on their individual account, and afterward distributed those purchases between their customers, leaving them without any remedy except against the broker for the delivery of the cotton, if such had in good faith been the contract between them. With the prices of cotton favoring the appellees, their claim as purchasers might have been enforced through their broker, in his name; but with an insolvent commission merchant, whose credit alone enabled him in the first place to enter the exchange, and make these large purchases, the remedy was necessarily worthless, because the party in fact liable had become insolvent.

It is shown that within less than a year prior to these contracts with the appellees, that appellants contracted for 300,000 bales of cotton, and on the eighth of February, 1882, the day they failed, the contracts they had on hand compelled them to receive and pay for near 60,000 bales of cotton, a portion of which, they say, was the cotton of these appellees. The appellants were not worth exceeding \$75,000, if that much, and yet it is argued that such contracts were valid business transactions, and the parties expected to comply with the terms of each contract; or, if not, that the prime object was not to speculate merely on the rise and fall of cotton, but to receive or deliver the cotton purchased or sold. It is evident that if the margin had been forwarded by the appellees, that all would have gone in the financial wreck that followed the reckless ventures of men who were doubtless enterprising merchants, but who had speculated to such an extent, either for themselves or others, as to involve all in financial ruin. This would constitute a complete defense to each action, regardless of the other questions raised, and the judgment in the case of Leet & Meadows was therefore proper. It is claimed that McElrath, one of the firm, was in New Orleans, and on the exchange, when some of this cotton was purchased. He was not a member of the exchange, and therefore made no purchases, but the cotton was purchased in the manner and as all other cotton was purchased for their customers by these appellants. They were simply paying the appellants a bonus for the privilege of trading with them, and were, in fact, the vendors, and the appellees the vendees, of the cotton. These appellees were men of limited means, living in this state, and contracting by telegrams and letters for futures in cotton, with no intention or expectation of receiving a single bale, either from the appellants or any one else, and this was the intention and purpose of the contracts,—a fact known to the appellants as well as the appellees. The testimony of the appellants leaves no doubt on this subject, and neither the rules of the cotton exchange, nor the letter of the contract, will be allowed to give validity to such agreements.

The opinion in the case of *Sawyer v. Taggart*, reported in 14 Bush, 727, was based on the idea that no evidence was offered by the defense showing that the contracts were to be settled by the payment of differences; but, on the contrary, the plaintiffs had assumed the burden, or rather established, that the contracts were to be executed in good faith, with no evidence conflicting with such a conclusion. Here the character of the business transactions conducted by the appellants, from their own statements, both with the appellees and others, conduce to show that there was a tacit, if not an express, agreement that no cotton was to be delivered, and, with the testimony for the defense, there can be no doubt on the subject.

But it is argued that a mere tacit agreement, or one necessarily inferred from the circumstances surrounding the various transactions connected with the positive statements of the defendants, cannot supplant that which the parties have reduced to writing, and the contracts must be enforced because they purport to be valid contracts, and the rules of the cotton exchange have so determined. In discussing a similar question, the supreme court, through Mr. Justice MATTHEWS, said: "We do not doubt that the question whether the transaction came within the definition of wagers is one that may be determined upon the circumstances, the jury drawing all proper inferences as to the real intent and meaning of the parties; for, as was properly said in the charge, 'it makes no difference that a bet or wager is made to assume the form of a contract.' Gambling is none the less such because it is carried on in the form or guise of legitimate trade. It might therefore be the case that a series of transactions might present a succession of contracts perfectly valid in form, but which on the face of the whole, taken together, in connection with all the attendant circumstances, might disclose indubitable evidence that they were mere wagers." *Irwin v. Williar*, 110 U. S. 511, 4 Sup. Ct. Rep. 160.

The bulk of the transactions in the exchange by the appellants were in the department known as the "margin," as distinguished from the other departments. The amount of cotton delivered in all the sales and purchases did not exceed 4,000 bales, and the proof conduces to show that the cotton was on consignment; but, whether so or not, it is unreasonable to suppose that the appellees, with their limited means, had undertaken to receive and pay for cotton exceeding in value greatly more than they were worth, and that appellants induced them to speculate through him as their agent with such an understanding or agreement. There are so many facts and circumstances leading to the opposite conclusion as to the intention of both parties when these trades were made as leave no doubt as to the correctness of the judgment below. We are aware that the business of the cotton exchange involves the greater part of the trade in the country's greatest staple, and that leading merchants and business men engage in such transactions; but this in no manner relieves the case from the vicious features of this class of contracts. Men, no doubt, of both personal and commercial integrity enter into such contracts. They are nevertheless pirates upon the legitimate trade, and consumers of the country. Fictitious values, created by a speculation that causes the fluctuation in prices from day to day of all the leading products of the country, based upon a species of gambling more ruinous to the people than any other, result from such contracts as were made in this case. They will not be enforced by the courts of this state.

There are many questions raised as to the pleadings and evidence not necessary to be considered, as from the testimony of the plaintiffs alone these judgments were proper. Judgment affirmed.

NOTE.

CONTRACTS FOR DEALING IN FUTURES. A perfectly valid contract may be made for the sale and future delivery of goods which the vendor does not own. *Irwin v. Williar*, 4 Sup. Ct. Rep. 160. Option contracts are not necessarily illegal, and the incident of

putting up margins amounts to nothing unless the contract itself is illegal. *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438. The validity of such contracts depends upon the mutual intention of the parties as to the actual sale and delivery of the property, or a pretended and fictitious sale, to be settled upon differences. *Hentz v. Jewell*, 20 Fed. Rep. 592; *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438. But such a contract, merely disguising an intention to speculate in margins without actual delivery of goods, is void. *Irwin v. Williar*, 4 Sup. Ct. Rep. 160; *Waugh v. Beck*, (Pa.) 6 Atl. Rep. 923; *Stewart v. Garrett*, (Pa.) 4 Atl. Rep. 399; *Hentz v. Jewell*, 20 Fed. Rep. 592; *Cobb v. Prell*, 15 Fed. Rep. 774; *Melchert v. American Union Tel. Co.*, 11 Fed. Rep. 193. It is the duty of the courts to scrutinize very closely such contracts, and, if the circumstances are such as to throw doubt upon the question of the intention of the parties, it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to the delivery and receipt of the commodity. *Cobb v. Prell*, 15 Fed. Rep. 774. It must affirmatively and satisfactorily appear that the contract was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction. *Barnard v. Backhaus*, (Wis.) 9 N. W. Rep. 595.

If it appear that the parties, or either of them, contemplated the delivery, or the possible delivery, of the goods, it is not void as a gambling contract, though it resulted in the settlement of the price by the payment of difference, without delivery of the grain. *Tomblin v. Callen*, (Iowa,) 28 N. W. Rep. 573. And it has been held that where a firm of brokers and commission merchants, dealing in grain and provisions on the board of trade in Chicago, transacted business for its customers, some of whom are buyers and some sellers, under the rules and regulations of the board, intending to deal in time contracts, and to settle the differences, so as to avoid paying for and carrying the commodity bought, is not a dealing in "options to buy or sell in future time," and is not within the prohibition of the *Illinois* statute; *Jackson v. Foote*, 12 Fed. Rep. 37. A gambling contract not being a legitimate cause of action, money advanced upon a contract cannot be recovered in the way of counter-claim. *Higgins v. McCrea*, 6 Sup. Ct. Rep. 557, 23 Fed. Rep. 782.

SHELBY'S ADM'R v. CINCINNATI, N. O. & T. P. RY. CO.

(Court of Appeals of Kentucky. February 19, 1887.)

1. NEGLIGENCE—RAILROADS—PERSON WALKING ON TRACK—KILLED BY MOVING CAR.

In an action against a railroad for negligence resulting in the death of appellant's intestate, it appeared that a locomotive drew a box car to the head of a switch, and, after giving the car an impetus forward, the locomotive moved off, and the car continued onward in the opposite direction, at a rapid rate of speed, down grade, and without the control of any one, until it ran over and killed the intestate, who was walking on the track, seeking employment in feeding and watering stock loaded in the cars; a portion of the track traversed by the car ran through a town, and persons were in the habit of passing over it by the tacit consent of the railroad; held, the evidence made out a *prima facie* case of negligence, and the lower court erred in directing a peremptory instruction for the railroad.¹

2. SAME—DUTY OF ENGINEER IN RUNNING THROUGH TOWNS.

It is the duty of the engineer in charge of a train to use increased vigilance while the train is moving through a town or city or other place, where pedestrians have, by license or custom, a right to be; and such duty is violated by sending a car forward, through a town or other such place, of its own impetus, without any one in charge to control it.¹

3. SAME—PARTY ON TRACK SEEKING EMPLOYMENT.

It being customary for the owners of live-stock being shipped on railroads to employ others than the servants of the company to feed and water them at stations or stopping places, a person coming on the tracks at such a point, seeking employment of that kind, is not a trespasser.¹

¹NEGLECT—PERSONS WALKING ON RAILROAD TRACKS. At a place on the line of a railroad where, although not a public highway, there is a crossing, constantly and notoriously used as such by the public without objection on the part of the company, the company is bound to give some reasonable notice and warning of the approach of trains, although not absolutely bound to ring a bell or blow a whistle. *Byrne v. New York Cent. & H. R. R. Co.*, (N. Y.) 10 N. E. Rep. —.

At a place where it be shown that people are in the habit of using the track with the acquiescence of the company, it is its duty to keep a lookout, and it will be liable for want of care. *Davis v. Chicago & N. W. Ry. Co.*, (Wis.) 17 N. W. Rep. 406; *Townley v. Chicago, M. & St. P. R. Co.*, (Wis.) 11 N. W. Rep. 55.

See, also, *Little Rock, M. R. & T. Ry. Co. v. Haynes*, (Ark.) 1 S. W. Rep. 774.

Appeal from circuit court, Boyle county.

Robt. Harding, J. B. McFerran, and Van Winkle & Rodes, for appellant. Breckinridge & Shelby, for appellee.

LEWIS, J. This is an action by appellant to recover for the destruction of the life of his intestate, George Shelby, a boy about nine years of age, by the alleged willful negligence of the servants and agents of the appellee; and the question before us is whether the lower court erred in giving, at the conclusion of the plaintiff's evidence, a peremptory instruction to find for the defendant. The intestate was killed by being run over by a box car on a side track of appellee's railroad at Junction City, Boyle county, where the Louisville & Knoxville road, running east and west, crossed it. It appears that on the occasion those in charge of a freight train standing on the main track of appellee's road were endeavoring to detach the box car in question, which was next to the engine, for the purpose of placing it on the side track near the depot, and with that view it was drawn along the main track to the intersection, and thence pushed upon the side track. But, instead of keeping it attached to the engine until it reached the place where it was the purpose to leave it, the engine, after being made to give it an impetus, was cut loose at a point about 75 yards from where the intestate was standing, and carried back in the opposite direction towards the main track, while the box car was permitted to move, without the control of any one, along the side track, that was down grade, at the rate of from five to eight miles an hour, going a distance of 200 yards after running over the intestate before it stopped. No signal or warning was given of the approach of the car to where the intestate was killed, nor does it appear that any servant of appellee was in a position to see or warn him, or any one else who might have been on the side track in front of the moving car, which the evidence shows did not itself make enough noise to attract attention.

It appears that Junction City contains a population of about 400, and about 20 families reside south of the Louisville & Knoxville road, who have been accustomed to pass along the side track of appellee's road going to the part of the town north of the other road. It further appears that, a few hours before his death, the intestate had been employed by the owner to water hogs in a box car of another freight train, and his purpose in going where he was when killed was to solicit employment by the same person in watering cattle in a car of the train from which the box car in question was detached, and when struck he was standing on the side track opposite the cattle car, waiting for the owner, who was at it, to become disengaged.

The right to maintain an action against a railroad company for an injury to the person always involves a breach of duty by the company or its servants, and its liability generally depends upon the place where, and the circumstances under which, the injury is done, and the situation and relation of the parties at the time. But there are certain well-established rules which regard for human life will not allow to be relaxed. It is the duty of the engineer in charge of a train, moving or about to move, to give timely warning of its approach to a crossing, or other place where the public have a right to go; and it is no less his duty to use all necessary means consistent with the safety of those on the train to prevent injury to a person on the track in front of a train, after his peril is discovered; and this duty the company owes even to a trespasser on its track; for while, as a general rule, he is required to use his eyes and ears to discover the approach of trains, he may nevertheless recover for an injury wantonly or intentionally inflicted on him. And increased vigilance and precaution to prevent injury are required of those in charge of trains moving in or through a city or town.

But it is obvious that neither the duty of giving the warning of the approach of trains, nor of resorting to the proper and necessary means to pre-

vent collision with persons, can be performed unless there be some one in a position to see ahead of the train and to control it. Though in this case the injury was done, not by a train drawn or moved by the engine, but by a single detached car, nevertheless it seems to us that it was as much the duty of some servant of appellee to be in a position to give warning of its approach, and to control its movement, as if it had been attached to a train; for its movement on the down grade was not only rapid, but without noise sufficient to attract attention. As held by this court in *Kentucky Cent. R. Co. v. Gastineau*, decided July, 1885, a railroad company is not required to anticipate the peril of a person who intrudes into its private yard; and undoubtedly a company may, without a breach of its duty to the public, move a single detached car by bumping or pushing, or suffer it to move by gravitation, to a desired position on that part of its track, at a depot or station, where the public have no right to go. But in this case the car was allowed to move without control, at a rapid rate of speed, a distance of near 300 yards, in a town, and along a considerable portion of the track where it ran persons were in the habit of passing by the tacit permission, if not express license, of the company.

There is some conflict of authority as to the extent of duty which a railroad company owes to pedestrians who, by license or custom, use its track to travel; but unquestionably such fact should enhance the duty of the servants of the company to exercise caution and prudence in the operation of its road at such place, (1 Thomp. Neg. 453;) and, in our opinion, the full performance of duty requires that neither a train nor single car should be moved at such place without some servant is in a position to give warning of its approach, and control its movement. The intestate, however, was not at the time he was killed using the track for travel from one part of the town to the other, but was there upon business legitimately connected, at least indirectly, with the operation of the road, the performance of which the company must be presumed to assent to; for, in transporting animals on a railroad, it is necessary and customary for the owners to employ others than the servants of the company to feed and water them at stations and stopping places. He had some time before his death been so employed, and at the time of his death was seeking the same employment. In our opinion, therefore, he had a lawful right to go upon the track, and the company owed to him a duty of active vigilance.

It is true, he was upon the side track near the rail next to the main track, and might have taken a safe position between the tracks while waiting to speak to the owner of the cattle; but when he went there the side track was open, and no notice or warning was given that the box car was about to be put upon the side track; the first notice given to him being when the car struck him. In our opinion, the evidence introduced by the plaintiff made out a *prima facie* case, and the court erred in giving the peremptory instruction. Wherefore the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

KEMPER v. COMMONWEALTH.

(Court of Appeals of Kentucky. February 19, 1887.)

CRIMINAL LAW—PROSECUTION UNDER STATE LAW FOR KEEPING BAWDY-HOUSE—AFTER CONVICTION UNDER CITY ORDINANCE.

One being indicted under the state law for keeping a bawdy-house in a city, it is no bar to the prosecution that she had previously been tried and convicted of the same offense in the city court under the city charter and ordinances, it appearing that the punishment imposed by the state for the offense was fine and imprisonment, while that imposed by the city was fine only. The act constituted an offense against both state and city, and each had the right to punish for it. The provision

of the city charter giving the city court exclusive jurisdiction of all offenses committed against the ordinances of the city means that that court only shall have power to try for an act so far as it constitutes an offense against the city.¹

Appeal from circuit court, Daviess county.

Owen & Ellis, for appellant. *P. W. Hardin*, for appellee.

BENNETT, J. The appellant was indicted, tried, and convicted in the Daviess circuit court for keeping and maintaining a bawdy-house in the city of Owensboro, Daviess county, Kentucky. Her fine was fixed by the jury at \$350. She pleaded in bar that she had been tried for the same offense, and convicted of it, in the city court of Owensboro, which court, under the city charter and by-laws, had jurisdiction to try the offense. The circuit court, regarding appellant's plea in bar as insufficient, overruled it, and rendered judgment against her for \$350, the amount fixed by the jury. She has appealed to this court.

By the charter of the city of Owensboro, its mayor and common council are authorized to pass such ordinances as they may deem necessary and proper for the purpose of suppressing disorderly houses, bawdy-houses, etc., within the city limits, and to prescribe the punishment for the violation of such ordinances. Pursuant to this power, the mayor and common council passed an ordinance providing that, "any person or persons, who shall within the city of Owensboro, establish or carry on, or permit to be carried on, upon his or her property, any house of ill fame, shall, upon conviction, for each and every offense, be fined not less than \$25, nor more than \$100; that each 24 hours the same is carried on, or permitted to be carried on, shall constitute a separate offense, under this ordinance." The city charter also provides that "the city court shall have exclusive jurisdiction of all actions and prosecutions for violations of the ordinances and by-laws of the city."

The question is, was the appellant's trial and conviction in the city court of Owensboro, for having kept a bawdy-house in the city in violation of the city ordinance, a bar to a prosecution by the state for the same acts, which constituted an offense against the laws of the state? The ordinances and by-laws of the city of Owensboro, which provide for the good order, peace, and morals of the city, are mere police regulations, and form no part of the criminal jurisprudence of the state. The state exercises its judicial power in criminal cases arising under the general criminal jurisdiction of the state, and where its peace, good order, and dignity are involved. The power conferred upon the city of Owensboro by its charter, as well as the purpose of the ordinance passed pursuant to the charter, was to provide a mere police regulation for the enforcement of good morals,—the suppression of bawdy-houses within the city limits. The city did not attempt to punish the appellant for any offense committed against the laws of the state. It had no power to inflict such punishment. The offense for which she was punished was committed against the good order and public morals of the city. The offense committed by the appellant against the city and the state, although consisting of the same act, are quite distinguishable, and the prosecution for each offense proceeds upon different grounds,—that of the city proceeds upon the sole ground of punishing for violating the city ordinance, the state having no jurisdiction to prosecute and punish for the violation of the ordinance; the prosecution by the state proceeds upon the sole ground of punishing for violating its criminal laws, which are applicable alike in the whole state, and violators of them must be punished by the same general principle,—the city, by virtue of its police regulations, having no jurisdiction to prosecute and punish persons for violating the criminal laws of the state.

¹A conviction under a municipal ordinance is not a bar to a prosecution by indictment under the state statutes. *State v. Lee*, (Minn.) 13 N. W. Rep. 913; *State v. Bell*, (Minn.) 5 N. W. Rep. 970; *State v. Oleson*, Id. 869.

The case at bar aptly illustrates these principles. The punishment prescribed by the city ordinance for keeping a bawdy-house within the city limits is a fine of not less than \$25, and not more than \$100. The punishment for violating the state law by keeping a bawdy-house is by fine or imprisonment, or both, at the discretion of the jury. So, if the principle contended for by appellant prevailed, she, although violating the laws of the state as well as the police regulations of the city, could but be fined for keeping a bawdy-house within the city limits from \$25 to \$100; while her neighbor, for keeping a bawdy-house just beyond the city limits, could be fined and imprisoned at the discretion of the jury. Such a rule would be clearly wrong. The truth is that the appellant, by keeping a bawdy-house within the limits of the city of Owensboro, violated its police regulations, for which the city had the right to and did punish her; and by the same act she violated the criminal laws of the state. Each had the right to punish her without reference to the jurisdiction of the other, and the punishment inflicted upon appellant by the city government for violating its police regulations was no bar to the right of the state to punish her for violating the criminal laws of the state. See *Cooley, Const. Lim. (5th Ed.) 241; Mayor, etc., v. Allaire*, 14 Ala. 402; *Shaffer v. Mumma*, 17 Md. 336.

The provision in the city charter which gives the city court exclusive jurisdiction of all offenses committed against the ordinances and by-laws of the city speaks for itself. It means that the jurisdiction of the city court to try and punish all offenses against the police regulations of the city shall not be invaded by any other jurisdiction. See *Levy v. State*, 6 Ind. 284.

The judgment of the lower court is affirmed.

SOAPER v. HOWARD.

(Court of Appeals of Kentucky. February 24, 1887.)

EXECUTION—LIEN—FAILURE TO RECORD.

Kentucky act March 8, 1878, (1 Acts 1877-78, p. 30,) providing that, where an execution is issued from one county to another to be levied, it shall be the duty of the sheriff of the county to which it is issued to return it, after levying it, to the clerk of the circuit court of his county to be recorded, and, after it has been recorded, to return it to the county whence it issued, *held*, the failure of the sheriff to do his duty, and have the execution recorded as directed by the statute, does not deprive the execution creditor of his lien under the execution and levy.

Appeal from circuit court, Daviess county.

H. M. Haskins and James Stuart, for appellant. *W. T. Ellis*, for appellee.

PRYOR, C. J. The appellant recovered a judgment in the Henderson circuit court against T. Y. Howard, and had an execution issued to the county of Henderson that was returned "No property found." Howard owning an undivided interest in a tract of land in the county of Daviess, the appellant had an execution issued to that county, and placed it in the hands of the jailer, who levied it on the land, subject to a mortgage held by one Hittchells; and, having advertised it for sale, the plaintiff in the execution, Soaper, became the purchaser. Between the date of the levy and the sale of the land under the execution, the owner, who was the debtor, sold the land to his co-appellees. The appellant then brought this suit to enforce his lien, and to remove the incumbrance by reason of the sale and conveyance to the appellees. This right was denied him, and his petition dismissed.

By an act of the legislature approved March 8, 1878, it is provided "that, when executions of *fiert facias* are or shall be issued from the courts of any county in this commonwealth, and the same are sent to another county, and shall be, by the sheriff of such county, levied upon land in such county, it

shall be the duty of the sheriff so levying said execution to return the same to the clerk of the circuit court in his county, who shall record the same as executions are now required to be recorded, and, after recording same, said clerk shall deliver said execution back to the sheriff, who shall return the same to the office of the court whence it issued."

It seems that this statute was not complied with by the officer, but the execution was returned to the Henderson circuit clerk's office, and the sale made without any evidence of the levy upon record in the county of Daviess, where the land is. It was insisted in the court below, and so adjudged, that the failure of the sheriff to comply with this statute deprived the appellant of his lien, and this is the question presented in this case. It will be seen, from the wording of this statute, that no mention is made of the lien in behalf of the plaintiff in the execution that exists, not only by reason of the levy, but while the execution is in the officer's hands; but a duty is only imposed on the sheriff and clerk of recording the levy in the county where the land is levied on. This duty is required to preserve the evidence of what has been done under the execution, and for the convenience of those who may be investigating the title to land with a view of purchasing; but the lien nevertheless exists, as there is nothing in the statute depriving the execution creditor of his right to enforce it. The execution in a case like this is required to be recorded by the clerk, when handed him by the sheriff, *in the same manner as he is required by law to record such levies on executions issued from his own office.* This is the express language of the act. The clerk, by section 4, art. 1, c. 16, Gen. St., is required to keep in his office a book in which he shall record every execution, and the return of the sheriff thereon, *the same to be in full,* whenever it shall appear by said return that any real estate, or any interest therein, hath been levied on by virtue thereof. This statute, as well as the one under consideration, was intended to preserve the evidence of such official action by the sheriff, and to extend protection as far as it applied to those purchasing the land; but it is nowhere provided that, if the record is not made, the lien shall be lost, or that the failure of this duty on the part of the official shall deprive him of the lien.

Liens existing by statute may be made conditional by statute,—that is, provided the instrument creating the lien is recorded within a certain time,—but the court will scarcely deprive one of a lien given him by statute upon a construction by mere implication as to the legislative intent. Besides, if the lien is released in this case by reason of the statute, why is not the lien released when the land is sold under execution from the same county in which it is located? It is made the duty of the clerk in each instance to record the levy.

It may be argued that, in the case before us, the purchaser would have no means of ascertaining the existence of the lien without going to the county of Henderson, and therefore should be treated as an innocent purchaser. Such may be the condition in which the purchaser is placed, but, with the execution in the hands of the sheriff, the lien would exist even before the levy, although issued from another county; and that lien must continue, if there is no other reason for disregarding it, although the sheriff may fail to have it recorded as required by the statute. The continuance of the lien is not made to depend on the discharge of this official duty. Such liens are created, as against subsequent purchasers, by reason of the statute, and the courts have only to enforce them.

It was never intended that the execution creditor should be deprived of his lien by reason of the failure of the clerk to record the levy under either statute. The judgment below is therefore reversed, and remanded for proceedings consistent with this opinion.

IRVINE v. SCOTT.

(Court of Appeals of Kentucky. February 24, 1887.)

LANDLORD AND TENANT — TENANT HOLDING OVER — LANDLORD ACCEPTING RENT — ESTOPPEL.

In Kentucky, where one rents a stable for a year from a certain date, and at the expiration of the year continues in possession for *two months*, paying rent for that time, which the landlord accepts, and also takes in, with the knowledge of the landlord, a stock of provender sufficient to last him for another year, the tenant is entitled to occupy the premises for another year, the landlord being estopped by his acceptance of rent, and allowing the tenant to store the provender, to evict him, notwithstanding Gen. St. c. 66, art. 4, § 1, which provides that, where a tenant is in possession under a lease for a year or more, which is to expire on a certain day, and he holds over without the express consent of the landlord, he does not acquire any right to remain for *ninety days*, and may be evicted within that time.

Appeal from circuit court, Fayette county.

Bronston & Kinkaid, for appellant. *C. Suydam Scott*, for appellee.

PRYOR, C. J. This is a controversy between the landlord and tenant in regard to the possession of a stable in the city of Lexington. It appears from the agreed state of facts that the appellant had rented this stable of the appellee for a number of years by parol. The renting was by the year, at the rate of \$20 per month, the rent payable monthly. On the eighth of October, 1882, the appellant and appellee entered into a written contract by which appellant rented the stable for one year at the price of \$240, the rent to be paid, as under the parol contract, by the month. The rent expired on the eighth of October, 1883, and the appellant still continued in the possession of the premises, paying to the appellee the rent at the end of each month, as under the former contract of renting. These payments were made for two months, and nothing said about the lease. At the end of two months the appellee demanded an increased rent, and the appellant refusing to pay a greater sum, this warrant of forcible detainer was issued, resulting in a judgment of eviction. It seems that the appellant had filled his stable with provender for the ensuing year, and was proceeding to occupy the premises as he had done under the previous renting.

The right to maintain this warrant is based on the provisions of section 1, art. 4, c. 66, Gen. St. That section was construed by this court in *Mendel v. Hall*, reported in 13 Bush, 232. It is there said that it was the duty of the tenant to abandon the premises at the expiration of his term, and that a holding over for a less period than 90 days gave the landlord the right to proceed against the tenant without notice, and also the right to the tenant to abandon the premises within that time. When the holding over is for 90 days after the expiration of the day fixed by the lease for abandoning the premises by the tenant, he then becomes a tenant for another year from the expiration of his lease. A contract for renting, to expire on a certain day, when the tenant holds over, is distinguished from a tenancy at will or by sufferance, and it is in that class of cases where article 4 of chapter 66 applies. By section 1 of article 6 of the same chapter, "a tenancy at will or by sufferance may be terminated by the landlord giving one month's notice to the tenant, requiring him to remove," but where, by the contract, a day is fixed for the renting to expire, and there is a holding over for 90 days, the tenant becomes a tenant for another year, and is not a tenant at will or by sufferance. It is plain that under article 4 of chapter 66 the landlord may sue out his writ of forcible detainer without notice, where the tenant fails to leave on the day fixed, and has not held over for 90 days after the renting terminates.

In this case the renting expired on a named day, and there is no express contract to continue longer. Nothing was said about the lease, and therefore there must be some facts that must defeat the landlord's right to the posses-

sion in addition to the mere holding over by the tenant, or the eviction must take place. The mere belief on the part of the tenant that he is to continue is not sufficient, or the implied understanding alone will not defeat the warrant. In this case it appears that the renting had been from year to year, under the same contract, or the same terms, and a continued possession of the property by the appellant under a renting from year to year until this warrant was issued, or the demand for an increased rent was made. The holding over was by consent of the landlord, and the monthly rent paid as formerly for two months after the expiration of the day the tenant should have left. But this alone would not be sufficient to defeat the remedy of the landlord for the possession. But the latter stands by, and permits the tenant to fill the stable with provender sufficient to last for the ensuing year, and then does not demand the possession, but an increased rent. It was, in effect, saying to the tenant, "You can continue in possession, and make arrangements to retain possession for another year;" and not only induces, but sees, the tenant make an expenditure that no man of ordinary prudence would have made but for the conduct of the owner of the premises. Under such circumstances, the right of the landlord to adopt such a remedy as is provided by the statute will be denied him. "The rule is clear and proper that one is concluded, not only by what he does or says, but by the natural and reasonable inference from his declarations or conduct." *Bigelow, Estop.* The payment of rent establishes the relation of landlord and tenant, but here that relation is controlled by the statute. The landlord has by his own conduct, and his failure to speak or assert his claim, stood by, and seen the tenant provide for the year's rent by an expenditure that works an injury to the tenant unless he can hold for the year. He believed that he had the right to hold for the year; that belief was evidenced by the act of the appellee, and the tenant, acting upon it, has done that which he would not have done but for the appellee's conduct. The judgment must therefore be reversed, and remanded for proceedings consistent with this opinion.

OWENSBORO & N. RY. CO. v. DAVIES CO.

(Court of Appeals of Kentucky. February 24, 1887.)

1. **TAXATION—DUE PROCESS OF LAW—CONST. U. S. AMEND. 14—KENTUCKY ACT OF APRIL 8, 1878.**

The Kentucky act of April 8, 1878, (Gen. St. Ky. 1883, p. 1019), requiring the chief officer of each railroad company in that state to make a return to the auditor of public accounts in July of each year of the length of his road within the state, and providing for the appointment of a board of equalization, to meet annually in a designated month, at a designated place, to receive the returns from the auditor, to ascertain the value of the property, and to equalize and adjust the assessment thereon, and providing, further, for the collection of the taxes so assessed by suit against the officers for the penalties incurred by a failure to pay the taxes levied, or for the recovery of the taxes themselves by action in the courts, is not in contravention of the fourteenth amendment of the constitution of the United States, as taking the property of the railroad companies without due process of law.

2. **SAME—"EQUAL PROTECTION."**

Nor is the act repugnant to the provisions of that amendment guarantying to all persons the equal protection of the laws, by reason of the fact that, in the legislation of Kentucky on the subject, railroad property, though called "real estate," is classed by itself, as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining their value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street-railway, manufacturing, gas, and water companies.

3. **SAME—BONDS IN AID OF RAILROAD—ASSIGNMENT OF FRANCHISE—LIABILITY OF PURCHASER.**

While a railroad cannot be taxed by a county to pay the subscription of the same county to aid in its construction, yet, when its franchises have been purchased by a new company, the property of the new company in the county, except

such as it acquired by its purchase from the old company, is subject to taxation for the payment of its part of the county's subscription to aid in the construction of the old road.

Appeal from circuit court, Daviess county.

The appellee, Daviess county, brought this suit against the appellant, the Owensboro & Nashville Railway Company, for taxes alleged to be due it from the said company for the year 1884. The suit is based on the order of the Daviess county court, levying for the year 1884 a tax of 63 cents on each \$100 worth of all the taxable property in the county, and on the assessment of the company's property made by the board of railroad commissioners. Of the 63-cents levy, it appeared that 40 cents was to pay the principal and interest of bonds issued by the county to aid in the construction of the *Owensboro & Russellville Railroad*, and that the appellant is the purchaser of and successor to all the rights, franchises, and property of the Owensboro & Russellville Railroad, and that, after the purchase, appellant bought other ground in the county. The railroad refused to pay the levy on the value of the property as fixed by the board of commissioners, but the court below held it was liable to 40 cents of the 63-cents levy upon *so much of its property as it had acquired after the purchase of the Owensboro & Russellville Railroad*, and from that judgment the railroad appeals.

R. S. Bevier, for appellant. *Yewell & Haskins*, for appellee.

PRYOR, C. J. The principal question in this case has already been settled by the supreme court in a case involving the constitutionality of the act appointing railroad commissioners.¹ The property acquired by the present company since its purchase is subject to this tax,—a question also decided in the case of *Clark Co. v. E. L. & B. S. R. Co.*, 7 Ky. Law Rep. 761.²

We see no reason for disturbing the judgment. Judgment affirmed.

TAYLOR v. LOLLER'S EX'RS.

(*Court of Appeals of Kentucky*. February 28, 1887.)

HOMESTEAD—WAIVER—WIDOW ACCEPTING PROVISIONS OF WILL.

A testator devising all of his estate, real and personal, to his widow, and she having failed to renounce the provisions of the will, must be presumed to claim under it, and consequently to have waived her right to homestead in his estate.

Appeal from Louisville law and equity court.

Richards & Hines and *A. C. Rucker*, for appellant. *Wm. F. McAfee*, for appellee.

PRYOR, C. J. The appellant, a creditor of the appellees' testator, filed this petition, asserting her claim as a creditor of his estate, alleging the insufficiency of the personal estate to pay his debts, and asking for a settlement of the estate, and the sale of a house and lot to pay the debts. An issue was made as to the indebtedness, and a judgment rendered in favor of the appellant for a small amount, less than \$100. The widow of the intestate claimed a homestead in the house and lot, and, it being of less value than \$1,000, the chancellor refused to subject it. It is claimed that this court has no jurisdiction. The widow's claim is adverse to that of the creditors, and the question is whether the lot belongs to the estate, and therefore subject to the payment of the testator's debts, or does it belong absolutely to the widow. The court below adjudged that it belonged to the widow.

The testator devised all of his estate, real and personal, to the appellee, his widow. The will was probated, and no renunciation of its provisions has

¹ Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. Rep. 57.

² Decided April 8, 1886, before the commencement of the Southwestern Reporter.

ever been made. She must therefore be presumed to hold under the will, and not against it, and cannot assert the right to a homestead, as was decided by this court in the case of *Watson v. Christian*, 12 Bush, 524. Besides, if there had been no will, and the widow entitled to a homestead, the creditor could have subjected it to sell subject to her right of occupancy, as is expressly provided by section 14, art. 13, c. 38, Gen. St. The homestead, when owned and occupied by the owner of the land, who is the debtor, cannot be sold, either absolutely or subject to his occupancy. It is a right vested in him, of which he cannot be deprived unless he voluntarily surrenders it, or disposes of it by sale to another. He may sell it as he would the fee to his land; but when he dies, and the right to the homestead or its occupancy passes to his wife and children, then it may be sold subject to this joint occupancy, or, if no children, subject to the occupancy by the widow. In this case, however, the widow, so far as appears from this record, has no homestead as against the husband's creditors, and the chancellor should have subjected it to the payment of his debts.

As the question of her renunciation of the will was not made in the court below, if, on the return of the cause, it appears that she does renounce the provisions made for her benefit within the time fixed by the statute, the court will sell the realty subject to her right of occupancy; but, if no renunciation has been made, the absolute estate will be sold.

We think on the question of indebtedness the judgment below was proper, but for the failure to subject the real estate to the payment of the testator's debts the judgment must be reversed, and remanded for proceedings consistent with this opinion.

HENDRICKSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. February 26, 1887.)

MANSLAUGHTER—DRIVING WIFE FROM HOME—DEATH FROM EXPOSURE.

A man and his wife had a fight, and, on his starting for his knife and threatening to cut her throat, she fled from the house, and the next morning was found in the snow frozen to death. The husband being indicted for manslaughter, the jury were properly instructed to convict, "if they believed the accused used such force and violence as to cause the deceased to leave the house from fear of death or great bodily harm." But it appearing that the husband was a cripple, and the wife, from temper and *physique*, was well able to contend with him, it was error to refuse to permit the jury to inquire whether or not such fear was well grounded or reasonable. And they should also have been instructed that, to convict, they must believe the death of the wife by freezing was the natural consequence of leaving the house at the time and under the circumstances.

Appeal from circuit court, Laurel county.

R. L. Howell, for appellant. *P. W. Hardin*, for appellee.

LEWIS, J. Under an indictment for the murder of his wife, appellant was convicted of manslaughter. From the testimony of a daughter of the deceased, and step-daughter of appellant, the only person present at the time, it appears that a difficulty took place at their residence at night, after they had retired to bed, in the winter of 1885-86, and, in the language of the witness, occurred as follows: "The sow rooted open the door of the cabin, and they, [her mother and father,] fell out over driving her out; and he choked, beat, scratched, and struck her, and she knocked him down with the iron shovel, and got on him, choked him, and asked him how he felt; and he started towards his breeches, and said, 'If I had my knife, I'd cut your doggoned throat,' and that she ran out at the door, and did not return that night; that he shut the door after her, and propped it with a stick of wood, and went to bed." She further stated that next morning she went to look for her mother, and found her lying in the snow dead; and that when she started appellant told her to take her mother's shoes and stockings.

The statement to the jury made by appellant himself is that the deceased commenced the fight, getting him down on the floor, when he choked and bit her, and she then knocked him down with an iron shovel, and got on and choked him, and then jumped up, and ran out the door, saying she would have him arrested and put in jail. He, however, admits he said to her that if he had his knife he would cut her, and started for his breeches.

From the testimony of a witness, it appears that the place where the deceased lay was within about 100 yards of his house, and about half a mile of her residence; and that in going to the place where she was found she had passed by the gate of another person, and within 20 feet of his house, which was 250 yards nearer her own residence than was the place where she died. When found, she was lying on her face dead, and badly frozen, the weather being extremely cold, and where she lay were signs of stirring in the snow, which was about 18 inches deep. When she left her residence she was barefooted, and had on very little clothing, and along the route she took, which led through briars, there were small quantities of blood, and fragments of clothing that had been torn off by the briars, and at another place she had struck her ankle against the end of a log, and it bled freely. The witnesses testify that there were scratches on each side of her neck, and finger prints on her throat, and prints of teeth on her left arm and back of her hands, and her legs from knees down lacerated by the briars. According to the testimony of a physician, she was eight months and one week gone in pregnancy, but she had no wound, bruise or other mark of violence that could have produced death. He also testifies that appellant was badly crippled, and paralyzed in an arm; and that on the day of his examining trial he had a considerable cut about his face, and a bad-looking one about the eye. There is evidence that the deceased was a high-tempered woman, hard to get along with. She told a witness of fighting and whipping her husband, who was a cripple, and had but one arm he could use, though the daughter testifies that in their fights he whipped her. It further appears that she had on other occasions run off and left her husband, and at one time she came to the house of a witness, and staid all night, leaving a young baby with her husband, saying to the witness that she had got mad and run off.

The lower court refused to instruct the jury, at the instance of appellant's counsel, that, before finding him guilty, they must believe the death of his wife was produced by him alone, and in no other way; and also refused to instruct that, in order to convict, they must believe he intentionally exposed her, or forced her to expose herself, to the cold, under such circumstances that her death would be the probable and natural consequence of such exposure, and that she died from such exposure. But, in lieu of those asked by his counsel, gave the following: "If the jury believe * * * that the defendant, * * * in sudden heat and passion, and not in his necessary or reasonably necessary self-defense, used such force and violence towards his wife as to cause her to leave his house from fear of death or great bodily harm at his hands, and from exposure to cold her death was produced by the said act of the defendant, they should find him guilty of manslaughter," etc. "Forcing a person to do an act which causes his death renders the death the guilty deed of him who compelled the deceased to do the act. And it is not material whether the force were applied to the body or to the mind; but, if it were the latter, it must be shown that there was the apprehension of immediate violence, and well grounded from the circumstances by which the deceased was surrounded; and it need not appear that there was no other way of escape; but it must appear that the step was taken to avoid the threatened danger, and was such as a reasonable man might take." 3 Greenl. Ev. § 142; 1 Russ. Crimes, 489.

In a case where the evidence was that the defendant, a husband, beat his wife, and threatened to throw her out of the window, and to murder her, and

that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and bruises received by the fall she died, it was held that if her death was occasioned partly by the blows and partly by the fall, yet, if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was amenable for the consequences of the fall, as much as if he had thrown her out of the window himself." And in another case, where the deceased, from a well-grounded apprehension of a further attack which would have endangered his life, endeavored to escape, and in so doing was fatally injured from another cause, it was held murder. See Whart. Hom. § 374, where these and other cases are cited.

The case of *State v. Preslar*, 3 Jones (N. C.) 421, was one where, after the husband had desisted from beating his wife, she went off a little distance in the yard, and sat down, and the husband, after about five minutes, went into the house, and laid upon the bed with his clothes on, and about a half hour afterwards she started in company of her son to the house of her father, about two miles off. But when she got within 200 yards of her father's house she said she did not wish to go there until morning, it being in the night-time, and laid down on a bed-quilt in the woods. Early next morning she gave notice to the inmates of the house of her presence, but was not able to walk there, and the next day died. In that case the court decided that as she had exposed herself thus without necessity, and there were besides circumstances showing deliberation in leaving her home; the husband could not be held responsible to the extent of forfeiting his life. But the court at the same time said that "if, to avoid the rage of a brutal husband, a wife is compelled to expose herself, by wading through a swamp, or jumping into a river, the husband is responsible for the consequences."

The question before us is whether, tested by the principle stated and illustrated, the instruction quoted correctly and fully embodies the law applicable to this case. It will be perceived that the jury were authorized by the instruction to convict if they believed the accused used such force and violence as to cause the deceased to leave the house from fear of death or great bodily harm at his hands. But they were not instructed, as they should have been, before convicting, to believe nor permitted to inquire whether or not such fear was well grounded or reasonable. The jury might, and from their verdict doubtless did, believe she left the house from fear of death or great bodily harm; yet taking into consideration the previous conduct of the deceased, her disposition and ability to fight with her husband, their comparative physical powers, and all circumstances proved in the case, they might not have believed her fear was well grounded or reasonable. And if it was, the accused should not be held responsible for her death, for in such case he could not be regarded as forcing her to leave the house.

The jury should have been further instructed that, to convict, they must believe the death of the wife by freezing was the natural and probable consequence of leaving the house at the time and under the circumstances. There is no evidence that the accused prevented her re-entrance into the house, as assumed in the instruction in regard to murder, and it was error to make reference thereto. For the errors indicated, the judgment is reversed for a new trial, and other proceedings consistent with this opinion.

TREACY v. ELIZABETHTOWN, L. & B. S. R. Co.

(Court of Appeals of Kentucky. February 24, 1887.)

CONSTITUTIONAL LAW—RAILROAD CONDEMNING LAND—REFEALING ACT—VESTED RIGHTS.

The appellee railroad was authorized by a special act (1 Acts Ky. 1869, p. 222, 223) to have a writ of *ad quod damnum* issued for the condemnation of any land it needed,

and though the finding of the jury on the question of damages might be appealed from, the railroad could take possession of the land pending the appeal, on payment of the damages assessed, and thereby become vested with the title. Subsequently, in 1882, a general law, applicable to all railroads, and repealing the special act, was passed. Appellee issued a writ while the special act was in force, but failed to show in that proceeding that the land was necessary for its use, which was a condition precedent to its right to take the land; and, while the proceeding was pending, the general act was passed. *Held*, subsequent proceedings in the case must be under the general law, no vested right having accrued under the prior special act, as the right of the railroad to take land under the special act depended on the existence of a fact which had not been shown to exist while the special act was still in force. If, however, it had acquired title to the land under the special act, then subsequent proceedings in the case must have been under that act, even after the passage of the subsequent general law.

Appeal from circuit court, Fayette county.

Wm. Lindsay, D. G. Falconer, and James H. Mulligan, for appellant. Breckinridge & Shelby, for appellee.

BENNETT, J. This is the second time this proceeding has been in this court. See 80 Ky. 259. Under the thirteenth and fourteenth sections of the appellee's charter, (see pages 222, 223, 1 Acts Ky. Leg. 1869,) a justice of the peace, upon the application of the appellee, was authorized to issue a writ of *ad quod damnum*, and the sheriff, by virtue of the writ, was authorized to impanel a jury in the county to find for the owners the value of the land that the appellee "wanted" for the purpose of constructing its road; also to assess the damages incidentally resulting to other land of the owners. The jury's verdict was to be in writing, and returned to the office of the circuit clerk, to be either confirmed or set aside by the circuit court. If the verdict was confirmed, it was to be recorded, but, if set aside, a new inquisition was ordered, which was to be held by the sheriff in the same manner as the first. Immediately after the return of the first verdict, and whether the same was set aside and a new jury ordered or not, the appellee had the right to enter upon the land, and construct its road, and, upon payment or tender of payment of the amount assessed, the appellee was clothed with the actual title to the property. The legislature of Kentucky passed a general act, which was approved April 11, 1882, prescribing the mode of condemning land for the use of railroad and turnpike companies. The act provides, in substance, that any railroad company authorized to construct and operate a railroad in this state, and being unable to contract with the owner of any land necessary for its use for the purchase thereof, may apply to the county court to appoint commissioners to assess the damages the owner of the land may be entitled to receive, and thereupon it shall be the duty of the county court to appoint three commissioners to act in the premises; that the commissioners shall view the land, and award to its owner the value; that they shall return their award in writing to the county court clerk's office; that, upon the application of the company in the manner indicated in the act, the clerk shall issue process against the owner of the land, citing him to show cause why the award should not be affirmed; and at the next regular term of court, after the owner shall have been summoned the length of time required, it shall be the duty of the court to examine the report, and confirm it, if it shall appear to be in conformity to the act, provided no exceptions to it are filed. If exceptions are filed by either party, then the court shall impanel a jury to try the issues of fact made by the exceptions. If sufficient cause be not shown for setting aside the verdict, the court shall enter judgment in accordance with it. Either party may appeal to the circuit court of the county, and the appeal shall be tried *de novo*. The act also repeals all acts and parts of acts in conflict with it.

This court in the case of *Chattahoochee R. Co. v. Kinner*, 81 Ky. 223, decided that the act *supra* repealed all former acts, whether general or special, which were in conflict with it; and, as there is no element of a contract in a special

remedy given to a railroad company to condemn land for its use, the legislature has the power to repeal it, and substitute new remedies in its stead.

The thirteenth and fourteenth sections of appellee's charter, as well as the amendments thereto, which prescribed the mode of condemning land for its use, were repealed by the general act of the legislature approved April 11, 1882.

The appellee, in 1880, attempted to have condemned for its use 50 feet off the rear end of a lot of land owned by appellant, in the city of Lexington, upon which he was erecting a valuable and expensive livery and sale stable, which was nearly completed at the time. The jury's "inquest of damages" was returned to the circuit court in February, 1880, and the circuit court, at the February term, 1880, confirmed the inquest. The appellant, Treacy, appealed from the judgment of confirmation to this court. This court, in May, 1882, reversed the judgment of the lower court, and remanded the case for further proceedings consistent with the opinion. After the return of the case to the lower court, it, at its special January term, 1884, heard the proof relative to the use for which the land was sought to be condemned, and the necessity for condemning it to that use, and damages the appellant sustained by reason of its condemnation to the use of the appellee; and thereupon again confirmed the inquest of the jury in the county. From that judgment appellant again appeals to this court. He contends that the appellee's charter relative to the mode of condemning land for its use having been repealed by the act of 1882, the case, upon its return to the circuit court, should have been heard and tried *de novo*, in accordance with the provision of the act of 1882, and not in accordance with the provisions of appellee's charter.

It is certain that the lower court retried the case in accordance with the appellee's charter. If the court was right in this, then the judgment must be affirmed. If the court was wrong, and should have retried the case *de novo*, as provided in the act of 1882, then the judgment must be reversed.

Sections 13 and 14 of appellee's charter, as well as the amendments thereto, which prescribed the mode of condemning land and other property for appellee's use, are in conflict with the provisions of the act of 1882, and were therefore repealed by the ninth section of that act. If, therefore, the appellee's proceedings in the county were sufficient compliance with the conditions precedent to its right to acquire right or title to the land, then the lower court should have retried the case under the provisions of the charter, because, in such a case, the appellee having actually acquired a right to the property by virtue of its charter remedies, the legislature could not, by a subsequent act, repeal the charter remedy, so as to change or affect the appellee's vested rights thereunder. On the other hand, if the appellee failed to comply with the conditions precedent to its right to acquire right or title to the land, then the court should have proceeded to retry the case *de novo*, under the act of 1882; because the appellee, having acquired no vested right to the land, or any interest therein, by its proceeding, the repeal of the charter remedy left appellee without right to proceed further under its charter, and it could only complete its right to condemn the land by conforming its proceedings to the provisions of the repealing act.

This court in 80 Ky. 266, *supra*, decided that the appellee's right to take the land depended upon two conditions—*First*, that the taking was for a public use; and, *second*, that the land was necessary for that use; that these conditions were precedent to the right of the appellee to take the land; and that it devolved upon the appellee to show affirmatively the existence of these conditions before the land could be legally condemned to its use; and the appellee having failed to show the existence of these precedent conditions, the case was reversed, and remanded for proceedings consistent with the opinion. If the appellee had complied with the conditions precedent to his right to have the land condemned, and the case had been reversed simply because the jury

misapprehended the merits of it, then the reversal could not, under the charter, have affected any right or title that the appellee acquired to the property by reason of the first inquest of the jury, and the tender of the sum awarded as damages to the owner. But the reversal was not because of the misapprehension of the jury as to the proper measure of damages. On the contrary, the reversal was based upon grounds which went beyond that question, and which developed the fact that the appellee had not complied with the conditions precedent to its right to have the land condemned to its use. The establishment of these conditions was an indispensable prerequisite to a legal condemnation of the land, and the failure of the appellee to manifest its right to have the land condemned to its use, by establishing these indispensable precedent conditions, was fatal to its proceeding to condemn the land; and the case having been reversed for these expressed reasons, the inquest of damages by the jury was also necessarily reversed by implication. Therefore, when the case again came up in the circuit court for trial, it stood, in legal contemplation, upon the appellee's application or petition alone, and, such being the *status* of the case, should the court have tried it under the law of 1882?

In the case of *Springfield & I. S. E. R. Co. v. Hall*, 67 Ill. 99, the court said: "This was a proceeding to condemn a right of way, commenced under the act of 1852. Before the trial in the circuit court the act of 1872 had taken effect, and the damages were assessed under the rule prescribed in that act. This was unquestionably right. The later act expressly repealed all conflicting provisions in the former, and, where proceedings of this character were *in fieri*, it would necessarily follow that they must be completed under the new law. The state has the right to say on what terms it will allow its right of eminent domain to be exercised, so long as anything remains to be done by the corporation in order to complete the condemnation of the land."

This court in the *Chattahoochee Ry. Co. Case*, 81 Ky. 223, says: "But the legislature has the power to enact any subsequent or amendatory law which regulates the remedy for enforcing corporate rights and privileges, so it does not, under the guise of regulating the remedy, impair the obligation of a contract, or which only operates on the relations between the corporation and other persons before any contract between them has been concluded, and interferes with no vested rights of the corporation."

As before said, as the appellee failed to establish the conditions precedent to its right to condemn the land, it acquired no title to the land, or any interest therein, by the jury's inquest of damages, and the tender of the sum assessed to the appellant. Therefore the circuit court should have tried the case *de novo*, and, upon the request of either party, a jury should have been impaneled to try the case.

The judgment is reversed, and the case is remanded, with directions to proceed consistently with this opinion.

BONNEY v. BONNEY.

(Court of Appeals of Kentucky. February 28, 1887.)

PARENT AND CHILD—CUSTODY OF CHILD.

The father is, in general, entitled to the custody of his infant child, but his right is not absolute, to be allowed in all cases. In determining, the court will consider the best interest of the child, and for that purpose will inquire into the capability, financially, morally, and intellectually, of each parent to care for and raise the child. In this case, it appearing that the mother, though a good woman, and devoted to the child, is yet unable to support it, and that the father is industrious, sober, and moral, and properly cares for the child, the custody will not be taken from him, and adjudged to the mother.

Appeal from circuit court, Madison county.

John Bennett, C. F. & A. R. Burnam, and Jas. Burton, for appellant.

BENNETT, J. The appellee, being the wife of the appellant, and having separated herself from him, caused a writ of *habeas corpus* to be issued against him for the purpose of obtaining the possession and control of their infant child, a girl. The appellant resisted the appellee's right to the child. The case was tried by the circuit judge in term-time. The trial resulted in a judgment in favor of the appellee's right to the possession and custody of the child. From that judgment the appellant has appealed to this court.

As a general rule, the father is entitled to the custody of his infant children. *McBride v. McBride*, 1 Bush, 15. He is entitled to their custody upon the principle that he is in duty bound, by the law of nature as well as of society, to maintain, protect, and educate them. This duty he is not permitted to disregard, and which he could not conveniently discharge, if they were withdrawn from his control. The father's right, however, to the custody of his children, is not unlimited. It is for their benefit that he is entitled to their custody and control. As the author of their being, it is his duty to maintain, protect, educate, and bring them up in moral courses. For these purposes, they are also entitled to the tender care and affectionate consideration of their mother. This protecting care infants are entitled to in any event, and, if the conduct of the parent is such as to lead them into vice and immoral courses, then courts of appropriate jurisdiction do not hesitate to interfere, and take them away from the offending parent; and this is done solely for the protection of the infants.

Where the father and mother have separated, and their infant children must of necessity be deprived of the care, protection, and training of one of them, then it is the duty of the courts of appropriate jurisdiction to confide the custody of the infants to that parent, whether father or mother, best suited to so maintain, protect, and educate them, and bring them up in moral courses. The court, in making the selection, must have in view the benefit of the infants, and for that purpose must look into the capability, financially, morally, and intellectually, of each parent to properly care for and raise the infants, and, if both are capable, then the court may determine upon a selection by other circumstances pointing to the best interests of the infants.

From the record before us it appears that the appellee is a good woman, and devoted to her child, and will use her best endeavors to care for it, and raise it up in proper courses, but that she has but little means of her own, and, to support herself and child, she must rely upon her own labor, and such assistance as her father may be willing to give her. It also appears that her father has sold his land, which it seems was the bulk of his estate, and may move from the state. The appellant's relatives, as well as his neighbors and acquaintances, swear that he is a sober, moral, and industrious man. To the contrary of this is the evidence of the appellee's father and mother, but the weight of the evidence is clearly against theirs.

It also appears that the child is with the appellant's mother, who is capable of bringing it up in proper courses, and who cares for it kindly, tenderly, and affectionately; also that the appellant provides for its support and comfort, and is very fond of it; and that the child is doing well, is growing finely, and is in excellent health. The weight of the evidence is that the appellant provided for his family well, and treated appellee kindly and affectionately. It also appears that they, in the main, lived together happily, and that they would have continued to so live but for the fact of the improper interference on the part of others, which engendered discontent in the mind of the appellee, and caused her to separate herself from the appellant without any justifiable cause. And it is highly probable that, with the improper interference withdrawn, the appellee will return to the appellant, and again live with him happily; and considering the excellent characters of the appellant and appellee, and their capability of raising the child in proper courses, it is certainly to the best interest of the child to have the united care, love, and protection of the appel-

lant and appellee. In view of the foregoing facts, we think that the best interest of the child requires that it remain, for the present at least, in the custody of the appellant, but that the appellee be permitted to see it and be with it as often as she may desire, and remain with it as long as she may wish. The lower court must, in its judgment giving the custody of the infant to the appellant, reserve the power to take from the appellant the child, and give it to the appellee, if sufficient cause be shown for it.

The judgment of the lower court is reversed and remanded, with directions to proceed consistently with this opinion.

VALLANDINGHAM v. JOHNSON.

(Court of Appeals of Kentucky. February 26, 1887.)

INFANT—DEED—DISAFFIRMANCE—ADVERSE DEED AFTER MAJORITY.

An infant having executed a bond to convey land when he should come of age to A., subsequently, and while still an infant, executed a deed for the same land to B., who purchased in ignorance of the prior bond to A. *Held*, in an action between A. and B. to determine title to the land, that the deed of an infant being voidable, and the infant in this case having executed a deed to A. after he came of age, this was a disaffirmance of his deed made while a minor to B., and vested title in A., though the infant did not return to B. the purchase money received from the latter.¹

Appeal from circuit court, Simpson county.

Wm. Lindsay and Bodes & Settle, for appellant. *Edward W. Hines*, for appellee.

HOLT, J. N. H. Horn sold to the appellee, Johnson, on October 14, 1881, by title bond, his undivided interest in a tract of land. He was then an infant. The bond recited that he would become of age in December, 1882, and that he would then convey by deed. The vendee had the bond recorded in the county where the land lies, but the record of it was destroyed by fire in May, 1882. It was, however, not a recordable instrument, and could not, therefore, operate to give constructive notice of the purchase to third parties. On January 3, 1883, Horn, for value, conveyed the same landed interest to the appellant, Vallandingham, and the deed was recorded in the proper office. It is evident that both vendees purchased in good faith. It is equally if not more plainly evident that the same cannot be said of Horn. No regard for even common honesty actuated him in the transaction.

There are some circumstances in the case which tend to create the belief that he became of age on December 19, 1882; but, viewed by the light of the entire testimony, the conclusion is inevitable that this is not so, and that he did not reach his majority until December 19, 1883. He was therefore an infant when he executed the deed to Vallandingham. On December 20, 1883, and which was the next day after he became of age, he, in conformity to his title bond, executed a deed, which was properly recorded, to his brother-in-law, the appellee, Johnson. The latter brought this action to quiet his title to the N. H. Horn interest, and have it declared superior to that of Vallandingham. Each of them owned other interests in the tract of land, and each, from the time of his purchase from Horn, claimed the interest in contest. They were joint tenants or owners, and the possession of one was that of both.

It is urged, as is true, that an infant is not privileged to commit a fraud,

¹A deed given by an infant will be avoided by the execution of another deed, conveying the same premises to a different grantee, if such other deed is executed within a reasonable time after the grantor attains his majority. *Corbett v. Spencer*, (Mich.) 80 N. W. Rep. 386; *Haynes v. Bennett*, (Mich.) 18 N. W. Rep. 539; *Dawson v. Helmes*, (Minn.) 14 N. W. Rep. 462.

As to what is a reasonable time, see *O'Brien v. Gaslin*, (Neb.) 80 N. W. Rep. 274, and note.

and that Horn induced the appellant, Vallandingham, to purchase by representing to him that he was of age. The testimony is conflicting upon this point; but, conceding that it so establishes, yet this is a contest between two innocent purchasers, and not between one of them and Horn. The validity of the deed to Vallandingham is the main question therefore to be considered.

Much diversity of opinion has existed as to whether the deed of an infant is void or voidable at common law. Some have held that it depended upon whether there was a semblance of benefit to him or not; that, if it necessarily operated to his prejudice, then it was void, but, if it might result in benefit to him, then it was merely voidable. In the leading case of *Zouch v. Parsons*, 3 Burr. 1804, Lord MANSFIELD said that the true ground upon which an infant's deed is voidable only was not settled; some holding that it depended upon the solemnity of the instrument, and its delivery by the infant himself, and others upon the semblance of benefit to him appearing upon its face.

The decisions upon the question, both English and American, are numerous, but the supreme court of the United States, in the case of *Tucker v. Moreland*, 10 Pet. 58, said: "The result of the American decisions has been correctly stated by Mr. Chancellor Kent in his learned Commentaries (2 Comm. § 31) to be that they are in favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election, when they become of age, either to affirm or disallow them; and that the doctrine of *Zouch v. Parsons* has been recognized and adopted as law. It may be added that they seem generally to hold that the deed of an infant conveying lands is voidable only, and not void, unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant, and this upon the nature and solemnity as well as the operation of the instrument."

The deed to Vallandingham was voidable only, and the question arises whether it has been avoided by Horn. If so, it was by the deed to Johnson. An infant may avoid his act or contract in various ways, depending upon the nature of the transaction, and the circumstances of the case. If the act be a matter *in pais*, it may be avoided by an act *in pais* of equal notoriety. Certainly, if the act of avoidance be of as solemn a nature as that to be avoided, it will be effectual. It need not always be of as high a nature, because a deed may be avoided by a plea; but if the act of disaffirmance be as high and solemn, then it cannot be impeached as insufficient. Under the old mode of conveying, if the infant had given livery of seizin, there must be a re-entry by him, with an expression of his dissent, because the act of avoidance, in order to disaffirm the first act, had to be of equal notoriety. The rule as to a feoffment, however, does not apply to a conveyance by bargain and sale. There is no reason why it should. Both principle and authority dictate that the infant should be allowed to manifest his dissent in the same manner as he first assented to convey. The early cases of *Jackson v. Carpenter*, 11 Johns. 539, and *Jackson v. Burchin*, 14 Johns. 124, announced this doctrine, and were followed by our supreme court in *Tucker v. Moreland*, *supra*.

The reason which required an entry to avoid a feoffment supports the rule that it is not necessary where the conveyance is by deed. The one was an alienation *in pais*. The entry upon the land, attended by certain formalities, transferred the right. Hence a re-entry was necessary, with an expression of dissent, to divest the livery of seizin; else the avoidance was not shown by an act of equal notoriety or solemnity. One deed of bargain and sale is, however, equally notorious and solemn with another, and there is no reason why an infant should be required to do more by way of disaffirmance than was necessary upon his part at the outset to manifest his assent to the conveyance. The present rule follows out the reason in the case of a feoffment, which required a re-entry for the purpose of notoriety.

A review of all the cases at hand shows that the rule that a subsequent conveyance by an infant amounts to a disaffirmance is well settled. Tyler, Inf. § 31, says: "The infant may also disaffirm his conveyance of real estate by a reconveyance of the same premises to a third person." See, also, the cases of *Youse v. Norcoms*, 51 Amer. Dec. 175; *Peterson v. Latk*, 24 Mo. 544; *Cresinger v. Welch*, 15 Ohio, 156.

In the case now in hand, the conveyance to Johnson, made without delay after Horn became of age, was of equal solemnity with that to Vallandigham, and was a disaffirmance of it. Nor was it necessary, in order that it might be effective, that the infant should place the other party *in statu quo*, by returning to Vallandigham what he had received from him. Morality and common honesty should prompt him to do so, but this controversy is between two innocent purchasers, whose equities are at least equal, if, indeed, that of Johnson, by reason of the priority of his purchase, is not superior. Judgment affirmed.

BROWN, Trustee, v. MAURY and others.

(*Supreme Court of Tennessee. January 28, 1887.*)

MORTGAGE—DESCRIPTION—PORTION OF LARGE TRACT NOT DESCRIBED BY BOUNDS.

Where A., having mortgaged his land to B., gets C. to execute a mortgage, with description blank, for the same amount, on 200 acres of his land, and then fills in a description which calls for 200 acres out of a tract of 900 acres, and gets B. to exchange it for his own mortgage, B. being ignorant of the mode in which the second mortgage was made, a court of equity will sustain the mortgage from C. to B., and will construe such mortgage as a mortgage of a two-ninths joint interest in C.'s 900 acre tract. TURNER, C. J., and CALDWELL, J., dissenting as to sufficiency of description.

Appeal from chancery court, Williamson county.

Suit to foreclose a mortgage, brought by Campbell Brown, trustee, appellant, against F. C. Maury and others, respondents.

SNODGRASS, J. Maury was indebted to Campbell Brown, as trustee of R. E. Scott, and had given him a mortgage on certain lots in Nashville to secure the indebtedness. Being desirous of removing this mortgage, he undertook, for this purpose, to give other security, and procured his sister, Mrs. M. F. Perkins, to execute a mortgage on certain lands in Williamson county, to be substituted for his own. He visited his sister, and procured her to sign a mortgage on the twenty-seventh of April, 1876. She most probably did not know, at the time of signing it, that it was to replace the mortgage on Maury's own land, nor is this material. She knew the amount secured, and the terms. The intention was to execute a mortgage on 200 acres out of several hundred belonging to her west of the Hillsborough pike. Of neither this 200 acres, nor of the entire tract including it, was any description written in the deed when she signed it; but the facts and circumstances make it clear that she authorized Maury to fill in the description, which he did after it was signed, and her authority to him for such purpose was valid and binding, though not written. Maury and M. E. Perkins, a son of Mrs. Perkins, signed the deed as witnesses. They went to Franklin, and there Maury put in the description; and E. M. Perkins and he proved the execution of the deed before the clerk of the county court, and Maury had it registered on the same day. He then delivered it to Campbell Brown, and obtained the release of his own mortgage, without any knowledge on the part of Brown as to the manner in which the deed was obtained or prepared.

The description inserted was as follows: "The following real estate situated in Williamson county, state of Tennessee, and bounded as follows: being two hundred acres of a tract commencing at a point on the east bank of West Harpeth river, the same being the north-east corner of the tract lately owned

by Mrs. S. A. Ellis; running thence west to Peter Perkins' line; thence westwardly to a rock at a point half way between two springs designated in the will of the late Nicholas Perkins' deed; thence due west with the western boundary of said Nicholas Perkins' land, and south of the lane dividing the Pampau tract from the West Harpeth tract, and including the land in the bend opposite the dwelling-house, and the land in the fork of Big Harpeth and West Harpeth, the E. and W. line dividing Pampau tract from the West Harpeth tract, and continued west to the west boundary line of said Nicholas Perkins' land east of South Harpeth, leaving the Mount Pine tract to the north, containing sixteen hundred acres, more or less. Said two hundred acres lie west of the Hillsborough turnpike. The entire tract was devised to M. E. Perkins by his father's (Nicholas Perkins') will, recorded in Will Book 9, page 95, and by him sold, transferred, and conveyed to me by deeds recorded in the register's office, Williamson county, Book No. 1, pages 141-2 and 8, respectively."

Default in payment having been made, the bill in this cause was filed to foreclose the mortgage. Mrs. Perkins resists, and in her answer, while admitting that she signed the mortgage to secure the \$3,000, upon Maury's request to her "to mortgage 200 acres of her land lying west of the Hillsborough turnpike," she insists that there was no description in the deed given. She denies that she authorized the insertion of any description. She denies that the description inserted is sufficient. Says she has 900 acres of the 1,600 described in the entire deed west of the Hillsborough pike, some of it worth \$40 and \$50 per acre, and some as little as \$2 per acre.

Upon the facts detailed the only real question in the case is as to the sufficiency of the description. It is the case of an entire tract, specially described by metes and bounds, including 900 acres west of a given line, (the pike,) and 200 acres of the 900 conveyed, without designating which 200. The mortgage is but a security for the debt, executed to a creditor who surrendered in consequence an equally valuable security, with no participation in or knowledge of any wrong upon the mortgagee, if any was committed. It is clear that it should be sustained in equity if it can be done under the authorities, and is equally clear that it can be so done.

Mr. Washburn, in his work on Real Property, states the rule in reference to such description, by quotation from certain cases, as follows: "Where A. granted one acre of woodland lying in common with his other woodland, it was held to be such an aliquot part of his woodland in common as one acre would be to the whole woodland owned by the grantor; and, upon a similar principle, where a deed of a given quantity of land, parcel of a large tract, does not locate it by its description, the purchaser becomes a tenant in common *pro rata* in the whole parcel." 1 Washb. (4th Ed.) 654. Several cases are cited to sustain it, and we hold they are sound in reason and equity.

Applying the rule, then, laid down to the mortgage in question, it would vest the mortgagee with an undivided two-ninths interest in the 900 acres described in the boundaries given, lying west of the Hillsborough pike; that being the proportion which 200 acres, the amount conveyed, bears to the 900 from which it is to be taken; and, if sold under decree for satisfaction of balance due, the purchaser will become a tenant in common with Mrs. Perkins to the extent of an undivided two-ninths of the 900 acres.

The report of the commission of referees is disapproved, decree of the chancellor reversed, and decree rendered here in favor of complainant for amount of his debt, and cost of the cause, and for a sale as indicated, upon the terms prayed in the bill, which will be made by the clerk of this court, unless the amount decreed is paid within 60 days.

TURNER, C. J., and CALDWELL, J., do not concur in so much of this opinion as holds the description sufficient.

MARSHALL and Wife v. RICE and others.

(Supreme Court of Tennessee. March 1, 1887.)

USURY—CODE TENN. §§ 1943, 1944—LOAN OF UNITED STATES BONDS.

An agreement by which a party lends United States bonds, and the borrower agrees to pay over to the owner the interest paid by the government, and 6 per cent. in addition, is not usurious, under the Tennessee usury law, (Code Tenn. §§ 1943, 1944,) declaring that any excess of interest over 6 per cent. per annum is usury.

Appeal from chancery court, Davidson county.

Bill to foreclose a mortgage by J. L. Marshall and wife, appellants, against G. Rice & Co., respondents.

Allen & Covington, for Marshall and wife. *Wilkin & Chamberlain*, for Rice and others.

TURNER, C. J. The following contract was made between Mrs. Lyle, now Marshall, and G. Rice & Co.:

"Received, Nashville, August 9, 1871, of Mrs. Maria Lou Lyle one United States bond for \$1,000, No. 165,810, also one thousand U. S. bond No. 879,748, making together two thousand dollars, the interest arising on said bonds, which are due January 1872, belonging to said Mrs. Maria Lou Lyle, and any interest thereafter; also, if said G. Rice & Co. and Mrs. Lyle agree that G. Rice & Co. shall keep said bonds after January 1, 1872, the interest every six months is thirty dollars in gold on each of said bonds, which we will pay to Mrs. Lyle.

G. RICE & Co.

"J. M. PATTERSON, Suing.

"N. B. We also agree to pay six per cent. interest on the aboved-named bonds, outside of the interest accruing on them. G. RICE & Co."

A mortgage on some lots was executed by Rice & Co. simultaneously with the above agreement. Several payments were made for the bonds and refused, and this bill is filed to foreclose the mortgage. The defense is usury.

Our statute (Code, §§ 1943, 1944) defines as follows: "Interest is the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money. The amount of said compensation shall be at the rate of six dollars for the use of one hundred dollars for one year, and every excess over that rate is usury."

Under the statute usury can be obtained in transactions for money, or the use of it. Can this be properly called a loaning of money, there being no evidence of a purpose or device to *avoid* the usury laws? We think not. We know that money has a fixed value. Bonds have not. They are, while negotiable securities, only chattels, with variable values, sometimes at a discount and at others at a premium. The value of the class of bonds before us has been fluctuating. Here it is claimed the bonds were, at the time of the negotiation, worth a premium of 11½ cents on the dollar. Rice & Co. were dry-goods merchants, and it may be inferred the bonds were readily available as a basis for raising means for their business, or as voucher for their credit; and we do not doubt they were so used, and so intended to be used, at the time of their procurement. Upon their faith, goods, money, and credit could be had. The face of the contract, though inartistic, shows with reasonable certainty that the bonds were to be returned on the first January, 1872, unless the parties should agree to a longer holding. The contract was merely one of renting or hiring, and was legitimate, as would have been the hiring of a horse, or the renting of a house and lot, with the agreement that the party might pledge or sell, but at the same time undertaking, with security, the return of the property in kind to the original owner, or account for its value.

In another view, this is not a case of usury. There was no agreement to part with the 6 per cent. gold interest to be paid by the government. Rice & Co. were merely the agents of Mrs. Lyle to collect that, and pay it over to her. In reality they were only loaned for the 6 per cent. they agreed to pay for the use of the bonds; so that, if we treat the bonds as loaned, the interest is lawful. The fact that the bonds were drawing no interest can make no difference. They were useful as money to Rice & Co. They could be, and no doubt were, worth more than 6 per cent. to them. To permit them to say, in defense of this suit, that the bonds draw no interest, would be in substance holding that the borrower of \$2,000 at 6 per cent. should be relieved of interest if he show that he kept the money in his drawer without use during the time of the loan. The bank-bill, or the gold and silver dollar, will of itself, on its face, draw no more interest than one of these bonds. The interest of both comes from their use, and is inherent in neither. If Mrs. Lyle thought proper to invest her bonds in an interest loan at lawful rates, but the borrower kept them idle, they, not she, must bear the loss.

The defendants are liable to pay the coupons at their gold value when due, the 6 per cent. they promised to pay on the face value of the bonds, and the market value of the bonds at the date of demand, credited by the several payments previous. The exceptions to the report of the commission are allowed, and the decree reversed.

KADER, Adm'r, and others v. YEARGIN and others.

HITE v. PARKS and others.

(Supreme Court of Tennessee. March 1, 1887.)

ADMINISTRATOR'S BOND—LIABILITY OF SURETY—DECEASED PRINCIPAL.

A surety upon an administrator's bond is not relieved from liability for a balance found due from the estate of his deceased principal by the fact that such principal died insolvent.

Appeal from chancery court, Davidson county.

Action to recover on administrator's bond, by Jacob Kader, administrator, respondent, against James A. Yeargin and others, appellants.

McLain & Haley, for Kader. *Allen & Covington*, for Yeargin.

FOLKES, J. Pryor L. Parks died in 1866, and immediately thereon his two brothers, Perry H. and W. D. Parks, qualified as administrators. They filed an inventory in the county court, from which it appears that, among the assets of their intestate, there were two notes,—one made by said Pryor L. for \$2,700, and one by said W. D. Parks for \$1,070.50,—due and payable to their brother, the intestate.

In July, 1869, more than two years and six months after their appointment, they made a settlement with the county court, charging themselves with assets \$5,836.49, and crediting themselves with \$2,895.36, showing a balance due by them to the estate of \$2,941.13. They then resigned. In March of 1872 the original bill is filed in this cause by Jacob Kader, as administrator *de bonis non* of Pryor L. Parks, and as husband of a sister of said Pryor L., and by another sister, Mrs. McFarland, another husband, against W. D. Parks, and James A. Yeargin as security on the administration bond of said W. D. and Perry H. Parks, the latter of whom had died without issue, leaving a widow, but with no administration yet taken on his estate. The other surety on the administration bond was not sued, as he was dead and his estate insolvent.

There were several matters set up in the bill upon which relief was sought, but none of which are material to be noticed here, as the case is before us only on the appeal of defendant Yeargin from so much of the final decree as holds him liable as surety on said administration bond for the sum of \$494.03, which is the amount found due from Perry H. to the estate of Pryor L. Parks,

after crediting him with a *pro rata* realized from his own estate, which, by proper pleadings, were brought into the original cause, and administered as an insolvent estate. To the report of the master fixing the \$494.03 as the proper balance due from the administrators of Pryor L. Parks, the appellant, Yeargin, filed his exceptions, in which he says, after referring to said two notes as property embraced in the inventory: "It is shown on final settlement in the county court that all the assets have been administered according to law, except said notes; and it is shown in this cause that all the property, both real and personal, belonging to the estate of both Perry H. and W. D. Parks has been exhausted in payment of the debts of said Perry H. and W. D.; and this being true, as appears of record, defendant insists that, because of his suretyship, he is not in any manner liable for said indebtedness. See transcript of county court record in this cause."

This exception is not good upon its face. An exception to a report of the master, like a special demurrer, must point out certainly and specifically the objections relied on. It must be positive, explicit, and certain, leaving nothing to supposition or inference. *Ridley v. Ridley*, 1 Cold. 332; *Musgrove v. Lusk*, 2 Tenn. Ch. 576; *Green v. Lanier*, 5 Heisk. 670. Everything stated in this exception may be true, and yet the defendant Yeargin be liable as surety. It by no means follows that, because the estate of Perry H. Parks is settled as an insolvent estate, paying 67 cents on the dollar, in a litigation begun in 1872, more than five years after the date when he was appointed administrator of his brother's estate, the money could not have been made out of him during his life. This exception is merely a repetition of the defense made in the answer, where he says: "But in going upon the bond of the administrator he did not thereby become surety on said notes,"—a proposition which we suppose no one will gainsay. The record discloses the fact that Perry H. Parks was solvent, and able to pay the debt due by him to his brother. Indeed, the answer of Yeargin admits as much, notwithstanding he seeks to combat it later. It says, referring to P. H. Parks, his residence was in Davidson county at the time of his death, and he owned a good estate, consisting of real and personal property, in said county.

It is insisted that he thought his share in his brother's estate would pay the debt, and for this reason his surety should not be held liable. By the exercise of ordinary diligence he could have easily ascertained the fact, and so have settled the matter. Not only did he fail to do this, but in his settlement with the county court he retained for his services as administrator the sum of \$500, leaving his debt to his intestate unpaid; thus appropriating to his own use a sum larger than the amount now charged to his surety. The degree of diligence required of an administrator who is a debtor to the estate, in the payment of the debt at the suit of those who are entitled to the fund, is the same that is imposed upon him in collecting a debt from a third party. *Spurlock v. Earle*, 8 Baxt. 437. And the liability of the surety on his official bond is the same as where the debt was due by a stranger. The criterion of the administrator's liability is that degree of diligence which would be expected of a reasonably prudent and diligent man in the management of his own affairs. Where good faith is shown, our courts do not hold him to the utmost degree of diligence. *Mickle v. Brown*, 4 Baxt. 468; *In re Cator*, 14 Lea, 408. Under the most liberal application of the note, the surety in this case is liable.

Let the decree be affirmed, and the report confirmed, with costs.

HAMMOCK v. CREEKMOORE.

(Supreme Court of Arkansas. February 5, 1887.)

LANDLORD AND TENANT—WORKING LAND ON SHARES—RIGHT TO CROP.

An agreement, by which the owner of land agrees to furnish team, utensils, and supplies to make a crop on his land, the crop to be his, but, in consideration of the labor of the other party, such party to have what remains after deducting half for the use of the land, etc., and, in addition, enough to pay for supplies furnished him, creates no relation of landlord and tenant, and the party to the agreement with the land-owner has no title to any part of the crop until it is divided, and the share contracted for set off to him.¹

Appeal from circuit court, Crawford county.

W. Walker, for appellant. B. J. Brown, for appellee.

COCKRILL, C. J. Hammock, the appellant, let one Stewart have land to cultivate during the year 1884, under this oral agreement, viz.: Hammock was to furnish a team, farming utensils, and supplies to make the crop on his land; the crop raised was to be his property; but, after he had reserved one-half for the use of the land, etc., and enough of the residue to pay for the supplies furnished, he was to deliver what remained to Stewart. After a cotton crop was made under the contract and gathered, Stewart sold and delivered seven and one-half bales of it to the defendant, Creekmoore. This action was brought against him by Hammock for conversion of the property; and a recovery to the extent of his ultimate interest (\$158) only was sought. These facts were set out in the complaint. The court sustained a demurrer to it. The plaintiff rested, and, after judgment against him, appealed.

The effect of the contract set forth is that Stewart should raise the crop for the plaintiff on the latter's land, and receive a part of it from him as wages for his work. *Leland v. Sprague*, 28 Vt. 746. The settled construction of such contracts by the court is that the title to the crop raised vests in the land-owner. If the terms of the contract had been such as to indicate the intention to create the relation of landlord and tenant, as in *Alexander v. Pardue*, 30 Ark. 359, and *Birmingham v. Rogers*, 46 Ark. 254, the title to the crop would have been in Stewart, the tenant, subject to the landlord's lien for rent, and the landlord could have maintained no action at law against Creekmoore for converting any part of it. *Anderson v. Bowles*, 44 Ark. 108. Or, if the intention to become tenants in common had been indicated, (see *Bertrand v. Taylor*, 32 Ark. 470; *Ponder v. Rhea*, Id. 496,) then the title would have vested as in other chattels held in common, (*Hamby v. Wall*, 2 S. W. Rep. 705,) and either of the common owners could maintain his action against one who converted the property to his use for the value of his interest. If there were otherwise any doubt of the intention of the parties to the contract under consideration as to which of these relations they would assume, it is dispelled by the failure to vest in Stewart any interest in the freehold, and the adoption of the express stipulation that the crop should be the property of the plaintiff. The contract, as it is alleged, is almost identical with that in *Ponder v. Rhea*, *supra*, and it was there held that the party who occupies Stewart's place here was merely hired to make the crop. And to the same effect are *Christian v. Crocker*, 25 Ark. 327; *Burgie v. Davis*, 34 Ark. 179; *Sentell v. Moore*, Id. 687; *Gardenhire v. Smith*, 39 Ark. 280. The party undertaking the labor under such a contract has no title to any part of the crop raised until it is divided, and the share contracted for set off to him. He may sell or mortgage his contingent interest, just as he may assign his wages to be hereafter earned, (*Beard v. State*, 43 Ark. 284;) but he can do no act to prejudice the right or title of his employer, who is the true owner.

¹See *Romero v. Dalton*, (Ariz.) 11 Pac. Rep. 363, and note.

The title to the cotton being in the plaintiff, it follows that he can maintain his action; and the judgment must be reversed, and the cause remanded, with instructions to overrule the demurrer.

HENRY and others v. CONLEY.

(*Supreme Court of Arkansas. February 5, 1887.*)

PAYMENT—SURRENDER OF NOTE FOR WORTHLESS CHECK.

Proof that a joint maker of a note gave, in payment thereof, his check on a bank where he had no funds, and that the holder surrendered the note for such check, will not sustain a plea of payment.¹

Appeal from circuit court, Benton county.

Sol. F. Clark & Son, for appellants. *U. M. & G. B. Rose* and *E. S. McDaniel*, for appellee.

COCKRILL, C. J. Henry, Woods, and McReynolds borrowed from Conley \$2,400, giving their joint and several promissory note, payable January 1, 1885. Before maturity of the note, the makers had provided money to pay it, and some other debts due by them. This money was put into McReynolds' Bank as a general deposit, and was mingled with the other funds of the bank. On January 3, 1885, Conley presented the note for payment to McReynolds. After conversation, Conley concluded to take the interest in cash, and St. Louis exchange for the principal. McReynolds accordingly paid the interest, and gave Conley two checks on the Third National Bank of St. Louis for \$1,200 each. The note was surrendered to McReynolds, who marked it paid, and on the same day handed it to Henry. Conley forwarded the checks to St. Louis, but neglected to indorse them. Hearing nothing from them, and becoming uneasy, Conley went to McReynolds, on January 10th, and got the money for one of the checks, and McReynolds telegraphed stopping the payment of it. Conley went home to Siloam Springs, where he received a letter inclosing the checks, unindorsed. Not knowing which of the checks it was the payment of which had been stopped, he indorsed both, and sent them on for collection. They reached St. Louis, and were protested January 16th for want of funds of the drawer. Notice of non-payment reached Conley and McReynolds between that date and the 21st. On the 21st, McReynolds' Bank suspended payment, and McReynolds is hopelessly insolvent. At the time of giving the checks, the account of McReynolds with the Third National Bank of St. Louis was overdrawn \$681.79. Nor did he, at any time between the third and tenth of January, have to his credit there a sum sufficient to pay both checks; nor, after he had paid the amount of one of the checks, on the 10th, did he thereafter have enough to his credit to pay the other check. Conley now brought his action against the makers of the note. The defendants pleaded payment. The case was submitted to the court, instead of a jury, upon evidence which showed the foregoing state of facts, about which, indeed, there was no dispute. The court declared the law as follows: Proof that a joint maker of a note giving his check on a bank in payment, where he had no funds, and a surrender of the note for such check, will not sustain a plea of payment. And it gave judgment against all the defendants for the balance due on the note.

The taking of a note, bill, or check of a debtor, or of one of several joint debtors, or of a stranger, for an antecedent indebtedness, is no payment un-

¹The acceptance of a check for an existing debt, and the surrender of the evidence of such indebtedness, operate only as a conditional payment of the debt. *Canonsburg Iron Co. v. Union Nat. Bank*, (Pa.) 6 Atl. Rep. 574. So does the acceptance of a bill, note, or other negotiable instrument. *Riverside Iron-works v. Hall*, (Mich.) 31 N. W. Rep. 152, and note.

less it is agreed to be taken as such. It is only conditional payment, dependent on the payment of the paper. If that is dishonored, the original debt revives. Story, Prom. Notes, § 104; 2 Daniel, Neg. Inst. § 1260 *et seq.*; 2 Rand. Com. Paper, § 750; 2 Amer. Lead. Cas. 263 *et seq.*; notes to the case of *Tobey v. Barber*. Such has been the settled law of England ever since the time of Lord HOLT, (*Clark v. Mundal*, 1 Salk. 124,) and such is the law of all the American states except Massachusetts, Maine, Vermont, Indiana, and Louisiana. The more recent decisions of this court are in perfect harmony with this rule. *Brugman v. McGuire*, 32 Ark. 783; *Akin v. Peters*, 45 Ark. 313; *Malpas v. Lowenstine*, 46 Ark. 552.

Counsel for appellants contend that checks stand on a different footing, in this respect, from notes and bills of exchange. It is true that a check is drawn on a bank or banker, and that it is payable on demand, without days of grace, but it is no payment unless duly honored,—only a means of getting paid. Nor do the adjudged cases recognize any such distinction. *Olcott v. Rathbone*, 5 Wend. 490; *Turner v. Bank of Fox Lake*, 42* N. Y. 425, 4 Abb. App. Dec. 434; *Heartt v. Rhodes*, 66 Ill. 351; *People v. Howell*, 4 Johns. 296, per KENT, C. J.; *McIntyre v. Kennedy*, 29 Pa. St. 448.

The law on this subject is thus stated by Mr. Daniel, in his work on Negotiable Instruments, (8d Ed. § 1623:) "In respect to payment by checks, a creditor may, if he pleases, accept a check in absolute discharge of the debt; but, where a check is received by the creditor, there is no presumption that he takes it in payment, but, on the contrary, the implication is that it is only to be regarded as payment *if cashed*. And so strong is this implication, the check being presumptively drawn on a fund deposited to meet it, that more evidence is required to prove that a check given to take up a note is received in satisfaction and discharge than is demanded when one note is given for another."

Accordingly we find that even in some of those states where the acceptance of a bill or note on account of a precedent debt is presumed to be in satisfaction of it, the same presumption does not arise when a check is received. *Small v. Franklin Min. Co.*, 99 Mass. 277; *Ocean Tow-boat Co. v. The Ophelia*, 11 La. Ann. 28. Nor is any agreement that the checks shall be satisfaction implied from the surrender and cancellation of the note. The surrender, under such circumstances, was conditioned upon the payment of the new security. It is like the case of a creditor giving up the former evidence of his debt, and executing a receipt. *Muldon v. Whitlock*, 1 Cow. 290; *Davis v. Allen*, 3 N. Y. 168; *Olcott v. Rathbone*, *supra*; *Turner v. Bank of Fox Lake*, *supra*; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Doebbling v. Loos*, 45 Mo. 150; *Heartt v. Rhodes*, *supra*.

It is further insisted that the defendants had provided a fund to meet their note at maturity, and that this imposed upon Conley the duty of protecting the interests of Henry and Woods in his dealings with McReynolds. There is no proof that Conley had any notice of this arrangement. But if he had known all the circumstances, it would not have altered the legal aspects of the case. The relations between a bank and a general depositor is that of debtor and creditor. Consequently, when the money which had been raised to pay Conley's note was put into McReynolds' Bank as an ordinary deposit, it then belonged to the bank, and the bank became debtor to the depositors. *Himstedt v. German Bank*, 48 Ark. 537.

The delay in presentment of the checks is not important, because the bank on which they were drawn remained solvent all the time. McReynolds suffered no actual damage thereby. And the only effect upon the other two defendants of giving the checks was to suspend Conley's right of action against them until the checks were dishonored by non-payment. 2 Daniel, Neg. Inst. 1272, 1587.

Judgment affirmed.

WILKERSON v. GORDEN, Adm'r.

(Supreme Court of Arkansas. February 12, 1887.)

1. EXECUTORS AND ADMINISTRATORS—AFFIDAVIT OF CLAIM—WHEN TO BE MADE.
The affidavit required for authenticating a claim against the estate of a deceased person cannot be made during the life-time of the decedent.
2. SAME—NECESSITY OF.
Without such affidavit one is not entitled to participate in the assets.

Appeal from circuit court, Arkansas county.

Gibson & Holt, for appellant. W. H. Halliburton and J. M. Pinnell, for appellee.

COCKRILL, C. J. The requirement of the statute for authenticating claims against the estates of deceased persons is not fulfilled by an affidavit, made at some period in the life-time of the decedent, to the effect that he was then justly indebted to the affiant in a sum stated, and that nothing had been paid or delivered towards the satisfaction of the demand. Such an affidavit might be true when made, but not true if applied to the facts existing at the date of the debtor's death. The affidavit required is the foundation for legal proceedings against the estate in the probate court, and the claimant is not entitled to participate in the assets without it. *Beirne v. Imboden*, 14 Ark. 237; *Walker v. Byers*, Id. 246; *Alter v. Kinsworthy*, 30 Ark. 756. But there is no estate to proceed against, nor anything over which the probate court can assume jurisdiction, until the death of the debtor, and prior to that time no steps can be legally taken in the matter. Affirmed.

BALTIMORE & OHIO TEL. CO. v. LOVEJOY.

(Supreme Court of Arkansas. February 12, 1887.)

JUSTICES OF THE PEACE—JURISDICTION—ACTION TO RECOVER STATUTORY PENALTY.

Under Const. Ark. 1874, art. 7, § 40, which restricts the civil jurisdiction of justices to actions arising on contract, actions of replevin, and actions for injuries to personal property, a justice has no jurisdiction over an action for the recovery of a statutory penalty.

Appeal from circuit court, Craighead county.

J. C. Hawthorne, for appellant. E. F. Brown, for appellee.

SMITH, J. Lovejoy recovered judgment against the telegraph company for the penalty of \$100 given by section 6419 of Mansfield's Digest for non-delivery of the message. It is now objected that the justice of the peace before whom the action was begun, had no jurisdiction of the subject-matter. The civil jurisdiction of justices is confined to three classes of cases: Actions arising on contract, actions of replevin, and actions for injuries to personal property. Const. 1874, art. 7, § 40. Unless, therefore, this is an action *ex contractu*, the objection must be sustained. Now, a relation of contract does exist between the sender of a message and the telegraph company. But the action to recover the statutory penalty does not arise on the contract to transmit, but on the statute which imposes the penalty for the neglect of the duty which the company owes to the public. This point was determined in *Bagley v. Shoppach*, 43 Ark. 375, which was an action against an officer to enforce a forfeiture for exacting excessive fees.

We are aware that in *Katsenstein v. Railroad Co.*, 84 N. C. 688, the supreme court of North Carolina reached an opposite conclusion. In that state the jurisdiction of justices of the peace in civil cases is limited to actions upon contracts; but it was held that an action to recover a penalty under a statute was an action upon a contract. The court seems to have been led to this conclusion by the consideration that, under the old system of pleadings, debt was

the appropriate form of action to recover a penalty, and that debt was classified as an action *ex contractu*. But debt was not necessarily founded upon contract. It lay wherever the sum demanded was certain, without regard to the manner in which the obligation was incurred or is evidenced; as, for instance, on the judgment of a court of record. Hence debt for a statutory penalty, while it was in form *ex contractu*, was in reality founded upon a tort. *Chaffee v. U. S.*, 18 Wall. 538; *Stockwell v. U. S.*, 13 Wall. 542.

In *Little Rock & Ft. S. Tel. Co. v. Davis*, 41 Ark. 79, a judgment similar to the one we are now considering was affirmed; but the question of jurisdiction was not raised, and escaped the attention of the court.

The judgment is vacated, and the cause dismissed.

DAVIES, Collector, v. GAINES.

(*Supreme Court of Arkansas*. February 12, 1887.)

1. WATERS AND WATER-COURSES—TAXATION FOR LEVEES—ACT OF GENERAL ASSEMBLY OF ARKANSAS OF MARCH 20, 1883, §§ 14, 16.

Sections 14 and 16 of the act of the general assembly of Arkansas of March 20, 1883, entitled "An act to provide for building and repairing levees in Chicot county," Arkansas, are unconstitutional and void; section 14 in so far as it exempts four townships which belong to the class upon which the tax is imposed from tax levy for the first year, and section 16 in so far as it provides for the reimbursement to citizens of moneys theretofore contributed by them for levee purposes, by allowing them a credit upon their future taxes for sums so contributed.

2. CONSTITUTIONAL LAW—CONST. ARK. 1874, ART. 5, § 23.

An issue on the constitutionality of an act of the Arkansas legislature cannot be raised in the courts on the ground that, in passing the act, Const. Ark. 1874, art. 5, § 23, requiring evidence of publication of notice of the intention to introduce the bill to be exhibited in the general assembly before it becomes a law, has been disregarded.

3. SAME—TAXATION FOR LEVEE PURPOSES.

The Arkansas legislature can constitutionally appoint a special agency outside of the county authorities to assess taxes for the purpose of building and repairing levees.

Appeal from chancery court, Chicot county.

Bill for injunction. Injunction granted. Defendant appeals.

J. G. B. Simms and *D. H. Reynolds*, for appellant. *W. B. Street*, for appellee.

SMITH, J. The complaint of George T. Gaines states, in substance, that he owned certain lands in Chicot county, valued, for taxation in 1882, at \$10,578, on which had for that year been levied state and county taxes amounting to \$312.55, which were paid by him; that, after these taxes had been levied and extended on the tax-books, the clerk, under the act of the general assembly of the state of Arkansas, entitled "An act to provide for building and repairing levees in Chicot county," approved March 20, 1883, added a tax of 1 per cent. on said lands, and extended same on the tax-books, and defendant, Davies, as collector, was trying to enforce the collection thereof, and had advertised the lands for sale on June 11, 1883, for such illegal tax. And denies that the clerk had authority to extend such tax on tax-books of 1882 under the act, and that, if he had, he denies that his lands were subject to such tax, because he says they were not benefited by the levees to pay for which said tax was levied; and denies that any lands were subject to levee tax in 1860 except those benefited by levees. And yet the act of March 20, 1883, authorizes a levee tax, and exempts townships 18 and 19 S., ranges 1 and 2 W., because no levee work was done in front of them, and they had received no benefit from the work done, and charges that these townships were as much or more benefited than his lands, and he is taxed and they are exempted; thus making the tax unequal and illegal, because the constitution provides that all

taxation shall be equal, and the last proviso of section 14 of said act levied a levee tax for 1882 on all the lands in said county subject to levee tax in 1860, and the lands in these townships were subject to such tax in 1860. And charges that the whole of said act of March 20, 1883, is unconstitutional and void, because "(1) a large amount of the lands on which said tax is imposed is not alluvial, and the owners thereof are denied a voice in the election of levee inspectors, and in imposing such tax; (2) it creates offices and appoints officers not authorized by the constitution, and in which the people have had no voice; (3) it imposes a tax without constitutional authority, and without the will of the people; (4) imposing the tax for 1882 was special legislation, and no notice of the intended application for the same was given; (5) the act seeks to exempt one part of the community from taxation, and imposes a tax upon another part of the same community equally meritorious; (6) said act is inconsistent and irreconcilable." And that, as said tax was levied by the legislature, he had no chance of appeal, and is without remedy at law and so seeks chancery; that all the levee tax-payers of Chicot county have a common interest with him, and he sues for himself and for such of them as wish to avail themselves of the suit. And prays for restraining order to enjoin the attempt to collect said tax, and to enjoin the sale for said tax.

A preliminary injunction was granted upon bond filed, and the same was served upon the collector. An amendment of the complaint was afterwards filed, stating that defendant had, after the order of injunction was served on him, advertised and sold the lands of plaintiff and others for said tax, and in contempt of the court, and referring to the records of the county court, and prayed to have the sale annulled and set aside.

To this complaint a general demurrer was interposed. The court overruled the demurrer, and, defendant electing to stand on his demurrer, the court decreed that the said levee tax for 1882 be perpetually enjoined, and that the sale of lands made by defendant on June 11, 1883, be set aside and held for naught, and that plaintiff recover of defendant all his costs, to which ruling the defendant excepted, and appealed to this court.

Our constitution recognizes the right of the citizen to institute suit, in behalf of himself and all others interested, for protection against the enforcement of any and all illegal exactions. Article 16, § 13.

The act of March 20, 1883, provides for laying off the territory of Chicot county into levee districts, and appoints levee inspectors, who are to serve until the next general election, at which time, and at each subsequent election, they are to be elected, one for each district. The most material portions of the act, so far as concerns the present litigation, are the following:

"Sec. 14. There shall be levied and collected in said county annually, on all alluvial lands therein that now are or would be benefited by levees, and which now are or shall become taxable for state revenue, a levee tax not exceeding two per centum on the assessed value thereof: provided; that there is hereby levied on all such lands in said county, except the lands in townships 18 south, one west, eighteen south, two west, nineteen south, one west, and nineteen south, two west, for the year 1882, a tax of one per centum on the assessed value thereof, for state and county purposes, which levy or tax shall be by the clerk of said county extended without delay upon the tax-books of said county, and collected by the collector thereof along with the state and county taxes for the year 1882; provided, further, that for the year 1882, and until otherwise directed by the board of inspectors, levee taxes shall be levied upon and collected from all the lands which are now in said county that were subject to levee tax in 1860.

"Sec. 15. It shall be the duty of the board of inspectors, at the regular October meeting, to fix and determine the rate or percentage of tax necessary to be levied for the year then current, which rate or percentage shall be certified to the county court of said county, which shall proceed to levy the rate

per cent. so certified, at the time and in the manner other taxes are levied, and the same shall be, by the clerk of the county, extended upon the tax-books of the county, in a separate column to be provided for that purpose. Said board shall have the power, and it is hereby made its duty, at its meeting in October, to hear and determine all questions as to whether or not any given tract of land is legally taxable for levee purposes under the provisions of this act, and all corrections or changes made in the list of lands subject to such tax shall be certified to the county court at the time the rate is certified.

"Sec. 16. The taxes, when levied, shall constitute a lien, and shall be collected, and payment thereof enforced, in same manner as taxes for state and county purposes: provided, that said taxes shall be payable only in lawful money of the United States: provided, further, that all persons who are liable for payment of taxes herein provided, who have since the first of October, 1882, contributed money for levee work being done or recently completed in said county, or who shall contribute money for such purpose, and shall hold the receipt of the committee appointed by the citizens of the county to look after its levee interests, or of the board of inspectors hereby created, for such voluntary contributions, shall be allowed credit on their levee tax for such sums, so contributed from year to year, until the whole of such contribution shall be absorbed by taxes levied on the property of contributors.

"Sec. 19. If, in adjusting and correcting the list of lands subject to levee tax, it shall be found that taxes have been collected from lands not subject to such tax, the board of inspectors shall cause such tax to be refunded."

It will be observed that the act imposes a tax directly upon the alluvial lands of the county that were subject to overflow for the preceding year of 1882, and for future years delegates the power of taxing, and of determining whether any given tract of land is legally taxable for levee purposes, to a board of inspectors. It is with this direct tax laid by the legislature that we have more immediately to deal, although the general features of the act, as affecting its constitutionality, may incidentally come under discussion.

We pass over the circumstance that a tax is levied for a past year. The time for paying the taxes for 1882 did not expire until April 10, 1883; and doubtless the legislature might, at any time before the expiration of that period, if not otherwise prohibited, levy a tax, to be collected along with other annual taxes, upon the basis of the assessment already made. But the direct levy of this tax by the legislature is perhaps open to the just criticism that it deprives the tax-payer of his right and opportunity to be heard, and of the privilege of showing that his land is not rightfully included within the taxing district. We do not regard the provision in the nineteenth section for refunding taxes erroneously collected as an adequate remedy under the circumstances. For, perchance, the owner might be unable to pay. In that event his land might be sold, and this title beclouded, when he was in no actual default. Here the plaintiff only alleged that his lands would not be benefited by the proposed levees. Now, of course, local assessments for the improvement of property can be justified only upon the idea of benefits. But a very large discretion must of necessity reside in the legislature, or in the agents it selects, for ascertaining and defining the boundaries of the improvement district. The listing of the plaintiff's lands for levee taxation raises the presumption that they are such as would be benefited by the construction of levees; and to rebut this presumption he should have alleged either that they were not included in the district established by the act, or that they did not belong to the class of alluvial lands subject to overflow.

There is, however, one objection to this legislative levy which is, in our opinion, fatal to its validity. It exempts for the year 1882 four townships of land, not because they do not belong to the class upon which the burden is imposed, for they are to be subjected to the tax after that year, but because, according to the allegations of the complaint, which the demurrer confesses,

no levy work had been done on their river front prior to the passage of the act. Such a provision violates the constitutional requirements of equality and uniformity,—requirements which have the same application to special assessments for the improvement of property that they have to other kinds of taxation. To omit a part of the lands benefited is to increase the burden of the others, and thus to defeat the rule of apportionment. *Fletcher v. Oliver*, 25 Ark. 289; *Peay v. Little Rock*, 32 Ark. 31; *Monticello v. Banks*, 48 Ark. —, 2 S. W. Rep. 852; *Welty, Assessm.* § 340, and cases cited; *Cooley, Tax'n*, (2d Ed.) 644, and cases cited in note 2. As REDFIELD, J., says in *Allen v. Drew*, 44 Vt. 186: "A tax for a local benefit should be distributed among and imposed upon all equally standing in like relation."

And this brings us to the consideration of the last proviso of the sixteenth section of the act, which provides for the reimbursement to citizens of moneys theretofore contributed by them for levee purposes, by allowing them a credit upon their future taxes for sums so contributed. This is in the nature of an exemption; and a tax levied to compensate them for past liberality is for a private and not a public use. It creates an obligation where none existed before, and decrees payment by sequestering the property of others. These contributions were voluntary, and paid for the advantage of the contributors themselves, and the legislature possessed no power to compel others to contribute, who might be incidentally benefited by such outlays. *Tyson v. School Directors*, 51 Pa. St. 9; *Perkins v. Milford*, 59 Me. 315.

These principles lead to an affirmation of the decree. But it does not follow that the entire act is inoperative. The objectionable features may be eliminated by rejecting the provisos in sections 14 and 16, and the remainder of the act stand as a feasible scheme for the protection of the lowlands of Chicot county from disastrous inundations of the Mississippi river. Apart from the objections already pointed out, we are not aware of any constitutional provision which the act violates, although we have not given it a very careful scrutiny, inasmuch as those defects were decisive of the present case. It is, indeed, rather a flagrant example of special legislation; and the constitution aims to discourage special legislation. Thus it provides that "in all cases where a general law can be made applicable, no special law shall be enacted." Now, this act is local in its operation; and that a general law could be framed to apply to all portions of the state in the like situation may be considered as demonstrated by the fact that there was such a law on the statute books at the date of its passage. See Mansf. Dig. c. 95, entitled "Levee and Cut-offs." Nevertheless, the constitution does leave with the legislature a very large discretion in determining when a general law can be made applicable; and, according to the adjudged cases, the legislature is the sole judge whether provision by a general law is possible, except in the enumerated cases of changing the venue in criminal cases, changing the name of persons, adopting and legitimating children, granting divorces, and vacating roads, streets, or alleys. The provision is merely cautionary to the legislature. *Boyd v. Bryant*, 35 Ark. 73, and cases there collected; *Little Rock v. Parish*, 36 Ark. 172; *Cooley, Const. Lim.* *129, and cases in note; *State v. County Court of Boone Co.*, 50 Mo. 317, 11 Amer. Rep. 415. "The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference." *Cooley, Const. Lim.* *168.

The same remarks apply to the passage of the bill without the previous publication of notice of the intention to introduce it. Section 26 of article 5 of the constitution of 1874 requires evidence of such publication to be exhibited in the general assembly before the bill becomes a law; but if the general assembly choose to disregard this requirement, and to enact a local or special law

without notice, no issue upon the subject of notice can be raised in the courts.

It is also said that the general assembly could not delegate its taxing power to a board of officers unknown to the constitution; the board not being one of the state's subordinate political or municipal corporations. The objection really amounts to this: that the county court should have been the instrumentality employed in the levy of the tax. The inspectors determine the rate of taxation, as well as what lands are subject to the tax; and the county court merely registers their determinations, as in the case of taxes levied by school-districts. Now, a levee district is not a political subdivision of the state; neither is it a corporation, as a school-district is. But local impositions upon property in the immediate vicinity of an improvement, laid with reference to the special benefit which the property derives from the expenditure, differ from impositions for purposes of general revenue, and stand upon peculiar grounds. *Palmer v. Stumph*, 29 Ind. 329; *Hale v. Kenosha*, 29 Wis. 599. This distinction was pointed out in *McGehee v. Mathis*, 21 Ark. 40, where the Chicot county levee act of January 7, 1857, was under consideration. It was decided in that case that levees were not an "internal improvement and local concern," and the taxes levied to build and repair them were not county taxes within the meaning of that clause of the constitution which vests exclusive original jurisdiction over such matters in the county court. The legislature might have devolved the duty of fixing the percentage of taxes, and the area of territory that would be benefited by levees, upon the county court. But we perceive no constitutional objection to the creation of a district agency for accomplishing the purposes of the statute. In *Little Rock v. Board Imp.*, 42 Ark. 152, we had occasion to pass upon the constitutionality of an act providing for sewerage and other local improvements in cities of the first class, in which the legislature had passed over the city council, and vested the substantial power of taxation in a board of improvements; and it was decided that for such purposes this might be done.

MARSHALL v. COWLES.

(*Supreme Court of Arkansas*. February 12, 1887.)

CONTRACT—TO PRE-EMPT AND CONVEY GOVERNMENT LANDS, VOID.

An action will not lie for specific performance of a contract by which one party agrees to furnish half the government price of land, and of improving the same, in consideration of the other party pre-empting and conveying half the land to him after title acquired.

Appeal from circuit court, Carroll county. In chancery.

Bill for specific performance of contract. Judgment for Hiram Cowles, plaintiff. Defendant appeals.

W. G. Whipple, for appellant. *Caruth & Erb*, for appellee.

BATTLE, J. Hiram Cowles alleged in his complaint that in November, 1881, the defendant, Henry Marshall, being in possession of the land in question, which was then wild and unimproved, and belonged to the United States, desired to purchase it, but was unable to do so, and that he proposed to plaintiff, Hiram Cowles, if he would contribute one-half of the purchase money, and assist in improving it, and pay one-half of the costs of the improvements, he would enter it, and plaintiff should have one-half interest in the land, and joint possession with him, and that, when he obtained title from the United States, he would convey one-half interest to him; that plaintiff accepted this proposition, and took possession of the land, and occupied it jointly with defendant; advanced one-half the purchase money, and assisted in improving the land; and that the money he advanced to pay for the land, and for the improvement thereof, and the labor performed by him in improving it, were reasonably worth the sum of \$500; that defendant afterwards ob-

tained title to the land, and refused to convey to him one-half thereof, as he had agreed to do. He asked that defendant be compelled to perform this contract. The defendant answered, and denied that he had made any such contract, or agreed to convey to plaintiff any interest in the land on any conditions whatever, and averred that they did agree to clear and cultivate it, and bear the expenses of doing so equally, and share equally the profits of the cultivation; and that, under this contract and no other, plaintiff occupied the land jointly with him, and expended money and performed labor in improving and cultivating it; that defendant expended larger sums of money, and performed more labor in improving and cultivating the land, than plaintiff did, and that on a fair settlement plaintiff would be largely in his debt. He pleaded no counter-claim or set-off, and asked for no relief.

On the hearing the court below found that plaintiff was not entitled to a specific performance, but that there had been a partnership between plaintiff and defendant, and appointed a master, and directed him to state an account between them, which he did, and reported the same to the court. After examining the report, the court found that defendant was indebted to plaintiff in the sum of \$400 for money expended in the purchase of the land, and for labor performed in improving it, and in the further sum of \$30 on other accounts, and rendered judgment against him for these sums, and decreed that plaintiff have a lien on the land for the \$400, and that, in the event defendant did not pay the same in 20 days, directed that a writ of *venditioni exponas* be issued, directing the land to be sold to pay it; and the defendant appealed to this court.

The evidence in the case is conflicting. Each party introduces evidence tending to support the statement made in his pleadings. But there is no question about the land belonging to the United States before the defendant entered it. This is admitted by both parties. According to the evidence supporting plaintiff's statement, defendant made the contract set forth in plaintiff's complaint, and in the contract agreed with plaintiff to pre-empt the land, and some time thereafter did so. If this be true, the contract, having been made prior to the purchase of the land by Marshall, was in violation of the laws of the United States, under which he pre-empted; for section 2262 of the Revised Statutes provides that, before any person shall be allowed to enter land under the act under which defendant purchased, he shall make oath "that he has not settled upon such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; and, if any person swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all rights and title to the same."

If the contract relied upon by plaintiff was valid, the title to the land, to the extent of one-half thereof, would have inured to plaintiff. It is evident, therefore, the contract set up by plaintiff is contrary to the spirit, intent, and policy of the law, and is illegal and void. It amounts to a contract in which one party undertakes to bribe, and the other agrees to commit perjury. There is no remedy in law or equity on such contracts. *Shorman v. Eakin*, 47 Ark. 351, 1 S. W. Rep. 559; *Warren v. Van Brunt*, 19 Wall. 646; *St. Peter Co. v. Bunker*, 5 Minn. 192, (Gil. 153); *Evans v. Folsom*, 5 Minn. 422, (Gil. 342); *Bruggerman v. Hoerr*, 7 Minn. 337, (Gil. 264); *McCue v. Smith*, 9 Minn. 252, (Gil. 237.)

No question arises in this action as to plaintiff's right to repudiate the contract, and sue for the money he has expended, or the value of the labor he has performed under it. He has not repudiated the contract, but, on the contrary, has sought to enforce it, and still relies on it to sustain the judgment

of the court below. According to the evidence and the master's report, defendant expended more money in improving and cultivating the land in question, under his agreement with plaintiff, than plaintiff did, and more than the value of the labor performed and money expended by plaintiff in purchasing, improving, and cultivating the land will amount to. The evidence does not show that there were any profits arising from the cultivation of the land. Under no view of the evidence that can be taken is there anything due to plaintiff. He is entitled to no relief in this action.

The decree of the court is therefore reversed, and a decree will be entered here dismissing the complaint.

ROSS, Ex'r, etc., v. HUIL.

(*Supreme Court of Arkansas.* February 19, 1887.)

EXECUTORS AND ADMINISTRATORS—ACTION AGAINST—INSUFFICIENT AUTHENTICATION OF CLAIM—NONSUIT.

Where a plaintiff sues an executor without first making the affidavit authenticating his claim prescribed by Mansf. Dig. Ark. § 102, he will be nonsuited.

Appeal from circuit court, Clark county.

Crawford & Crawford, for appellant.

COCKRILL, C. J. The appellee sued an executor without first making the affidavit authenticating his claim against the estate, as required by the statute. The executor moved to dismiss the action upon this ground. No affidavit was produced except the ordinary form of verification to the complaint, but neither this, nor the allegations of the complaint, conformed with any degree of substantiality to the statute for authenticating claims against estates. Mansf. Dig. § 102. The statute is peremptory in its terms, directing a nonsuit if the authentication is not made, (Id. § 107,) and this court has universally given effect to it, (*Alter v. Kinsworthy*, 30 Ark. 756, and cases cited.) The appellee has not undertaken to favor us with any reason for taking his case out of the rule, and we have failed to perceive that any exists.

The judgment will be reversed, and the cause remanded for further proceedings.

KANSAS CITY, S. & M. RY. CO. v. KIRKSEY.

(*Supreme Court of Arkansas.* February 19, 1887.)

NEGLIGENCE—EVIDENCE.

In an action against a railroad company for injury to a mule by a moving train, the fact that a clump of bushes was growing on the defendant's right of way, behind which the mule was standing till frightened onto the track by the approach of the engine, is not material to the question of negligence.

Appeal from circuit court, Craighead county.

Newman Erb and *Caruth & Erb*, for appellant.

COCKRILL, C. J. This action was brought by the appellee against the railroad to recover damages for an injury to his mule, caused by one of the appellant's moving trains. The plaintiff relied upon the statutory presumption of negligence, and the company undertook to overcome the presumption by the evidence of the train hands to the effect that everything that could be done to prevent the accident was done. There was, however, evidence tending to show that outside of the ditch, at the foot of the embankment where the mule was killed, there was a clump of bushes on the company's right of way, behind which the animal was standing as the engine approached, and that it was hid thereby from the train-men's view; that, as the train approached, the mule rushed suddenly out of the bushes, and upon the track, where it was unavoidably struck by the engine and killed. Upon this branch of

the case the court charged the jury as follows: "The railroad company, being assumed to be the owners and to have control of the right of way, would be held to ordinary care and diligence in keeping the right of way in such condition that its officers and servants, engineers and firemen, could have a free and unobstructed view of the right of way from the locomotive. Now, if you find that this mule was killed without fault on the part of the company or its servants, and they used every possible means to avoid the calamity, but it happened in spite of everything that could be done, then you will find for the defendant. This must be shown by a preponderance of proof; otherwise you will find for the plaintiff. And it is the duty of the company to keep their right of way in such a condition that its employes and agents could have a proper view of it, such as is necessary for the safe operation of its trains. In this case, if you find that the clump of bushes was outside of the right of way, you need not consider that any further; but, if it is inside the right of way, then you will look to see if it contributed to the accident, and, if so, then you will entertain it; but, if it did not contribute, then you will not entertain it."

The jury were thus left at liberty to find that it was negligence which would authorize a recovery for the company to permit bushes to grow upon its right of way, and they returned a verdict for the appellee. It may be that the charge announces the rule that should govern when the relation of the company to its passengers, or the owner of live-stock to which it has assumed the obligation of a common carrier, is considered, or when its duty to one who is crossing its track upon a highway, and is prevented by the undergrowth upon the right of way from seeing an approaching train, is involved, as was the case of *Dimick v. Railroad Co.*, 80 Ill. 338. But the question is, what was its duty to the plaintiff in this case? The first requisite to establish negligence is to show the existence of a duty due to the party aggrieved, and then a violation or neglect to perform that duty. Cooley, Torts, 859, 860. The railroad's obligation as a carrier, or its duty to a person rightfully upon its track, is not coincident with the negative duty not to injure unnecessarily stock that wanders upon its right of way and track. It is held to a rigid observance of its public duties; but as to stock straying upon its right of way its obligation is not different from that of other owners or occupants of real estate. *Pittsburgh, Ft. W. & C. Ry. v. Bingham*, 29 Ohio St. 364. The statute has placed no obligation upon the railroad in that respect, and the rights and liabilities of the company and the stock-owner are governed by the common law. The company is not required to fence out the stock, and the stock-owner enjoys the passive license of free pasturage upon its open premises, as upon those of natural persons, without being held to accountability as a trespasser. *Little Rock & Ft. S. Ry. v. Finley*, 37 Ark. 562. The technical wrong that the land-owner suffers by the entry of another's stock is regarded as too slight to engage the attention of the law, and is *damnum absque injuria*. But the privilege of entry and free pasturage is not a right which can be demanded and enforced; it is only an immunity from suit or punishment; and the company or other land-owner is under no obligation to expend money or labor in preparing the land for a convenient or a safe enjoyment of it. *Illinois Cent. Ry. v. Carraher*, 47 Ill. 333; *Hughes v. Hannibal & St. J. Ry.*, 66 Mo. 325; *Peoria & R. I. Ry. v. McClenahan*, 74 Ill. 435; *Pittsburgh, Ft. W. & C. Ry. v. Bingham*, *supra*. One who suffers his stock to go at large takes upon himself the ordinary risks incident to it. He takes the permissive pasturage, with its accompanying perils. *Knight v. Abert*, 6 Pa. St. 472. To him the land-owner owes no duty prior to the entry of his stock upon the premises, unless it be to refrain from unnecessarily attracting or drawing them into a place of danger; as in *Jones v. Nichols*, 46 Ark. 207, (*Crafton v. Railway Co.* 55 Mo. 580; *Page v. North Carolina Ry.*, 71 N. C. 222;) and, after they are upon the premises, he owes only the negative duty

of avoiding any injury to them which the exercise of ordinary care at that time would prevent.

The language of the court in *Little Rock & Ft. S. Ry. v. Henson*, 39 Ark. 413, 419, that a railroad company owes no duty to the owner of stock which has strayed upon its track except to use ordinary or reasonable care at the time to avoid injury to it; and in the case of *Same v. Holland*, 40 Ark. 336, that "ordinary care in the management of their trains is the measure of vigilance which the law exacts of railroads in their relations to the owners of such animals,"—is strictly applicable to this case. This measure of vigilance does not require a lookout over the entire breadth of the right of way, and an apprehension of danger whenever an animal is discovered upon it. *Railroad Co. v. Reidmond*, 11 Lea, 205, 211; *Edson v. Central Ry.*, 40 Iowa, 47; *Peoria, P. & J. Ry. v. Champ*, 75 Ill. 577; *Railroad Co. v. Holland*, *supra*. How, then, can it be said that the company owes him the duty of keeping the right of way in such condition as to afford its employes a view of it?

The charge was erroneous, and the judgment is reversed, and the cause will be remanded for a new trial.

WALDRIP, Guardian, v. TULLY, Next Friend.

(Supreme Court of Arkansas. February 19, 1887.)

GUARDIAN AND WARD—AUTHORITY OF GUARDIAN TO MAKE REPAIRS—ACCOUNT.

Where money was advanced by a guardian for necessary repairs to his ward's property, without the authority first obtained from the probate court to make such repairs, *held*, that the guardian was entitled to credit in his account for the money advanced for such repairs, it appearing that the repairs were necessary and proper.

Cross-appeal from circuit court, Independence county.

J. W. Butler and Robert Neill, for appellant. *Coleman & Yancy*, for appellee.

SMITH, J. Waldrip was guardian of Adlen C. and John D. Magness. His wards were owners of a cotton plantation, the annual rents from which ranged from \$600 to \$1,000. There was a gin-house, at which the cotton raised by the tenants and the planters of the neighborhood was ginned and prepared for market. At the date of Waldrip's appointment, the machinery of the gin had become worn out by long use. He advanced about \$350 of his own money in the purchase of a new gin-stand, feeder, condenser, horse-power, etc., and was thereby enabled to let the use of the gin on advantageous terms. In the midst of the ginning season, the cotton-press, which was an old one, broke down, and the guardian bought a new one, at a cost of \$213.60. A few months later, the gin-house and its machinery were destroyed by an accidental fire. In his account current the guardian asked credit for the sums so expended. The mother of the infants filed exceptions, alleging that these expenses were incurred of the guardian's own motion, and without authority of law, and that it was not to the interest of the wards to make the improvements. The probate court overruled the exceptions; but, on appeal, the circuit court disallowed the credits, except the item for the press. Counsel on both sides concede that the expenditure for the press stands upon the same footing as the other expenditures; and for ourselves we can see no difference. A cotton-press is a machine for bailing the cotton after the seeds have been separated from the fiber by the action of the gin, and there could be no use for the press until this process had been performed.

A guardian is the authorized agent, appointed by law, to take care of the ward's estate, and manage his affairs. If the estate consists of lands, it is his especial duty to collect the rents and profits, and to this end keep the ward's premises in tenantable order and repair. He cannot build or make expensive permanent improvements without a previous order from the probate court.

It is not questioned that the guardian acted in entire good faith, believing that what he did would be beneficial for his wards. It would have been safer and better to obtain in advance the sanction of the probate court; but, as the proposed improvements were in the nature of repairs, and as the outlay did not encroach upon the capital of the wards, but only anticipated their income for the current year, his action, without directions, only imposed upon him the burden of showing the necessity for the repairs. If it is clear that the probate court, upon an application by him setting forth the circumstances, would and should have granted authority to replace the worn-out machinery, then he should have credit for his expenditures. Waldrip did not embark his wards in a speculation or a new enterprise. Their means were already invested in agricultural lands, which their father and grandfather before them had devoted to the production of cotton. As a necessary adjunct to the prosecution of their planting operations, those ancestors had built and equipped a cotton-gin; and, as a matter of profit, they had ginned also the cotton of their neighbors. It was a public or toll gin, situated at a steam-boat landing on White river, which was considered a good stand for such a purpose. Waldrip had to determine whether he would let the capital that was invested in the gin lie idle and eventually perish, or expend a few hundred dollars in making needed repairs. In concluding to repair, he exercised a wise discretion, although he should have laid the facts before the probate court, and have sought its advice. But the making of the repairs was what any prudent man would have done with his own property, and so the uncle of the wards and the administrator of their father's estate testified. It would have turned out profitably for the wards but for a calamity which could not have been foreseen. During the few months the gin was operated, Waldrip received as rent for its use \$184.49. The cost of the new machinery would have been repaid by the tolls of two or three seasons.

The judgment is reversed, and cause remanded, with directions to overrule the exceptions to the guardian's account.

DOLES v. HILTON and others.

(*Supreme Court of Arkansas. February 19, 1887.*)

INFANTS—REMOVING DISABILITY BY PROBATE COURT—SALE OF LAND BY INFANT.

Under the laws of Arkansas, a probate court has no jurisdiction to remove the disabilities of minors, respectively 7, 10, and 12 years of age, so as to empower them to sell and convey a valuable tract of land.

Appeal from circuit court, Lincoln county. In chancery.

D. H. Rousseau, for appellant. *Harrison & Harrison*, for appellees.

BATTLE, J. John I. Matthews departed this life intestate, seized in fee of a certain tract of land in Lincoln county, in this state, and left Willie G. Hilton, Ida Johnson, and Mattie Lettish, his children and only heirs at law, him surviving. These heirs and children were minors when their father died. During their minority they applied to the Lincoln probate court for an order to remove their disabilities as minors so as to allow and empower them to sell and convey their interest in this tract of land. The Lincoln probate court, at its April term in 1872, granted this application, and made an order according to the prayer thereof. At the time this order was made they were, respectively, 12, 10, and 7 years of age. About this time they sold and conveyed the land to Moses De Baunne and Mort. M. Mesler. After they arrived of age they brought this action against Carlton Doles to recover the possession thereof. Doles answered, and claimed title and possession through De Baunne, Mesler, and plaintiffs. Plaintiffs recovered judgment for the land, and defendant appealed.

The only question in the case is, was the order of the Lincoln probate court a valid order? Section 1 of the act, under which this order was made, reads as follows: "That the court of probate in and for the several counties in this state shall have power, in its discretion, to authorize any person who is a resident of the county, and under twenty-one years of age, to transact business in general, or any particular business specified, in like manner and with the same effect as if such act or thing was done by a person above that age, and every act done by any person so authorized shall have the same force and effect in law and equity as if done by a person of full age; and *letters testamentary or of administration or guardianship* may be granted to any such person, if otherwise entitled by law to have or hold such fiduciary trust, with like effect as if granted to a person over twenty-one years of age."

In the construction of all statutes the real intention of the law-giver, when accurately ascertained, should prevail over the literal sense of terms. That intention is to be deduced from a view of the whole and of every part of a statute, taken and compared together, and from other statutes *in pari materia*. "If the language," said this court in *Reynolds v. Holland*, 35 Ark. 59, "be plain, unambiguous, and uncontrolled by other parts of the act, or other acts or laws upon the same subject, the court cannot give it a different meaning to subserve a public policy, or to maintain its constitutional validity. The question for the courts is not what would be wise, politic, and just, but what did the legislature *really mean to direct*. This narrow circle embraces and circumscribes the whole ambit of the court, although within that it may move very freely in catching the intention. It may disregard the literal meaning of words, when it is obvious from the act itself the use of the word has been a clerical error, or that the legislature intended it in a sense different from its common meaning."

Mr. Blackstone, in speaking of the rules of interpretation of laws, says: "The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects, and consequence, or the spirit and reason of the law." Again he says: "As to the *effects and consequences*, the rule is that where words bear either none or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held, after long debate, not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it, or the cause which moved the legislator to enact it; for, when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. There was a law that those who in a storm forsook the ship should forfeit all property therein, and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now, here all the learned agree that the sick man is not within the reason of the law; for the reason of making it was to give encouragement to such as should venture their lives to save the vessel. But this is a merit which he could never pretend to who neither stayed in the ship upon that account, nor contributed anything to its preservation." 1 Bl. Comm. 58, 60.

It is obvious that the act authorizing the removal of disabilities of minors was only intended to apply to such minors as are capable of transacting their

own business. The object of the common law in making minors incapable of binding themselves absolutely and irrevocably by contract is to protect them from improvident engagements; but, inasmuch as there are minors capable of making intelligent and beneficial contracts, and managing their own affairs, the legislature, in its wisdom, saw fit to authorize the probate and circuit courts to remove the disabilities of such minors. Its intention was to authorize the removal of disabilities only in those cases where the limitation upon the capacity of the minor to contract worked a hardship, and the reason for the limitation does not exist. If such had not been its intention, its object could and would have been more easily accomplished by an act removing the disabilities of all minors. The policy of the law is to protect all persons incapable of conducting their own affairs and estates. The statutes make it the duty of the probate court to appoint guardians to take the care, custody, and management of idiots, lunatics, habitual drunkards, and persons of unsound mind, who are incapable of conducting their own affairs and estates. There is no reason why an infant in like condition should be made an exception.

But it is insisted by appellant that, while it is obvious that this was the intention of the legislature, the Lincoln probate court was vested with jurisdiction, and its order removing the disabilities of plaintiffs cannot be called into question in a collateral proceeding. If this be true, a probate court, while the constitution of 1868 was in force, might have removed the disabilities of an infant in his swaddling clothes, and appointed him an administrator or guardian, with the control of large estates, and such orders would have been valid in all collateral proceedings until set aside in a direct proceeding, notwithstanding all the facts appeared of record. For the purpose of his contentions, appellant assumes that the probate court had jurisdiction to make such orders. Is he right? We have seen that the intention of the legislature was to empower the probate court to remove the disabilities of those minors, and no others, who are capable of making contracts and controlling their own affairs and estates; and that, in construing the act in question, we must construe it in connection with other statutes upon the same subject. Under the statutes of this state an infant under 12 years of age is incapable of committing crime; under 10 he is incompetent to testify; and under 14 is not qualified to select his own guardian. These are conclusive presumptions of law. Evidence is not admissible to remove them. Is it therefore reasonable to presume that the statutes of this state intended that a probate or circuit court should have jurisdiction to remove the disabilities of a minor under 14 years of age, and thereby qualify him to become an executor, or administrator and guardian, when, before the removal of his disabilities, he was presumed to be incompetent, and was incapable of selecting his own guardian? There is but one answer to the question. It is contrary to all reason to suppose that the intention of the act in question was to authorize any court to empower a minor under 14 to do an act requiring a higher qualification to do than an act he is presumed, under the statute, to be incompetent to perform. Construing all the statutes on the subject together, and governed by the manifest intent of the act in question, we conclude that no court has or had the authority, under the act in question, to remove the disabilities of a minor under 14 years of age.

The Lincoln probate court undertook to remove the disabilities of plaintiffs, when they were, respectively, 7, 10, and 12 years of age, so as to empower them to sell and convey a valuable tract of land. These facts are stated in the record in the application made by the plaintiffs to the court. The order removing their disabilities is therefore void. The judgment of the court below is affirmed.

CREASE and another v. LAWRENCE.

(Supreme Court of Arkansas. February 19, 1887.)

1. EQUITY—BILL AND CROSS-BILL—JURISDICTION.

Where the allegations of the complaint showed that plaintiffs were not entitled to any relief in equity, but defendant's cross-complaint showed that defendant was entitled thereto, this supplied any defect in the equitable jurisdiction of the court, the original and cross-complaints being but one cause, and imposed upon the court the duty of granting relief to the party entitled thereto.

2. EJECTMENT—TITLE BY ADVERSE POSSESSION.

In an action of ejectment, when the evidence showed that the possession of plaintiffs and their grantors was open, notorious, and adverse, and continued for more than seven successive years before the defendant purchased or entered into possession, *held*, that this was sufficient to vest in plaintiffs the title to the land, and to enable them to maintain an action of ejectment for it; following *Logan v. Jelts*, 84 Ark. 547.

Appeal from circuit court, Saline county. In chancery.

U. M. & G. B. Rose, R. C. Newton, and R. A. Howard, for appellants.
Ratcliffe & Fletcher, for appellee.

BATTLE, J. On the eighteenth day of April, 1882, A. Sophia Crease and Laura C. Lewis filed their complaint in equity in the Saline circuit court against W. A. Lawrence, alleging the following facts: About the year 1844, John H. Crease, the father of the plaintiffs, occupied certain lands lying in Saline county. On the twenty-eighth of June, 1855, George C. Watkins conveyed these lands to Jane Crease, the wife of John H. Crease. On the twenty-sixth day of July, 1871, Crease and wife conveyed the lands to plaintiffs. John H. Crease and wife were in actual, adverse, and peaceable possession of the land from 1844 until 1872, when they both died, and, from the time of their death, plaintiffs remained in like possession until 1880, making a continuous possession of more than 30 years. About the twenty-seventh of February, 1880, defendant, knowing these facts, entered upon one tract of the land, and made a small improvement on it, claiming by virtue of a deed executed by John T. Jones, as an attorney in fact for L. A. Epperson, C. W. Epperson, C. L. Scrutchfield, and S. F. Scrutchfield, dated twenty-seventh of February, 1880. Since his entry, defendant has committed many trespasses on the tract claimed by him, and still continues to do so, and by his claim casts a cloud over the title of plaintiffs. And they prayed for an injunction against the trespasses complained of, for possession, for an account of rents, and for general relief.

The defendant answered, and denied that John H. Crease ever occupied the land in controversy; that plaintiff had actual and continued occupancy and possession thereof for seven years next before the twenty-eighth of February, 1880; and that Watkins had any title to the land on the twenty-eighth of June, 1855, when he conveyed to Mrs. Crease. He averred that Watkins pretended to derive title from one S. M. Rutherford, who conveyed to him by deed dated September 30, 1854; that on the twelfth of June, 1846, in a suit then pending in the chancery court of Pulaski county, wherein Albert Epperson was plaintiff, and Muchberry H. Beatty, and Samuel M. Rutherford and others were defendants, it was decreed, among other things, that all the right, title, and interest of said defendants in the land in question should be divested out of them, and vested in Beatty, and that the land should be sold by Milton Fowler, as commissioner; that Fowler, as such commissioner, sold the land on the nineteenth of October, 1846, pursuant to the decree, and executed a deed to Epperson, who bought at his sale; that on the twenty-seventh of February, 1880, L. A. Epperson and others, only heirs of Albert Epperson, who had died in the meantime, by John T. Jones, their attorney in fact, conveyed the land to defendant; that since the conveyance of the land by Fowler, or soon thereafter, Epperson, and those claiming under him, have had possession

and control of the land openly and adversely. He denied that he took forcible possession of the land, but averred that possession was delivered to him by his grantor peaceably, and that he had made valuable improvements on it. He demurred to the complaint because there was no equity in it, and the facts therein stated were not sufficient to constitute a cause of action. He made his answer a cross-complaint against the plaintiffs, and prayed that the complaint be dismissed, and that the deeds from Rutherford to Watkins, from Watkins to Mrs. Crease, and from Crease and wife to plaintiffs, be set aside, and that the title of the defendant to the land be forever quieted, and for other relief.

Plaintiffs answered the cross-complaint, and repeated the allegations of their complaint as a part of their answer. They denied that Watkins, or any one occupying the land and claiming title to it, were parties to the suit brought by Epperson against Beatty and others; that Fowler, as commissioner, ever made any valid deed to the land as alleged. They said they knew nothing of the death of Epperson, nor whether he died intestate, nor who his heirs were, and they denied the right of defendant as claimed under Epperson. They denied the authority of Jones to act as attorney in fact; that Epperson, or any one claiming under him, had possession or control of the land; and that defendant entered peaceably into the possession of the land, and made valuable improvements thereon. The court sustained the demurrer to the complaint, because there was no equity in it, and dismissed it without prejudice; and plaintiffs appealed.

According to the allegations of the complaint, plaintiffs were not entitled to any relief in equity. But defendant's cross-complaint showed he was, and this supplied any defect in the equitable jurisdiction of the court, placed the court in the possession of the whole cause, and imposed the duty on the court of granting relief to the party entitled to it; the original and cross-complaints being but one cause. The court below, therefore, erred in sustaining the demurrer of defendant, and dismissing the complaint. *Radcliffe v. Scruggs*, 46 Ark. 102.

As the cause was ready for hearing, we proceed to consider the merits, and to render such decree as should have been entered below. The evidence established that plaintiffs and their grantors held, occupied, and cultivated a farm on the land in controversy, and lands contiguous thereto, under deeds conveying the same to them, respectively, for about 20 years before defendant's purchase. Only a small part of the farm, however, was on the land in controversy; the remainder thereof, except two or three acres, being woodland. During the entire 20 years plaintiffs and their grantors claimed the land as their own, and used so much thereof as was not inclosed as a wood lot, and cut on it the fire-wood and timber used on the farm, as they did on their other woodland. Their claim was open, adverse, and notorious. Soon after the close of the late war between the states, Epperson's agent had notice of their claim; both insisting on paying the taxes on the land. For more than 10 years before he purchased defendant knew of their claim. Taking all these circumstances together, it is evident that the possession of plaintiffs and their grantors was open, notorious, and adverse, and continued for more than seven successive years before the defendant purchased or entered into possession. This was sufficient, as held by this court in *Logan v. Jelks*, 34 Ark. 547, to vest in plaintiffs the title to the land, if it was not already vested, and enable them to maintain an action of ejectment for it.

The decree of the court below is therefore reversed, and a decree will be entered here in favor of plaintiffs, quieting their title to the land in controversy, and for the possession thereof, and for the costs of this court and the court below.

SORRELS, Adm'r, v. TRANTHAM, Adm'r.

(Supreme Court of Arkansas. February 19, 1887.)

1. EXECUTORS AND ADMINISTRATORS—REOPENING ACCOUNT—LIMITATION AND LACHES.

In proceedings to open an administrator's account, and for a further accounting, when it appears that the heir and distributee was an infant when the administrator settled his accounts, and died in infancy, and an administrator to such heir's estate was not appointed till 10 years afterwards, the statute of limitations does not begin to run in favor of the administrator until such appointment, and no laches can be imputed to the heirs of decedent in their action.

2. SAME—EXPENDITURES FOR CHILDREN.

A court of equity will not, at the instance of an heir, open an administrator's account on the ground merely that expenditures made for the benefit of decedent's children had not been specifically allowed or ordered to be paid by the probate court.

3. SAME—INDEBTEDNESS OF ADMINISTRATOR.

Where an administrator, indebted to his decedent's estate, files claims for administration expenses and disbursements; without setting off his indebtedness, and his successor indorses his allowance upon them, the allowance and payment of such claims is a constructive fraud upon the rights of those interested in the estate by the administrator, who is chargeable with knowledge of his predecessor's transactions.

4. APPEAL—FROM PROBATE COURT—FINAL ADJUSTMENT BY CIRCUIT COURT.

Where the assets of an estate have all been converted into money, and all debts paid, and there is no necessity for further proceedings in the administration, a court of chancery, in proceedings to open the administrator's account and for further accounting, will retain the cause for final adjustment, instead of certifying its conclusions and corrections down to the probate court.

Appeal from circuit court, Drew county. In chancery.

Harrison & Harrison, for appellants. *Wells & Williamson*, for appellee.

SMITH, J. The object of this bill was to reopen the account of Sorrels, as administrator of England, for false and fraudulent credits therein taken, which were particularly specified, and for a further accounting. The answer denied specifically the various charges of fraud; but at the hearing the court found that all of the disbursements with which the administrator had been credited in the probate court, except some trifling sums paid to officers of the court, had been improperly obtained. It therefore set aside the settlement account, and referred it to a master to restate the same, excluding the objectionable items, and charging the administrator with lawful interest upon whatever balance might be found in his hands, with annual rests.

The bill was filed by the personal representative of the last surviving heir and distributee of England; and it is suggested that, as near 14 years had elapsed from the confirmation of Sorrels' account before the suit was begun, the demand is stale, and barred by lapse of time. But Georgiana England, the said heir and distributee, was an infant when the administrator settled his accounts, and in fact died in infancy in the year 1873; and administration was not granted upon her estate until in 1883, and the present bill was filed in the year following; so that the statute of limitations never began to run in her life-time, nor until there was an administrator upon her estate. Nor can laches be imputed in a case where no one in existence is capable of suing. *Mansf. Dig. § 4489; Hanf v. Whittington*, 42 Ark. 491, and cases cited. It is, indeed, contended that, upon the marriage of the said Georgiana, in 1871, all her personal property became vested in her husband, and he could have sued immediately. But by section 6 of article 12 of the constitution of 1868, her inheritance and distributive share in her father's estate was her separate property.

One of the credits which the probate court had allowed to Sorrels, but which the circuit court rejected, was a bill of \$74.43 for medical services rendered

to one of England's daughters in her last illness. This was after England's death; and the ground of rejection was that the demand had never been allowed, nor ordered to be paid, by the probate court. Properly, it was not a claim against the estate, nor a part of the expenses of administering it; but the child had no guardian, nor any other estate except that in course of administration out of which to pay for these useful and necessary services. The only risk which an administrator takes under such circumstances is the solvency of the estate; for such payments are not good as against creditors. But there was no fraud in the matter; and a court of equity will never, at the instance of heirs, open an account for such expenditures. The claim was not such a one as is required to be presented to the probate court for allowance and classification, having accrued after the death of the intestate. Nor was a previous order of court for its payment necessary. The probate court afterwards sanctioned such payment by allowing the administrator credit therefor. *Farborough v. Ward*, 34 Ark. 205; *Martin v. Campbell*, 35 Ark. 137; *Bonsford v. Grimes*, 17 Ark. 567.

A second item of credit rejected *in toto* by the circuit court was the sum of \$500 retained by the administrator in payment of certain claims which had been transferred to him by one Harris. England had died in the year 1860, and Harris had been the first administrator of his estate; Sorrels being one of the sureties upon his administration bond. Harris had sold personal property belonging to the estate of the value of \$138.05, as shown by his sales-bill returned into court, and had never accounted for the proceeds; nor has he attempted to give any such account in this suit, although he was sworn as a witness in behalf of the defendant. He had, however, paid certain expenses of administration and bills for England's children, and held in his own right, and by assignment of other creditors, certain claims against his intestate's estate, the whole amounting to \$258. He now, in 1863, abandoned the administration, or, rather, he made an arrangement with Sorrels to take charge of the estate; and, as he was a debtor to Sorrels, he gave him in payment these claims, which had not yet been passed on by the probate court, but which were authenticated by Harris' affidavit as to their justice and non-payment. Sorrels, after he succeeded to the administration, indorsed his allowance upon the claims; and they were, without other evidence, allowed in a lump by the probate court. It is for the principal and interest of these claims that Sorrels claimed and received credit for \$500. Now, to the extent that Harris was indebted to the estate, the allowance and payment of these claims, without deduction, operated as a constructive fraud upon the rights of those interested in the estate. Sorrels, as the surety of Harris and his successor in the administration, was chargeable with a knowledge of the facts, because an inspection of the probate records relating to this estate would have disclosed them. Nor could Harris transfer to him a greater interest than he himself had, which was to have the claims paid, less his own indebtedness to the estate. And it was the duty of Sorrels to protect the estate by enforcing the right of set-off against himself as assignee of the claims. He is only entitled to retain the excess of the claims over Harris' indebtedness to the trust.

The remaining item of credit in dispute (taxes, \$7.50) was rejected by the circuit court because it was paid without an order of court, and was not accompanied by a voucher. This is no sufficient evidence of fraudulent conduct upon which to falsify an administrator's account. The estate owned 200 acres of land, the taxes upon which it was necessary to keep down. The probate court was satisfied they had been paid.

As the assets of this estate have all been converted into money, and all debts have been paid, and there is no necessity for further proceedings in the administration, nothing remaining to be done except to fix the liability of the administrator, and the rights of the representative of the distributee, a court of chancery will retain the cause for final adjustment, instead of certifying

its conclusions and corrections down to the probate court. *Reinhardt v. Gartrell*, 33 Ark. 727.

The decree of the Drew circuit court is reversed, and a decree will be entered here against the defendant for the balance due the estate upon his account as restated upon the basis indicated.

STATE v. CLUM.

(*Supreme Court of Missouri. January 31, 1887.*)

1. HOMICIDE—EVIDENCE—THREATS OF DECEASED.

On a trial for murder, evidence of threats made by deceased, and known to defendant, are not admissible in behalf of the latter, when he does not claim to have committed the homicide in self-defense.

2. SAME—CAUSE FOR HOSTILITY AGAINST DECEASED.

On a trial for murder, *held*, that evidence was inadmissible for defendant that the deceased had in her possession articles formerly belonging to the defendant's deceased wife, or that the death of the latter was caused by medicine administered by deceased.

Appeal from circuit court, Barry county.

Indictment for murder. The evidence for the prosecution showed that in July, 1886, Edward F. Clum, the defendant, was staying at the house of one J. J. White, a farmer, who resided on Capps' creek, in Barry county, five or six miles south of Pierce City. The persons residing at White's house were White, Clum, the appellant, a Mrs. Vassar, the housekeeper, and her 14-year old boy, and a young girl about 17 years of age named Ella Bowe. In addition to these, a negro named Willis De Honey and his wife lived in a house on the farm, Willis being employed as a farm hand by White. On the day of the killing, the negro, Willis De Honey, and the boy, Bud Vassar, were at work in the field. Late in the afternoon, White and the girl, Ella Bowe, came out to the field, and, after White addressed some remarks to the boy, they (White and the girl) went out to one side of the field, and sat down under a tree. While they sat there, the defendant came out to the field with a double-barrelled shotgun, and shot them both dead. He then covered their bodies with straw, which he and the negro had previously loaded onto a wagon, and in the evening he went with the negro, whom he compelled to go along with him by threats, and removed the bodies to a ditch, where he covered them with dirt. He warned the boy and the negro not to tell what had happened, threatening them in case they should do so, and told the housekeeper the next morning that he had driven White and the girl to the train, and they had gone off to get married. Defendant kept the negro under his surveillance for several days, but finally the latter escaped to Pierce City, and reported the case to the police. The bodies were found buried in the ditch. Defendant was convicted of murder in the first degree, and appealed.

The Attorney General, for respondent. *S. R. Bridges*, for appellant.

SHERWOOD, J. The defendant was indicted for the murder of Ella Bowe by shooting her with a shotgun. The evidence adduced at the trial, a *resume* of which will accompany this opinion, shows in the clearest possible light a most atrocious and brutal murder of two persons at the same time, without a single palliating circumstance attendant on the commission of the crime; and the trial resulted in a verdict of murder in the first degree, and sentence accordingly. The indictment is in the usual form. The instructions are such as have frequently received the approval of this court, and no objection was urged against them in the motion for a new trial. The only points in that motion were two: (1) That illegal testimony was admitted on the part of the state; (2) that competent and legal testimony offered by the defendant was excluded.

It will be seen by an inspection of the testimony offered by the prosecution that it was in every respect competent, and pertinent to the charge contained in the indictment; and, besides, there were no exceptions saved to the introduction of such testimony.

In relation to the second ground for new trial, testimony of threats alleged to have been made by Ella Bowe and by J. J. White to the effect that they would make away with or secretly take the life of the defendant, was very properly excluded. Threats alone, unaccompanied by any overt act or outward demonstration, will not justify any one in hostile acts towards those making the threats. The danger must be immediate. 1 Bish. Crim. Law, § 843; 1 Bish. Crim. Proc. § 619. And if a person thus threatened, with no excuse in the way of self-defense, because of outward demonstration being made against him, kills the threatener, the slayer will not be allowed to lay before the jury, before whom he is tried for the homicide, the known threats on which he bases his unlawful action. 1 Bish. Crim. Proc. § 620; *State v. Alexander*, 66 Mo. 148; *State v. Taylor*, 64 Mo. 358. If evidence of mere threats would not be admissible where self-defense is attempted to be established, then, *a fortiori*, such evidence should be rejected where the homicide is the result of covert assassination, as in the present instance. And the like line of remark applies to evidence offered on behalf of the defendant to the effect that Ella Bowe had in her possession articles which had formerly belonged to Mrs. White or Mrs. Clum, deceased, said to have been the wife of the defendant. Equally impertinent and inadmissible, also, was testimony which was offered on behalf of the defendant that the death of Clum's wife was occasioned by medicine administered by Ella Bowe and J. J. White. In short, none of the testimony on behalf of the defendant had the slightest tendency to exculpate the defendant, or to abate by one jot or one tittle the enormity of his guilt.

The conclusion that we have reached, from an examination of the evidence and the instructions, is, that the defendant has been fairly tried, and that the law must take its course.

(All concur.)

MAYFIELD v. ST. LOUIS & S. F. R. Co.

(*Supreme Court of Missouri. February 14, 1887.*)

1. RAILROAD COMPANIES—FENCES—INJURY TO ANIMALS—PLEADING—REV. ST. MO. § 809.

In a suit for damages against a railroad company under section 809, Rev. St. Mo. 1879, for killing a heifer, when the complaint states facts which show that the animal got upon the track of defendant at a point where the defendant is required to fence its road, it is sufficient, and it is not necessary to state that the animal did not get upon the track at a crossing of a highway.¹

2. SAME—CIRCUMSTANCES SHOWING PLACE WHERE INJURY TOOK PLACE.

Direct evidence that the animal passed through a gap in a fence which the defendant was required to maintain is not required. Where it appeared that the fence had been down for a month or more at a place where the railroad passed along cultivated fields, that defendant had notice of the condition of the fence, and that plaintiff's cattle grazed at that place, *held*, that these circumstances were sufficient from which to deduce the conclusion that the animal got upon the track at a place where the defendant was required to fence, and that the animal got upon the track because of the failure to repair the fence after ample notice.

3. SAME—CIRCUMSTANTIAL EVIDENCE.

When it appeared that plaintiff's cattle were seen upon the defendant's railroad track in the forenoon, and in the afternoon of the same day blood was seen on the track, with the trace of it leading to a gap in the fence, and the heifer was found dead not more than a quarter of a mile off, with a leg broken, *held*, that there was evidence from which to find the fact that the heifer was injured by the defendant's cars, and that she died from the effects of that injury.

¹ See note at end of case.

Appeal from circuit court, Laclede county.

J. P. Nixon, for respondent. *John O'Day*, for appellant.

BLACK, J. This was a suit for damages under section 809, Rev. St. 1879, for killing a heifer. The suit was commenced in a justice's court, and on appeal to the circuit court was tried by the court without a jury.

It is first insisted that the court erred in overruling the objection to the introduction of any evidence. This objection was made on the ground that the complaint failed to state that the heifer did not get on the track, and was not killed, at the crossing of a highway. The complaint does state that, at the place where said cow came upon the railroad and was killed, the road passed through and along inclosed and cultivated fields and inclosed lands. From this allegation it follows that the company was bound to fence its road at the point where the heifer got upon the track and was killed. The allegation negatives the notion that the animal got upon the road at the crossing of a highway, where the company is, of course, not required to fence. When the complaint states facts which show that the animal got upon the track at a point where the company is required to fence its road, that is sufficient. Having clearly stated this, it is not necessary to state that the animal did not get upon the track at the crossing of a highway. *Williams v. Railroad Co.*, 80 Mo. 599; *Wade v. Railroad Co.*, 78 Mo. 365.

In the next place, it is insisted that there is a total failure of proof to show the following facts: (1) That the animal got upon the track at a place where the defendant was required to fence the road; (2) that it was killed by colliding with the engine or cars; (3) that the animal was killed by reason of the failure of defendant to maintain fences. No one saw the animal when injured, and the evidence is entirely circumstantial. It was found dead, with one leg broken, a quarter of a mile from the track, and about a mile and a half from the plaintiff's house. Plaintiff testified as follows: "The fence was burned down, where my cattle and stock generally run, in several places, about the first of March, 1883. I notified West, the section boss, and then came and notified Mr. Abbott that the fence of the company was down in the fields adjacent to the railroad track where my stock ran all around, where the gap was, and if they did not fix the fence the cars would kill my stock." Says he found the heifer on the first Tuesday in April, 1883, and that she had then been dead three or four days. Another witness states that, at the time the cow was reported to have been killed, he passed along the railroad at the place in question, and saw several cattle on the right of way, some of them belonging to the plaintiff; that there was no fence at the place where he saw the cattle; that there had been a fence at that place, but it had been burnt down in several places; that this was in the forenoon; and, when he came back along the same place in the afternoon, he saw what he took to be blood on the track, and that he noticed it continued up to the ashes where the fence had been burnt, and where there was a gap in the fence. Direct evidence that the heifer passed through the gap in the fence is not required, (*Gee v. Railroad Co.*, 80 Mo. 283,) nor is it necessary that the collision of the cars with the animal should be shown by any eye-witness. These things may be shown by the circumstances, as well as by direct evidence. There was evidence that the fence had been down for a month or more, and of this defendant's agent had notice. It appears, too, that the gaps were at a place where the road passed along cultivated fields, and, whether inclosed or not, it was the duty of the defendant to fence its road at that place. The cattle grazed at that place, and nothing could be more natural than that they should pass through the gaps, and thence on the road. These circumstances were sufficient from which to deduce the conclusion that the animal got upon the track; and that, too, at a place where the company was required to fence the road, and that she got upon the track because of the failure to repair, after ample notice. The evi-

dence that the animal was injured by the cars is less satisfactory; but when it is remembered that plaintiff's animals were seen upon the track in the forenoon, and in the afternoon of the same day blood was seen, with the trace of it leading to the gap, and the heifer was found dead not more than a quarter of a mile off, with a leg broken, we cannot say there was no evidence from which to find the fact that she was injured from the cars, and died from the effects of that injury.

The conclusion reached by the court is not a rash one. Judgment affirmed.

BRACE, J., absent. The other judges concur.

NOTE.

RAILROAD COMPANIES—FENCES—BURDEN OF PROOF. In an action against a railroad company for damages for killing stock, the burden is on the plaintiff to prove that the animals entered the track at a point where the road was required to be fenced, Louisville, N. A. & C. Ry. Co. v. Goodbar, (Ind.) 3 N. E. Rep. 162, 2 N. E. Rep. 337; Wabash, St. L. & P. R. Co. v. Lash, (Ind.) 2 N. E. Rep. 250; Bremmer v. Green Bay, S. P. & N. R. Co., (Wis.) 20 N. W. Rep. 687; Foster v. St. Louis, I. M. & S. R. Co., (Mo.) 2 S. W. Rep. 138; and where it was not securely fenced, Louisville, E. & St. L. Ry. Co. v. Thomas, (Ind.) 5 N. E. Rep. 198. But it has been held, in the absence of proof to the contrary, the jury may presume that the injury was not inflicted within the depot grounds of a railroad company, where it was not required to fence, when it is shown that such injury occurred one and one-fourth miles from a certain station. Smith v. Chicago, M. & St. P. Ry. Co., (Iowa,) 15 N. W. Rep. 303.

In *Missouri* it is held to be unnecessary to aver in the complaint that the animal entered the road at a point where the same was, by statute, required to be fenced; but it is sufficient if it be alleged that the defendant might have fenced the road at that point. Radcliffe v. St. Louis, I. M. & S. Ry. Co., 2 S. W. Rep. 277.

The petition alleged, among other things, that the mules injured came upon defendant's track where it passes through uninclosed lands, and where there was no crossing by a public highway. Held sufficient to show that the animals got on the track at a point where the defendant was by law required to erect and maintain fences, and that the killing was not within the limits of an incorporated town. Kline v. Vogel, (Mo.) 2 S. W. Rep. 408.

MITTLEBURG v. HARRISON.

(*Supreme Court of Missouri.* February 4, 1887.)

1. FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS—VOLUNTARY CONVEYANCE.

Actual fraud must be shown in order to set aside a prior voluntary conveyance at the suit of a subsequent creditor.¹

2. SAME—INCUMBERED PROPERTY—EVIDENCE.

A voluntary conveyance by an insolvent of property already incumbered for twice its value, made in fulfillment of an agreement made by the grantor's father, and apparently in order to enable the grantee to perfect his title to a larger tract of which that conveyed was a part, held not shown to be fraudulent, as to a subsequent creditor of the grantor, by the testimony of a witness that the grantor said that by making the conveyance he would save something to himself.

Error to St. Louis court of appeals.

The following opinion was delivered in the court below by BAKEWELL, J.:

"This is a proceeding in equity, in the nature of a creditors' bill, to set aside a conveyance of real estate by one George A. Magwire to defendant, Harrison, and to subject the property to sale for the satisfaction of the plaintiff's judgment against Magwire. The answer is a general denial. It also sets up that defendant is the sole owner, at law and in equity, of the land in question. The land in question is a parcel fronting 261 feet on the east line of Second street, at the corner of Webster street, in St. Louis, and is the western half of city block No. 292. It appears that it lies in the Brazeau tract of four by four arpents. To this tract John Magwire, the father of George A. Magwire, laid claim, and after litigation he was put in possession. During the litiga-

¹See note at end of case.

tion, John Magwire, the father, had obtained advances of large sums upon his claim from defendant's father, from Filley, and from defendant himself, under an agreement that they were to be reimbursed from the land when recovered. Magwire, during the litigation, had conveyed interests in the tract to sundry persons, retaining, as was supposed, an interest of over 50 per cent. After recovery by John Magwire, in 1873, partition was had; and by agreement defendant, Harrison, purchased at partition sale, under an agreement to sell, and divide the proceeds among the owners according to their respective interests as found by the decree in partition. After this conveyance to Harrison, it was first learned by Harrison that John Magwire had already conveyed away his interest in the tract in controversy in this suit. After the legal title had been conveyed to Harrison in the four by four tract, in the partition proceedings, on June 27, 1875, John Magwire made a declaration of use in favor of Harrison to the extent of his indebtedness to him, and to his father's estate, which was about \$150,000; and on April 4, 1876, Magwire conveyed to Harrison and Filley his entire interest in the land for \$235,000, being at the rate of \$400,000 for the entire tract. This was in part payment of his indebtedness to Filley, to Harrison, and to the Harrison estate.

"The tract in controversy in this suit had been conveyed by John Magwire to Montgomery Blair in December, 1866; the consideration named in the deed being \$1,000. On May 10, 1869, Blair and wife conveyed this piece of land to George A. Magwire, the consideration named in the deed being \$6,525. George A. Magwire, on the same day, executed a deed of trust back for part of the purchase money; the sum of the notes secured being \$4,525. On July 23, 1874, George A. Magwire executed a deed of trust on the property in question in this suit to secure to one Beal \$5,000. In 1874 and 1875, judgments to the amount of over \$1,500 were obtained against George A. Magwire. On July 2, 1875, George A. Magwire, being then insolvent, covered with debts, and having no other property, made the conveyance attacked in this proceeding, by which he transferred this property to defendant, Harrison. The consideration named in the deed is \$100, but no money passed. Shortly after this, George A. Magwire became indebted to plaintiff in the sum of \$1,100. George A. Magwire died in 1878, insolvent, leaving no estate. Plaintiff obtained judgment against Magwire in February, 1878. Execution was returned *nulla bona*. There was evidence that large amounts of taxes, general and special, had been allowed to accumulate against the Brazeau tract, and that Harrison had been obliged to pay over \$22,000 to settle these tax claims in the interest of those for whom he held the Brazeau tract. After the death of Magwire, under foreclosure of the deed of trust of Magwire to Montgomery Blair, which Harrison had acquired, he purchased 120 feet of the premises described in the petition, leaving 141 feet unsold.

"Defendant, Harrison, being examined as a witness for plaintiff, stated that this deed was made to him without any understanding whatever with either George or John Magwire that he was to hold it in trust for either of them; that nothing was said about it between him and George Magwire; that the conveyance was made under the general understanding with John Magwire to convey all his fractional interest in the Brazeau tract, and to perfect the title in Harrison for those for whom Harrison held it under the agreement mentioned above; that the conveyance was to clear up title; that no consideration was paid, or agreed to be paid, to any one; that the consideration for the deed was the indebtedness of Magwire, the father, in part payment of which he was to convey his fractional interest in the Brazeau tract; that Harrison knew George was insolvent, and knew the land conveyed by him was incumbered; that the property in question was worth about \$5,000, and was incumbered for more than its value, and that he (Harrison) assumed the deeds of trust upon it, and paid seven or eight thousand dollars for back taxes on the larger tract. As to amounts, the witness said that he could not

be exact; his business in regard to the property being managed for him by Mr. Miller, his secretary.

"Mr. Miller stated that the transaction with regard to the transfer of this property was with him; that he believed Harrison never spoke a word to George Magwire or his father about it; that, it being known that this equity of redemption was outstanding, John Magwire, shortly after the partition deed to Harrison, said that George would convey to Harrison, and the deed was accordingly made; and that the deed was taken for the sole purpose of perfecting the title; that it was only discovered, after the partition, that John Magwire had parted with title to his interest in the western half of block 292. The total back taxes paid by Harrison on the Brazeau tract amounted to \$22,000, and the tract in question was about one-twentieth of the tract, and was about of an average value with the rest of the tract. Harrison paid \$3,900 on the Beal deed of trust, and bought in part of the land for \$3,850 under the Blair deed of trust.

"The only witness who testifies as to any actual fraudulent intent is Beal. He swears that George A. Magwire, at the time he executed the conveyance, told him that the judgments against him would sweep away everything, and that, by making this conveyance to Harrison, he would save something to himself. Magwire being dead, this statement cannot be contradicted. It is not corroborated. The trial court on hearing dismissed the bill.

"The question whether a conveyance made without any valuable consideration moving from the donee to the donor is fraudulent must be determined by all the circumstances, and actual fraud must be proved in order to set aside a prior voluntary conveyance at the suit of a subsequent creditor. *Payne v. Stanton*, 59 Mo. 159; *Boyle v. Boyle*, 6 Mo. App. 594. In this case we see no satisfactory evidence of actual fraud. The evidence tends to show that George A. Magwire, owning an equity of redemption which could be of no money value to him, or to any outsider, at the request of his father, and to aid his father in carrying out an agreement he had made, conveyed this equity to the person to whom his father had conveyed the tract of which it was a part, to enable his father's grantee to perfect his title, and to make good, to some small extent, what appears to have been a breach of good faith on his father's part. The donee had no fraudulent intent, and the donor seems to have acted without any intention of defrauding any one. It cannot be believed on the evidence that George A. Magwire, or any one else, could have supposed that anything could ever be realized to him out of an equity of redemption in property incumbered for more than twice its value.

"It is contended by counsel for appellant that the judgment creditor has a right to subject the property of his debtor to sale; that it lies in no one's mouth to say that that property is worthless; that the creditor may have some special use for it, and may be willing to bid it in at execution sale, and has a right to his opportunity of doing so. However true this may be, we do not regard the principle as decisive of this case. Plaintiff was not a creditor of Magwire at the time this conveyance was made. If it was not fraudulent in fact, it was not void as to him. The conveyance was, at the most, a constructive fraud, and, in the absence of proof of actual fraud, ought not to be disturbed at the suit of one to whom the donor was not indebted at the time it was made, and as to whom it is clear that it was made with no idea of defrauding him; and that, whether it had been made or not, the property was so covered with prior liens that, under no circumstances, could plaintiff ever have realized anything upon it, even had it remained in the name of Magwire to the date of his death.

" 'Fraud as to a voluntary conveyance,' says Chancellor KENT in *Reade v. Livingston*, 3 Johns. Ch. 501, 'is an inference of law as to existing debts; but as to subsequent debts there is no such necessary legal presumption, and there must be proof of fraud in fact.' The courts have always construed 13 Eliz.,

from which our statute is taken, so as to make void any conveyance not made for value, as against previous creditors; but, as to subsequent creditors, such conveyances have been constantly held good, where there was no particular badge of fraud to deceive subsequent creditors. *Sexton v. Wheaton*, 8 Wheat. 229.

"In the case at bar, there was no bad faith. The debt to plaintiff could not have been in contemplation of George Magwire when he made the deed attacked. The donor was hopelessly insolvent, and he knew it; but he did not, because he could not, regard this equity of redemption as being of any value, present or prospective, to himself or his creditors. He could have had no view of raising a trust in Harrison in his own behalf, or of taking from his creditors anything whatever. Nor did he, by this deed, deprive them of anything having a money value; nor did the purchaser consider that he was acquiring by the deed any beneficial interest in the property in dispute. Courts take a practical view of all matters. We are not to be understood as intimating that, even had plaintiff been a creditor of Magwire at the date of the conveyance, a court of equity, under the evidence in this case, would have been bound to sustain this bill for the purpose of placing in the hands of plaintiff a barren power of bidding in this equity of redemption, to the annoyance of defendant, and without any reasonable probability of pecuniary benefit to plaintiff.

"We are clearly of the opinion that the action of the trial court in dismissing the bill was correct. The judgment is affirmed. All the judges concur."

T. H. Culver, for plaintiff in error. *Cline, Jamison & Day*, for defendant in error.

NORTON, C. J. This cause is before us on a writ of error prosecuted by plaintiff from the judgment of the St. Louis court of appeals affirming the judgment of the circuit court of the city of St. Louis dismissing his bill. We are satisfied, after an investigation of all the matters in the record before us, that plaintiff, who became a creditor of George A. Maguire subsequently to the execution by said George to defendant, Harrison, of the deed which he assails in this suit on the ground that it was made in fraud of creditors, has failed in his proof to show fraud in the transaction. The opinion of the court of appeals is reported in 11 Mo. App. 136, where the facts, and the law applicable to them, are fully stated; and, without reiterating them here, we affirm the judgment.

NOTE.

FRAUDULENT CONVEYANCES — SUBSEQUENT CREDITOR. A subsequent creditor has no right to complain of a prior conveyance as fraudulent, *Johnson v. Skaggs*, (Ky.) 2 S. W. Rep. 493; without proving an intent to defraud subsequent creditors, *Barrows v. Barrows*, (Ind.) 9 N. E. Rep. 371; *Emery v. Yount*, (Colo.) 1 Pac. Rep. 696. But a creditor who had contracted to deliver goods to the grantor may attack the conveyance, although he did not actually deliver the goods until after it was made. *Crawford v. Beard*, (Or.) 8 Pac. Rep. 537.

Where the means of creditors have been used to pay off prior indebtedness, they will be subrogated to the rights of the prior creditors, for the purpose of avoiding a fraudulent conveyance. *Barhydt v. Perry*, (Iowa,) 10 N. W. Rep. 820.

See, also, *Brown v. Vandermulen*, (Mich.) 7 N. W. Rep. 238.

In *New Jersey* a bill showing that a defendant had title to lands when he incurred the liability in question, and afterwards conveyed them away fraudulently, is held to show equity. *Cubberly v. Yager*, 2 Atl. Rep. 814. If the conveyance, alleged to be fraudulent, was made in trust for the debtor, it makes no difference whether the debt was contracted before or after the making of the conveyance. *Newman v. Van Dyne*, (N. J.) 7 Atl. Rep. 897.

MASON v. BANK OF COMMERCE.

(*Supreme Court of Missouri*. February 14, 1887.)

TRUSTEES—POWER OF TRUSTEES TO SELL NOTE—RIGHTS OF PURCHASER.

Under a trust created for the benefit of life-tenants and a remainder-man, with directions to allow the former not only to have the rents, issues, and profits, but

to enjoy the property itself, the trustee has an implied power to sell transient securities in order to make permanent investments; and therefore, where a bank in good faith discounted a note, having less than a year to run, for such a trustee, upon his statement that he wished to accommodate the beneficiaries by making a loan to them, *held*, that the bank was protected, although the trustee misappropriated the proceeds of the note.

Appeal from St. Louis court of appeals.

In the court below the following opinion (referred to in the opinion in this court) was delivered by THOMPSON, J.:

"Wherry was trustee under Julia G. Cabanne's will. The nature of the trust was expressed in the following language: '*First*, to permit my said son Julius to use and enjoy the said property, and take the rents, issues, and profits thereof as long as he shall live; and, *second*, if he die, and his wife, Ann Stella, survives him, to permit the said Ann Stella to use and enjoy the said property, and to take the rents, issues, and profits thereof as long as she shall live and remain the widow of the said Julius; and, *third*, after the death of the said Julius, and the death or marriage of the said Ann Stella, to hold the same in trust for such child or children as may be then living, and the survivor or survivors of them, until the youngest of such children shall be twenty-one years of age, or be married, and shall then convey the absolute title to such child or children. And if, after the death of the said Julius, and the death or marriage of said Ann Stella, there be no child of said Julius, or if his children all die before becoming twenty-one years old or being married, then my will is, and I devise and bequeath accordingly, that the share hereby set apart for the said Julius pass to and be vested in my own right heirs, in the same manner and proportions as if it descended from me by direct inheritance.'

"As such trustee Wherry held an unmatured negotiable promissory note, made payable to certain persons, and by them indorsed in blank. He went to the president of the Bank of Commerce, and asked to have the note discounted, saying: 'This note I hold as trustee, and desire to accommodate the beneficiaries under the trust by making a loan, and I want to negotiate the note.' The president of the bank, having made some inquiries to satisfy himself as to the goodness of the parties to the note, discounted it for him. The proceeds were paid to him by means of a cashier's check, which was made payable to him as trustee, and which he presented to the paying teller, who handed to him the money. The note was paid to the bank at its maturity. The money which the bank paid to Wherry for the note was misappropriated by him, and lost in the general wreck of his business. He subsequently resigned his trust. The plaintiff was appointed trustee in his stead, and has brought this action against the Bank of Commerce to recover the money which it received from the parties to the note in payment of it at its maturity. Upon evidence substantially as above stated, the circuit court gave an instruction to the effect that the plaintiff could not recover.

"The action necessarily proceeds upon the idea that the Bank of Commerce received a portion of the trust funds which were in the hands of Wherry under such circumstances that the law will allow it to be recovered for the benefit of those interested therein. If this is so, it is plain from the above statement that it must be in consequence of some rule of law under which parties who deal with trustees proceed at every step at their peril, and under which parties who have dealt with trustees in entire good faith are liable to suffer the plainest injustice. We hold the following propositions to be well settled:

"(1) That the holder of an unmatured negotiable promissory note, indorsed in blank, is *prima facie* the owner thereof, with full power to dispose of the same, and that whoever purchases it from him for value gets a good title thereto, in the absence of knowledge of circumstances affecting the title of

such holder, provided such purchaser act in good faith. It is not sufficient to destroy his title that there were circumstances sufficient to put a prudent man upon inquiry, or that he may have been negligent in failing to avail himself of his means of knowledge. The test of his liability is not negligence or diligence, but it is good faith or bad faith, although the fact of negligence may, under circumstances, be evidence tending to show bad faith. *Goodman v. Harvey*, 4 Adol. & E. 870; *Swift v. Tyson*, 16 Pet. 1; *Goodman v. Simonds*, 20 How. 348; *Hamilton v. Marks*, 63 Mo. 178; *Edwards v. Thomas*, 66 Mo. 483.

"(2) But where the person to whom such note is offered for sale or discount has distinct notice, at the time, that the holder does not own it in his own right, but as trustee, he is bound at his peril to inquire whether the instrument creating the trust has conferred power upon the holder so to dispose of it. In the case of executors, administrators, and guardians, the trust is so far governed by law that such trustees have, *prima facie*, the power to sell personal property belonging to the trust-estate. A person may therefore purchase such property of such trustees under the assurance that the law will protect him in his title, provided he act in good faith. *Field v. Schieffelin*, 7 Johns. Ch. 160; *Fountain v. Anderson*, 33 Ga. 372; *Goodwin v. American Nat. Bank*, 48 Conn. 564; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 235; *Lowry v. Commercial, etc., Bank*, Taney, 333. But the powers of a trustee under a will are such as are conferred upon him by the will, and none other. He has not, *prima facie*, the power to sell personal property, or to vary securities belonging to the trust-estate. Whether or not he have such power is a question, the answer to which must be sought for in the terms of the will; and whoever purchases of him ordinary personal property belonging to the trust-estate, or negotiable paper, with knowledge that he holds it as trustee, must make this inquiry at his peril. *Loring v. Salisbury Mills*, 125 Mass. 138; *Magwood v. Railroad Bank*, 5 S. C. 379; *Bayard v. Farmers', etc., Bank*, 52 Pa. St. 237; *Third Nat. Bank v. Lange*, 51 Md. 138.

"(3) But if he make this inquiry, and find that such a power exists in the trustee, or if, having notice of the trust, he assumes the risk of its existence without inquiry, and thereupon purchases the property in good faith, he will get a good title if the power in fact does exist. He is not bound to see to the application which the trustee may make of the purchase money. *Goodwin v. American Nat. Bank*, 48 Conn. 564; *Shaw v. Spencer*, 100 Mass. 391; *Ash-ton v. Atlantic Bank*, 3 Allen, 217; *Fountain v. Anderson*, 33 Ga. 337. The last proposition is declared by statute in this state. Rev. St. § 3937.

"(4) Where, by the terms of the instrument creating a trust, the trustee is to pay the income of the trust property to a life-tenant, and hold the capital for a remainder-man, he has an implied power to sell perishable property, and to convert into money transient securities, for the purpose of making permanent investments. *Howe v. Earl of Dartmouth*, 7 Ves. 137, 151; *Litchfield v. Baker*, 2 Beav. 481; *Pickering v. Pickering*, 4 Mylne & C. 298; *Benn v. Dixon*, 10 Sim. 638; *Cairns v. Chaubert*, 9 Paige, 163; *Healey v. Toppam*, 45 N. H. 243.

"Applying these principles to the case in judgment, we have no doubt that, by the terms of Julia G. Cabanne's will, Wherry had impliedly the power to convert the note in question into money for the purposes of the trust. The trust was, indeed, larger in its terms than the trusts in the case in which the English courts of chancery, and the American courts following them, have implied such power; for here the trustee was not merely to permit Julius Cabanne and his wife to have the rents, issues, and profits of the trust property, but he was to permit them to enjoy the property itself. A promissory note having less than a year to run is manifestly a transient security, such as a trustee, under the rule above stated, ought to convert into money for the purpose of a permanent investment. Trustees, in the course of business, are

liable to receive negotiable promissory notes from the lessees of real property, and from other persons having dealings with the trust-estate. Such notes may, *prima facie*, as well form a part of the income as a part of the capital of the estate; and the trustee may, in the proper discharge of his trust, under the terms of such an instrument as the will here in question, have occasion to convert such transient securities into money, in order that it may be handed over to the beneficiaries in the trust.

"Since, then, Wherry had the power to convert the note in question into money, the only remaining inquiry can be whether, in purchasing it from him by way of discount, the Bank of Commerce acted in good faith. Upon this point there is not a particle of doubt. There were no circumstances developed by the evidence which would authorize the court to put such a question to the jury. There was nothing in the statement of Wherry to the president of the bank that he wanted to use the money 'to accommodate the beneficiaries under the trust by making a loan,' which would raise a suspicion that a breach of trust was intended. It might well be an accommodation to the beneficiaries in the trust to convert the note into money, and lend it to them upon such security as a trustee is authorized to take. Certainly, there is nothing in this statement that would convey an intimation, or even a suspicion, to a prudent business man that the trustee intended to convert to his own use the money so received. The statement was made by Wherry for the very purpose of warding off such a suspicion, because no bank would, for the sake of getting the discount usually reserved upon commercial paper, run any risk of its title in case of a note as large as this was; it being for the sum of \$2,666.66. We are therefore clearly of opinion that the circuit court was right in giving the instruction that the plaintiff could not recover.

"In reaching this conclusion, we have not overlooked the cases cited to us by the learned counsel for the plaintiff.

"In *Renshaw v. Wills*, 38 Mo. 201, a note secured by a deed of trust had been given in payment of purchase money at a partition sale. The note expressed on its face that it was given to him as sheriff. The sheriff sold it before maturity. The court held that the purchaser did not get a good title. He had notice, from the terms of the note itself, of the fiduciary character in which the sheriff held it. The reasoning of the court is not very clear; but the decision may be supported upon the ground that a sheriff has presumptively no power to sell a note thus held by him, and that good faith requires that a person to whom such a note is offered by a sheriff for sale should satisfy himself concerning the power of the latter to sell it. If, however, this decision goes against the conclusion at which we have arrived in this case, it is sufficient for us to say that, in so far as it places the liability of the purchaser of a negotiable note upon the duty of making inquiry, it is overruled by the subsequent cases of *Hamilton v. Marks*, 63 Mo. 178, and *Edwards v. Thomas*, 66 Mo. 483.

"The case of *Third Nat. Bank v. Lange*, 51 Md. 138, proceeded upon the ground that the bank purchasing the note had knowledge, from the terms of the note, that the holder was a trustee; that it was hence bound to make inquiry as to his power to sell the same. Having failed to do this, and it having turned out that he was disposing of it in fraud of his trust, it was held that the bank did not get a good title. We do not understand from the decision of the court whether the trustee had or had not in fact the power to sell the note. Assuming that he had such power, if the Maryland court intended to hold further that the purchaser was bound to inquire into the purposes for which he was offering the note for sale, and to satisfy himself that those purposes were lawful, and within the terms of the trust, we feel bound to say that, while we have great respect for the court pronouncing the decision, it is contrary to the rule of the two cases above cited from our supreme court, and it does not meet with our approval. Our decisions proceed upon

the ground that public policy requires that those who purchase, before maturity, negotiable securities, which enter so largely into the movements of commerce, should not lose their title because they have not suspected fraud or instituted inquiries where all seemed fair, honest, and conformable to business usage.

"The judgment of the circuit court is affirmed.

"(All the judges concur.)"

Krum & Jonas, for appellant. *Jas. Taussig*, for respondent.

RAY, J. This case is before us on appeal taken by plaintiff from the judgment of the St. Louis court of appeals, affirming the judgment rendered in defendant's favor by the circuit court of the city of St. Louis. The opinion of the court of appeals appears in 16 Mo. App. 275. The case is not presented in this court in any new and controlling aspect, and, inasmuch as a discussion by us of the questions involved would lead to the same conclusion reached by that court, which we think is correct, we see no good reason to add anything to what is there said. Judgment affirmed.

(All concur, except **BRACE, J.**, absent.)

DOUGHERTY and others v. BROWN and others.

(*Supreme Court of Missouri*. February 14, 1887.)

1. PUBLIC ROAD—PETITION—REV. ST. MO. § 6936.

Under section 6936, Rev. St. Mo., a petition to establish a public road is not required to be signed.

2. SAME—APPEAL—PROCEEDINGS—JURISDICTION.

Where, upon a petition to establish a public road, the county court entered an order, reciting the presentation of the petition, and that it had been proved to the satisfaction of the court that due legal notice had been given of the intended application, etc., *held*, on appeal, these facts sufficiently appearing in the record, that the county court had jurisdiction to establish and open the road.

3. SAME—DAMAGES—RULE IN *NEWBY V. PLATTE CO.*, 25 MO. 258, ADHERED TO—CONST. MO. 1875.

The rule established in Missouri by the case of *Newby v. Platte Co.*, 25 Mo. 258, and uniformly adhered to since, that damages for property taken for a public use may be compensated for or paid in benefits peculiar to that which is not taken, but not in such benefits as are common to the public at large, has neither been nullified nor impaired by the constitution of 1875.

Appeal from circuit court, Audrain county.

Forrist & Fry, for appellant.

NORTON, C. J. 1. This is a proceeding by injunction to restrain and enjoin the defendant Brown, as road overseer, and the judges of the county court of Audrain county, from opening a road over the land of plaintiff. The grounds alleged for the relief asked are that the road was never legally established; that no notice of filing a petition to establish the road had been given; that the county court acquired no jurisdiction to establish the road; that the right of way had never been legally acquired over the land; and that no compensation had been received by plaintiff for the right of way.

It is insisted that the notice is insufficient, not because it was not put up in three public places in the township 20 days before the first day of the regular term of the county court, but because it does not appear to have been signed by any person. While, by section 6935, Rev. St., it is made necessary that the petition, when presented, should not only be signed, but that it should be signed only by a certain designated class of persons, no such requirement is made by section 6936 as to notice of the presentation of such petition, and in the absence thereof we cannot assume to make a requirement which the legislature omitted. To sustain defendants' contention, we have been cited

to certain cases, of which the case of *Schulenburg v. Bascom*, 38 Mo. 189, is a type, in which it is held that under the mechanic's lien law the notice required to be given by a subcontractor must be in writing, and signed by him. There the duty of giving the notice is imposed upon a particular person or class of persons, and in such cases stand upon entirely different grounds from the one under consideration. The notice in the present instance contained in it everything which the statute requires, and seems to have been effectual to bring into court Mrs. Walker, plaintiff's grantor, for the purpose of objecting to the notice on the ground that it was not signed.

2. The jurisdiction of the county court to establish and open a new road is predicated upon the fact that a notice has been given as required by section 6936, and the presentation of a petition in conformity with said notice, as provided by section 6935; and, unless these things appear on the face of the proceedings of the court, its judgment is *coram non judice*. In this case these jurisdictional facts sufficiently appear in the record and proceedings had; it being recited in the order of the court as follows: "And it appearing on the face of the petition that the signers thereto were twelve householders in Cuive township, and that three of them lived immediately on the line of the road sought to be established," etc. On this notice and petition the county court, after reciting in the order the presentation of the petition, and that it had been proved to the satisfaction of the court that due legal notice had been given of the intended application, then ordered the commissioner to view and mark out the road petitioned for. The record further shows that the commissioner made his report, which was approved, and upon such approval that three disinterested householders were appointed to act and assess damages; that they made a report to the effect that no persons are entitled to damages, upon which the court made the following order: "And now the court, having fully considered the foregoing report, find the said road a public utility; wherefore it is by the court ordered that the road be, and the same is hereby, established and located as set forth in said report. And the court further finds from the report of the jury appointed to assess damages that no damages are allowed; therefore it is adjudged by the court that no one is entitled to damages on account of said road. And it is further ordered by the court that the road overseer of that district proceed to open said road as by statute provided." These proceedings seem to be regular enough, and the case of *Whitely v. Platte Co.*, 73 Mo. 30, and others like it, to which we have been referred, are not analogous to this; for it did not appear in the *Whitely Case* that the required notice had been given.

It is further insisted that under the constitution of 1875, art. 2, § 21, the compensation for land taken for a public use must be in money, and that commissioners appointed to assess damages for land thus taken cannot, in estimating damages, take into consideration the peculiar advantages to that which is not taken, by reason of the use to which that taken is to be devoted, but must assess the money value of that which is taken, without reference to the advantages to that not taken, and that such money value must be paid to the owner, or into court for him, before his proprietary rights can be disturbed. Previous to the adoption of the constitution of 1875, the rule was firmly established in this state by the case of *Newby v. Platte Co.*, 25 Mo. 258, and has uniformly been adhered to since, that damages for property taken for a public use may be compensated for or paid in benefits peculiar to that which is not taken, but not in such benefits as are common to the public at large. We are of the opinion that this rule has neither been nullified nor impaired by the section of the constitution of 1875 referred to, and the only change affected by it, where property is taken for public use, is that if the commissioners appointed to assess damages report that the owner has been damaged by such taking in a given amount, that such amount, before the owner can be disturbed in his proprietary rights, be either paid to him, or into court for him. If, however,

the commissioners ascertain that the benefits peculiar to the land not taken is a full equivalent for the land taken, and that the owner is not entitled to any damage, there is nothing to pay, because there is no damage to be compensated for; and it is only where damages are assessed, and the amount ascertained, that the constitution providing that, before the owner can be disturbed in his proprietary rights, "such compensation must either be paid to the owner, or into court for him," applies in so far as *taking* private property for a public use is considered. If all the land the owner has is taken for a public use, leaving him none to be benefited by the use to which it is devoted, in such case the land cannot be compensated for in benefits, but must be compensated for in money. The rule adverted to has been deemed so well established that in the case of *Jackson Co. v. Waldo*, 85 Mo. 640, where the correctness of the rule was challenged, the judgment of the circuit court recognizing its correctness was affirmed in a *per curiam* opinion on the authority of *Newby v. Platte Co.*, *supra*. Judgment affirmed.

(All concur, except BRACE, J., absent.)

SMITH and others v. JAMISON and others.

(*Supreme Court of Missouri*. February 14, 1887.)

INJUNCTION—DISPUTED TITLE.

An injunction will not lie, as an original and independent suit, to try the title to a "disputed strip of ground," and a mine situated on it, held and possessed by another person under claim of right and color of title.

Appeal from circuit court, Jasper county.

Phelps & Thomas, for appellant. *Young, Harding & Buler*, for respondent.

RAY, J. This is an original and independent suit for an injunction to restrain the defendants from moving upon a "strip of ground," on the boundary line between lots 1 and 2 of the S. W. $\frac{1}{4}$ of section 7, township 28, range 33, in Jasper county, 12 feet wide at the north end, and 20 at the south end, the ownership and possession of which is claimed by both parties. Suit was commenced twelfth of January, 1883, with temporary injunction till the March term, 1883, when there was answer of general denial, and motion to dissolve the injunction, which came on for trial at the September term, 1883, and resulted in a finding and judgment for defendants, dissolving the injunction, and dismissing the bill, from which the plaintiffs appealed to this court. At the trial it was admitted that the plaintiffs were the owners and in possession of lot 2 of said quarter section, and that the defendants Jamison and Vivian were the owners and in possession of lot 1 of said quarter section, and that the other defendants were moving on the west side of lot 1, under a license from said Jamison and Vivian, and that lot 2 is valuable principally for mining purposes; that the controversy here is as to the line between the lots,—the strip in dispute being, as before stated, 20 feet wide at one end, and 12 at the other; and that defendants are in possession of shaft on the disputed strips,—that is, in possession of the shaft located on the line of the disputed strip known as the "Line Shaft." The shaft itself, in which the mining is being done, is conceded to be in possession of defendants, and one-half of it, less six inches, is also admitted to be on lot 1, outside the disputed strip; but it is claimed, and the evidence tends to show, that, at the bottom of the shaft, defendants are drifting west at one point about 6 feet, and at another about 15 feet, and mining on the disputed strip, and have taken therefrom about 100 tons of ore, worth \$2,000. The line between lots 1 and two runs north and south; lot 1 being on the east, and lot 2 on the north.

Two different surveys had been made for the purpose of locating and fixing this dividing line. The first was made in 1852, by Mark Richardson, as

county surveyor, at the instance of J. N. Vivian, the original owner of lot 1, under whom defendants claim, who located and fixed the south-west and north-west corners of lot 1, and ran the line between said corners as the western boundary of said lot, and blazed the way, all along between said corners, by marking the trees, which were still visible and traceable at the time of the trial. In July, 1883, after suit was commenced, another survey was made by K. Elliott, as county surveyor, at the instance of plaintiff, who located the dividing line east of that fixed by Richardson in 1852. These two lines, as before stated, were 12 feet apart at the north end, and 20 at the south, and the strip of ground between them is the land in controversy. The correctness and legality of each survey is controverted by the opposing party. In addition to these two surveys, there was another survey made in 1881, under article 2 of chapter 58, Rev. St. 1879, p. 585, for the purpose of locating, identifying, and establishing the corners, line, and western boundary of lot 1, as fixed by the original survey of Richardson, made in 1852. This survey, at which said Elliott acted as county surveyor, was made at the instance of defendants, and resulted in relocating and fixing the western corners and line of lot 1 within a foot or two of the original boundary made by Richardson's survey of 1852.

The shaft called the "Line" or "Weatherby & Mayhew Shaft" is located on the eastern line, ran by Elliott in July, 1883, which passes over the mouth of the shaft, and six inches east of the centre thereof. It was in this shaft, thus situated mostly on the disputed strip, that defendants were mining at the time this suit was brought; the plaintiffs claiming that the disputed strip west of the line was a part of lot 2, and belonging to them, and was in their possession, at the institution of this suit, while the defendants claim that all the land east of the line ran by Richardson in 1852, including the disputed strip, was a part of lot 1, and in law and fact was in their possession, and had so been ever since the Richardson survey of 1852, except a brief interval at and subsequent to the late civil war, and by reason thereof. In support of this claim, there was evidence tending to show that the defendants, and those under whom they claim, had lived and resided upon lot 1 ever since the Richardson survey, in 1852, except the interval aforesaid; that they had actual possession of a part of said lot, in the name of the whole, under claim and color of title, exercising the usual acts of ownership over the whole tract, up to the Richardson survey as the western boundary thereof. There was evidence also tending to show that, for some short time before the institution of this suit, the plaintiffs had been mining on the disputed strip, close up to the eastern line ran by said Elliott in July, 1883, and claimed to own the same.

The question presented for our determination upon this state of facts is whether injunction will lie, as an original and independent suit, to try the title to the "disputed strip of ground," and the mine in question situated thereon, and so held and possessed by the defendants under claim of right and color of title. On this subject the law is thus stated by High on Injunctions, (section 732:) "The jurisdiction in restraint of trespass to mines is not an original jurisdiction of equity, under which the court would be justified in trying the title to the mines themselves, and the party aggrieved must therefore first establish his title at law, or show satisfactory reason for not doing so. And an injunction has been refused when defendants claim under an adverse title, and where plaintiffs had allowed nearly a year to pass after defendants had begun working the mine before seeking relief. So it is proper to refuse the injunction where plaintiffs right is by no means clear, and where his remedy at law is adequate." In the same section, this author further adds: "It is not necessary, however, that the owner should have actually established his title by an action at law; and if he makes out a good *prima facie* title, which is not controverted by defendant, and shows that those under whom he claims have been in possession and use of the mine for a long period

of years, he is entitled to an injunction to prevent such depredations upon his mine as are likely to result in irreparable injury." There is an abundance of other authority to the same effect. *Pillsworth v. Hopton*, 6 Ves. 51; *Smith v. Collyer*, 8 Ves. 89; *Hart v. Mayor, etc., of Albany*, 9 Wend. 571; *Echekamp v. Schrader*, 45 Mo. 505; *Preston v. Smith*, 26 Fed. Rep. 884, (opinion by BREWER;) *High*, Inj. §§ 697, 698, 701.

Tested by these views, it will be seen that plaintiff's case falls very far short of the requirements of the law in such cases. In a case like the present an action of ejectment would be an appropriate remedy to test the right and try the title to the "disputed strip and mines" in question, and in such action, and as auxiliary thereto, if the facts warranted it, and under proper averments, an injunction *pendente lite* might be appropriate, and amply secure all the just rights of the plaintiff in the premises. *Janney v. Spedden*, 88 Mo. 395; *Majors' Heirs v. Rice*, 57 Mo. 385; *More v. Perry*, 61 Mo. 174; *Tamm v. Kellogg*, 49 Mo. 119.

With these views, and under these authorities, we are of opinion that the trial court committed no error in dissolving the injunction and dismissing the bill, and for these reasons its judgment is affirmed.

(All concur, except BRACE, J., absent.)

STAMPER v. ROBERTS and others.

(Supreme Court of Missouri. February 14, 1887.)

INJUNCTION—LACHES—SCHOOL TAX.

In a proceeding for an injunction to restrain the collection of a school tax for a school-district, in which it appears that plaintiff bases his objection to pay taxes on an irregularity in the proceedings for the formation of the school-district four years previously, the court will refuse the relief on the ground of the laches of the plaintiff in delaying so long his proceedings for relief.

Appeal from circuit court, Randolph county.

NORTON, C. J. This is a proceeding by injunction to restrain the collection of a school tax for school-district No. 5, township 54, ranges 15 and 16, in Randolph county, on the ground that said school-district was never legally organized, and that there is in fact no such school-district. Notice was given that the petition would be presented to the Randolph circuit court on the twenty-ninth of March, 1884. Defendant appeared, and the cause was submitted to the court on the petition, and the bill was dismissed, and final judgment rendered against plaintiff for costs, from which he prosecutes his appeal to this court. It appears from complainant's bill that on the twelfth of March, 1880, a petition was presented to the school directors of district No. 4, township 54, range 16, saying that the petitioners wished to form a new district out of territory to be taken from school-district No. 4, township 54, range 16, and from school-district No. 2, township 54, range 15. This petition set forth with particularity the territory to be taken from said districts No. 4 and No. 2. On the reception of the petition said directors had notices of election for said purpose posted as required by law, in exact conformity with said petition, the boundaries of the contemplated new district being described in said notices exactly as in the petition; that the boundaries, as described in said petition, and notices, embraced 164 acres of land of plaintiff, on which he then resided and now resides; and that one McCrary also owned and now owns 216 acres of land within said boundaries. It also appears that at the annual meeting of said school-district No. 4, held in April, 1880, when the proposition to form a new district came up to be acted upon, an amendment was made changing the proposed boundaries, without any further notice to plaintiff, who was not present at said meeting, so as to include only his dwelling-house and seven acres of his land in the proposed new district, leaving his barn, stables, and

157 acres of his land in district No. 4, and so as to include only 50 acres of said McCrary's land in the proposed district, leaving the rest of his farm, 166 acres, in said district No. 4; that the original proposition as thus amended was voted upon, and declared adopted, and said new district organized. It further appears that plaintiff paid the school taxes thereafter assessed against him for said new district (but paid the same, as alleged, under protest) till the institution of this suit, in 1884.

It is contended by counsel that under sections 7023 and 7081, Rev. St., the voters, when assembled at the annual meeting, were confined to the proposition of creating the new district out of the exact territory as described in the petition and notices; and that as they did not do so, but changed the boundary in the particulars above stated, the whole proceeding is void. According to the petition and notices it was proposed to include 164 acres of plaintiff's land in the new district. According to the change or amendment made, all of the land was not included, but only seven acres of it, and it is the change thus made upon which the above contention is based. Conceding, for the purpose of this case, without determining the question, that the change thus made was irregular and in excess of the powers conferred, the question still remains whether, under the facts of the case, a court of equity should interpose its injunctive and restraining process. The proceedings to establish this new district occurred in April, 1880. This suit, assailing its validity, was brought in 1884. In the mean time the new district was in fact organized, and has remained so organized, unchallenged by plaintiff, except so far as his protest, when paying school taxes assessed against him, may be regarded as challenging it. In view of these facts, and the further fact that during an interval of four years the *de facto* existence of the district was recognized, and parties interested have adapted themselves to the changed condition of things, presumably, for school purposes, and incurred expenses necessarily incidental to conducting a school, we are fully justified in affirming the judgment of the circuit court, on the ground, if on no other, that plaintiff by his laches has allowed a condition to exist for four years which would make it inequitable to grant the relief prayed for. *Landrum v. Union Bank*, 63 Mo. 48; *Kitchen v. Railroad Co.*, 69 Mo. 224; *Bradshaw v. Yates*, 67 Mo. 221.

Judgment affirmed, in which all concur, except BRACE, J., absent.

CITY OF SAVANNAH v. HANCOCK.

(*Supreme Court of Missouri*. February 14, 1887.)

MUNICIPAL CORPORATIONS—CONDEMNATION OF LAND FOR ALLEY—PUBLIC USE—QUESTION OF LAW.

Under Const. Mo. 1875, art. 2, § 20, providing "that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined," a question as to whether the condemnation of land for an alley-way is for a public use is one for the court, and should not be submitted to the jury.

Appeal from circuit court, Andrew county.

D. Rea & Son, for appellant. *Gidding & Sanders*, for respondent.

BLACK, J. The plaintiff is a city of the fourth class under the general laws of this state. The mayor and aldermen passed an ordinance establishing an alley in block 23, on property owned by the defendant, in the rear of a row of business houses fronting upon one of the streets. The ordinance declares that the property taken "shall thereafter be and remain a public alley, in all respects, in the city of Savannah." Commissioners were appointed to assess damages to defendant for the property; and to their report he filed exceptions in the circuit court under the provisions of section 4940, Rev. St. On trial

the circuit court instructed the jury that whether the contemplated use was really a public use was a question for them to determine, and for their guidance various instructions were given in that behalf. Verdict for defendant.

The only matter which we need consider is whether this question should have been submitted to the jury at all. Section 20, art. 2, Const. 1875, provides "that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public." As this is a new section, not found in any of the former constitutions of this state, it may be well to look to the state of the law before its adoption. In *County Court of St. Louis Co. v. Griswold*, 58 Mo. 175, which was a proceeding to condemn property for a park, these propositions of law were clearly asserted: (1) That, when it is once seen that the land sought to be appropriated under the power of eminent domain is for a public use, then the legislative authority over the subject cannot be supervised or restricted by the courts; (2) that, where it is plainly seen that there is an attempt to procure the condemnation of property for private use, then the courts will declare the law void. It is also there said, if it is doubtful or questionable whether the use is public or not, testimony may be heard to determine the fact. These same principles of law had been previously laid down in the case of *Dickey v. Tennison*, 27 Mo. 373, where it is said: "As we may determine from the act authorizing the improvement whether the property directed to be taken is for public use, there is no reason why the same means should not be resorted to in order to ascertain whether it is not for a private use." Accordingly the court in that case looked into the act, which was one to establish a "neighborhood road," and from the various provisions declared it an effort to take private property for private use, and therefore unconstitutional and void.

It will thus be seen that the question whether the use for which the property is about to be taken is a public use has already been regarded in this state as a judicial question,—a question which the courts would for themselves decide. Notwithstanding this, it is undeniably true that the courts were disposed to defer somewhat to a legislative declaration upon the subject. Hence it is said, if the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably private. Dill. Mun. Corp. (3d Ed.) § 600. Mills, Em. Dom. § 10, is to the same effect.

Now, the constitutional provision of this state, before quoted, makes it the duty of the courts to determine whether the use be a public use or not, without any regard to a legislative assertion upon the subject. They are freed from the influence of any expressed judgment of the legislature in that behalf, and enjoined to determine the question wholly regardless of what that branch of the state government asserted upon the subject. The method, however, by which the courts determine whether the use is a public use, remains the same as before. Neither the constitution nor any statute requires that question to be submitted to a jury. The courts will decide the question without the aid of a jury. In most cases there is and can be no fact for the jury to determine. Statutes often require a finding by the court or commissioners that the proposed improvement is necessary for the public convenience; but that is another and a different question from the one whether the use is really public.

In the present case the mayor and aldermen have ample power, by ordinance, to establish new streets and alleys, and to cause property to be condemned therefor. The alley in question is opened, as the ordinance says, for the purpose of grading and improving the same, and is to be and remain a public alley in all respects. All this is done at the public expense, and the alley becomes a part of the system of streets and alleys of the city. That the use is a public one is manifest on the face of the record. Dill. Mun. Corp.

(8d Ed.) § 595. The court should have so ruled, without submitting any such issue to the jury. The use being public, the necessity of exercising the power to condemn is by the law left to the judgment of the mayor and aldermen. The judgment is therefore reversed, and the cause remanded.

BRAOE, J., absent. The other judges concur.

KING v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Missouri. February 14, 1887.)

RAILROAD FENCES—MISSOURI DOUBLE DAMAGE ACT—PLACE OF INJURY—EVIDENCE.

In an action for double damages for the killing of stock, brought against a railroad company under Rev. St. Mo. § 809, the fact that the injury occurred in the township in which the action is brought, or in the adjoining township, as required by Rev. St. Mo. § 2839, must be proved, and in the absence of such proof the defendant is entitled to an instruction in the nature of a demurrer to the evidence.

Appeal from circuit court, Buchanan county.

M. A. Low, for appellant.

RAY, J. This action was commenced April 16, 1879, before a justice of the peace in Bloomington township, Buchanan county, to recover double damages, under the statute, for killing or injuring two mules and one mare, the property of plaintiff. Plaintiff recovered judgment for double the value thereof before the justice, and defendant appealed to the circuit court, where plaintiff filed an amended statement. The case was dismissed as to the mules, and on a trial of the cause anew in the circuit court, at the September term, 1880, plaintiff recovered a judgment for double the value of the mare, from which defendant has appealed to this court.

The stock was injured during the night, and there were no witnesses to the occurrence. The two mules were found in the public crossing the next morning, and the mare inside the cattle-guards, and near thereto, on the right of way. The fence was built, for the company, by the plaintiff, about a year before this, and seems to have been such a fence as was required by the statute. There is evidence that the top plank had been off, at two different places in the fence, for some time; but plaintiff's own evidence, and that of other witnesses in his behalf, indicated pretty clearly, we think, that the stock got in or broke in through a fresh break in the fence, made during the night. The plaintiff says he does not know where the stock got on the track, as it was done in the night, but he further says: "At this new break, which showed it had just been made, there was found to be horse hair upon the splinters of the broken plank, and tracks all along between this break and the railroad." To the same effect is the testimony of the witness Clay Dunlap, who further testified he was along the railroad the day before, and that there was no break in the fence where this fresh break was found. He also says: "We examined carefully, and the stock did not get upon the railroad track at the place where the boards had been off before the night of the accident." If this is so, the case would be thus brought within the rule declared in *Clardy v. St. Louis, I. M. R. Co.*, 73 Mo. 577, which is that, after the fences have once been erected as required by law, the company is only liable for a negligent failure to maintain such fences, and is entitled to a reasonable time in which to make repairs.

But, waiving this view of the case, the judgment must, we think, be reversed for another reason. We have attentively read the entire evidence in the record, and we fail to find therein any proof whatever that the injury occurred, either in Bloomington township, as charged in the amended statement, or in any adjoining township. For this reason the instruction, in the nature of

a demurrer to the evidence, asked by the defendant, should have been given. *Mitchell v. Missouri Pac. Ry. Co.*, 82 Mo. 106.

Judgment reversed, and cause remanded, in which all concur, except BRACE, J., absent.

BUTTS, Adm'r, etc., v. PHELPS.

(*Supreme Court of Missouri.* February 14, 1887.)

PLEADING—COMPLAINT—ACTION AGAINST ATTORNEY.

In an action to recover the value of a draft entrusted to defendant, an attorney, for collection, a complaint, as follows: Plaintiff states "that in the spring of 1875 he delivered defendant a check or draft upon Stroud & McBride for \$125, and directed him to send the same to Prindle Brothers, Watson, Ark., for collection, and, before the same had been sent by defendant, plaintiff called upon defendant, and gave him some directions, but the defendant wholly disregarded the requests and directions of the plaintiff, and sent said draft to one Moore, in Arkansas; that, by reason of the conduct of the defendant in disobeying the orders and directions of the plaintiff, the plaintiff is damaged in the sum of fifty dollars, for which he asks judgment."—is sufficient to apprise defendant of the nature of plaintiff's claim, and the extent of the damages, and to support a judgment, and bar another action.

Appeal from circuit court, Webster county.

This action was brought to recover of defendant, an attorney, the value of a draft entrusted to him by plaintiff for collection.

Rush & Foster, for respondent. *Stuart & C. W. Thrasher*, for appellant.

RAY, J. This cause has once before been in this court, when it was reversed and remanded on account of the insufficiency of the statement. See 79 Mo. 302. Thereafter plaintiff filed an amended statement in the cause, and a retrial thereof has again resulted in a verdict and judgment in favor of the plaintiff, from which defendant has again appealed to this court. The material facts of the case, as detailed in the present record, are, in substance, that McAlpine & Butts, in the winter of 1875-76, sold three mules to Stroud & McBride, who lived at, or near Watson, in the state of Arkansas, and received, in part payment therefor, a draft drawn by them on a Memphis firm, payable in 90 days from its date. On their return to Webster county, Missouri, where they lived, McAlpine placed the draft in the defendant's hands for collection. Plaintiff and defendant differ as to the amount of the draft, but it was either for \$125, as plaintiff says, or for \$90, as defendant thinks; and whether for the one sum or the other is immaterial, as the judgment is for \$50. The draft was sent thereafter by defendant to one Moore, an attorney at either Watson or Napoleon, Arkansas, for collection, who it appears received it, but as to what he did with it, or what became of it, does not, perhaps, so satisfactorily appear. Neither plaintiff nor defendant, however, saw it after it was sent to Moore. Some efforts, which were unsuccessful, were made by defendant to take the business out of Moore's hands, and there was some controversy between defendant and said Moore about the matter. Said Moore, it seems, at one time wrote defendant a letter, purporting to inclose money, on account of the draft, but in point of fact the letter, when received, contained no money, as stated therein. No notice of protest of the draft was ever received by plaintiff, and the facts and circumstances would seem to indicate that the draft was either paid when presented by Moore, or was never presented by him. The evidence does not show or indicate that defendant has ever received any money on account of said collection. So far, then, as we understand the record, there is not much, if any, dispute as to the facts. The material, meritorious, and controlling question in the case, however, was as to whether, upon the delivery of the draft to defendant, or while it was in his possession, he was directed by plaintiff to send it to a specified agent in Arkansas for collection, and upon this question the testimony of plaintiff and defendant is directly conflicting and contradictory.

They were the only witnesses testifying in the case, except one Yandall, called in rebuttal, whose testimony we deem unimportant. Plaintiff, Butts, testifies that the draft, when delivered to defendant by McAlpine was not then due, and that in one-half hour thereafter he called, and informed defendant that he knew the Prindle Bros. at Watson, Arkansas, to be reliable attorneys, and directed defendant to send the draft to them for collection. On the other hand, the defendant testifies that he was given no direction as to the collecting agent in Arkansas, and that, in the absence thereof, and of personal knowledge on his part of any attorney in the county where the parties lived, he sent the same to one Moore, whose name he found in Hubbell's legal directory. This being, in substance, the material evidence upon the main question so far as we need now notice the same, the case was properly submitted to the jury for their determination.

Defendant now contends that the amended statement fails to state facts sufficient to constitute a cause of action, and that it is just as vulnerable to this objection as the original statement, heretofore held to be insufficient. As said by this court in its former opinion, the original statement, then before it, did not contain an averment of a single fact, but only stated a conclusion of law, and was not sufficient to advise the defendant of the nature of the claim, nor specific enough to be a bar to another action. The amended statement is as follows: "Now comes the plaintiff, and for amended petition states that the plaintiff and J. H. McAlpine were partners in the years 1875 and 1876, and in the spring of 1875 McAlpine delivered to H. F. Phelps a check or draft upon Stroud & McBride for the sum of \$125, and directed him to send the same to Prindle Bros., Ark., for collection, and, before the same had been sent by defendant, plaintiff called upon defendant, and gave him some directions, but the defendant wholly disregarded the requests and directions of the plaintiff, sent said draft to one Moore, of Arkansas; that, by reason of the conduct of the defendant in disobeying the orders and directions of the plaintiff, the plaintiff is damaged in the sum of fifty dollars, for which he asks judgment."

The averment as to delivery of the said draft on Stroud & McBride to defendant for collection purports, we think, an indebtedness on their part to plaintiff in the amount of the draft, and that plaintiff was the owner, and lawfully entitled to collect the amount of the said draft. The amended statement fairly apprised defendant of the nature and ground of plaintiff's claim, and the extent of the damages, and thus enabled him to prepare his defense, and to show that no such special directions were in fact given, or obeyed if given, and that no damage was occasioned plaintiff by his action in that behalf. It is also certain and specific enough, we think, to support a judgment, and to bar another action, and, although imperfectly and inartificially drawn perhaps, meets the above-mentioned objections to the original.

The action of the court in giving and refusing instructions is also complained of, but the law, as declared, conforms to the doctrine announced in the prior decision of this court, and we see no substantial reason for another reversal upon any of the grounds specified in this behalf.

This leads to an affirmance of the judgment; and it is accordingly so ordered.

(All concur, except BRACE, J., absent.)

STATE v. DOWNS.

(*Supreme Court of Missouri. February 14, 1887.*)

1. MANSLAUGHTER—NOT FIRST DEGREE.

On an indictment for unlawful killing, in which it appears that deceased was in the act of attempting to strike defendant's son, of 11 years of age, when defendant seized a bottle out of which deceased and others were drinking whisky, and struck

him a fatal blow on the head, it is error to instruct the jury on manslaughter in the first degree, under Rev. St. Mo. 1879, § 1238, in which that crime is defined as the killing of a human being while the accused is attempting to commit a crime less than felony, when such killing would be murder at common law.

2. SAME—EVIDENCE—DEFENDANT'S BELIEF.

On an indictment for manslaughter, testimony by defendant that he believed deceased was about to do his (defendant's) son some great personal injury is inadmissible.

3. SAME—EVIDENCE—CHARACTER OF DECEASED.

On an indictment for manslaughter, where there is doubt as to whether the killing was done from malice or from a sense of real danger, and there is evidence that deceased commenced the attack, testimony of the turbulent character of the deceased is admissible.

4. SAME—THREATS OF DECEASED ADMISSIBLE.

On an indictment for manslaughter, where there is evidence to show an actual assault by deceased upon defendant, evidence of previous threats by deceased, whether communicated to the defendant or not, is admissible; but not so where the assault is made, not on defendant, but on his son.

5. WITNESS—IMPEACHMENT OF WITNESS.

Where, in a criminal case, the defendant offers to prove by another witness that a witness who had been examined by the state had said that he and another witness would leave, and not be witnesses against defendant, for \$100, the defendant is entitled, in cross-examination, to ask such state witness whether he made the statement alleged.

Appeal from circuit court, Iron county.

Indictment for manslaughter. Defendant appeals.

Atty. Gen. Boone, for respondent. *Dinning & Byrnes*, for appellant.

BLACK, J. The defendant was indicted for killing Peter Prow, and found guilty of manslaughter in the first degree. The evidence for the state is, in substance, as follows: Between 9 and 10 o'clock on the night of the sixteenth December, 1882, the deceased and others were in a saloon kept by the defendant. Deceased asked several persons, and among them Newberry, to drink. Newberry, to avoid drinking, dodged behind some men, when Prow, the deceased, went after him, saying: "I will kick him." The defendant's son, a lad some 11 years old, who was on a card-table, raised up and asked Prow who he was going to kick. Prow told the boy to go along about his own affairs. The boy again asked Prow the same question, when Prow told him to go, at the same time suggesting that the boy had been intimate with negro women. The boy, in connection with abusive language, hit Prow in the face, when the latter stepped back and threw up his hands, though not then in reach of the boy. At this moment the defendant, without any warning, stepped up behind Prow, and hit him on the head with a cut-glass bottle or decanter containing liquor, and in all weighing from three to five pounds. Prow fell, and soon died from the effects of the blow. Evidence for the defense tends to show that the boy was standing by a stove, when Prow hit him, knocking him over on the card-table; that deceased then raised his hands, when the defendant stepped up with the bottle from which the parties were taking the liquor, and inflicted the blow which proved fatal.

1. The first complaint is that the court erred in instructing upon manslaughter in the first degree. That degree of homicide, as defined by statute, is "the killing of a human being, without the design to effect death, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration, or attempt to perpetrate, any crime or misdemeanor not amounting to a felony, in cases where such killing would be murder at the common law." Section 1238, Rev. St. 1879. This section of the statute was considered in the case of *State v. Sloan*, 47 Mo. 604. It is there held, following a line of decisions upon a statute of the state of New York like our own, that, in order to convict the defendant of manslaughter in the first degree, the defendant must be engaged in the commission of some

offense other than violence upon the person killed. The statute contemplates a class of cases where the defendant is engaged in the commission or attempt to commit a crime or misdemeanor not amounting to a felony, other than violence to the person killed, and, without design to effect death, kills a human being. The crime or misdemeanor which the defendant is perpetrating, or attempting to perpetrate, must be one which is not a part or an ingredient of the offense charged. Here the acts of the defendant were all parts of the principal act charged in the indictment. He was not engaged in perpetrating, or attempting to perpetrate, any other crime or misdemeanor whatever. It was error, therefore, to instruct upon this degree of homicide. It is true that, upon an indictment for murder in the first degree, the accused may be convicted of a lesser grade of homicide; but, as was said in the case of *State v. Sloan, supra*, the conviction must be based upon some degree of which the evidence tends to show him guilty. Here there is not a particle of evidence tending to show that defendant is guilty of manslaughter in the first degree. As well might he have been convicted of deliberately assisting another in self-murder, which is also made manslaughter in the first degree.

2. When the defendant was upon the witness stand, it was proposed to prove by him that he believed the deceased was about to do his son some great personal injury. This evidence was properly excluded. What he thought was wholly immaterial. The question was not what he believed, but the questions were, did he have reasonable cause to believe deceased designed to inflict great personal injury upon the boy, and was there reasonable cause to believe that such design would be accomplished? Whether these reasonable grounds of belief existed were to be determined from the circumstances and appearances as they existed, and not from what the defendant thought or believed. Repeated adjudications hold that evidence of the defendant's belief is not admissible in such cases. *White v. Mawoy*, 64 Mo. 560; *State v. Gonce*, 87 Mo. 633.

3. We are of the opinion the evidence offered, but excluded by the court, that the deceased was a fierce, violent, and dangerous man, should have been received. Where the killing has been under such circumstances that there is doubt as to whether the act was done from malice or from a sense of real danger, testimony of the turbulent character of the deceased may be received, and should be admitted, as tending to show and explain the motive that prompted the act. *State v. Hicks*, 27 Mo. 588; *State v. Elkins*, 63 Mo. 159; *State v. Keene*, 50 Mo. 360; *State v. Bryant*, 55 Mo. 77. As there was some evidence going to show that deceased was the aggressor as to the assault upon the boy, the evidence should have been admitted. If the deceased did first assault the boy, and was a man of violent passions, then the defendant would, and of right might, consider the defendant's character in that respect in deciding what he would do in respect of the defense of his child, and the jury should be put in possession of all the facts upon which the defendant had a right to act.

4. Defendant sought to prove by one witness that the deceased, "just a short time before the difficulty," had threatened to get some boys, and "clean out" the defendant's saloon; that he had threatened personal injury to the defendant. The evidence was excluded, and exceptions taken. It was not shown, nor was there any offer to show, that these threats were communicated to the defendant. It is now the law of this state that, where there is evidence tending to show an assault first made by the deceased, previous threats by him are admissible, whether communicated or not to the defendant. *State v. Alexander*, 66 Mo. 161, and cases cited. Such uncommunicated threats are not admissible to justify the killing; but, with evidence of an assault, serve to prove a substantial fact,—the purpose of the deceased, his state of feeling towards the accused. But it was said in that case, unless an attempt be made to execute the threat, evidence that it was made is wholly irrelevant.

In this case there is no evidence of any attempt to execute any of the alleged threats. The threats proposed to be shown all relate to the defendant in person or to his business, and none of them had any reference to the son. The only assault shown was that made upon the son. The threats were therefore properly excluded, for they do not appear to have had any connection with the difficulty in question. The assault cannot be said to have been made in execution of them.

5. Allen Heaston, a witness for the state, stated on cross-examination that he did not, at a designated time and place, say to John C. Downs that he and another witness would leave, and not be witnesses against defendant, if John C. Downs would pay him \$100. Defendant offered to prove by John C. Downs that Heaston had made the proposition, but the court excluded the evidence. Generally a party is bound by the answer of a witness given upon cross-examination as to a collateral issue. But here the evidence cannot be said to be collateral. It goes directly to the credit of the witness, and shows him a corrupt witness. Whart. Ev. § 547. The proper foundation having been laid, the evidence should have been received. 1 Greenl. Ev. § 462.

The judgment is therefore reversed, and the cause remanded for new trial.

BRAOE, J., absent. The other judges concur.

JONES v. PARKER.

(Supreme Court of Texas. November 30, 1886.)

1. **GUARDIAN AND WARD—SETTLEMENT—REV. ST. TEX. ART. 2685—VOIDABLE JUDGMENT—RIGHTS OF WARD—PRESUMPTION—ESTOPPEL.**

Where, at the time of a final settlement by a guardian of his accounts, under Rev. St. Tex. art. 2685, the ward was in fact a minor, the judgment of the court as to him is voidable, and by no presumption of law or finding of the court can he be estopped to show the fact of his minority in order to vacate it.

2. **APPEAL—GUARDIAN AND WARD—SETTLEMENT—FINDING—PRESUMPTION.**

Where, in the settlement of a guardianship account, the court below finds that but few, if any, of the claims paid by the guardian had been established before payment, an appellate court will, where no vouchers appear in the statement of facts, conclude the finding to be correct.

3. **WITNESS—ACTION BY AND AGAINST GUARDIAN—ARTICLE 2248, REV. ST. TEX.—CONSTRUCTION.**

The provisions of article 2248, Rev. St. Tex., on the subject of evidence, in actions by and against guardians, apply to actions between the guardian as guardian and third persons, and not to suits in which the guardian and ward are opposing parties.

4. **GUARDIAN AND WARD—REPRESENTATIONS OF WARD—PROMISE TO PAY—LIABILITY—ESTOPPEL—CONTRACT.**

A representation made by a ward to his guardian that he would soon be 21 years of age, and a promise that the guardian should be allowed credit in his final settlement for goods sold him, will not be binding upon the ward either as an estoppel or as a contract.

5. **SAME—ACCOUNTING—MONEY PAID WARD—FINAL SETTLEMENT.**

Where a guardian pays money to his ward to enable him to engage in business, upon his representation, relied on by the guardian, that he has become of age, the money so paid should be allowed the guardian as a credit in the final settlement of his accounts.

6. **SAME—ALLOWANCES TO GUARDIAN—INCOME—ORDER OF COURT.**

The general rule governing settlements by guardians is that they can only be allowed for expenditures to the extent of the income of the ward's estate, unless proof be made of an order of court authorizing it, and a mere verbal direction of the judge is not a legal order for this purpose.

7. **SAME—FINE AGAINST WARD—WATCH.**

A guardian should be allowed credit in his settlement for a fine against his ward, paid by him in order to obtain his release, and also for money paid for a watch, if deemed necessary or proper to one occupying his station in life; especially if the ward retained it after his majority and failed within a reasonable time to return it.

8. EQUITY—BILL OF REVIEW—GUARDIAN AND WARD—SETTLEMENT OF ACCOUNTS—FINDINGS.

Upon a bill of review to vacate the settlement of a guardianship account, where the items alleged to be incorrect are numerous, and evidence is adduced to show the errors, the findings (when the trial is in the district court) ought to point out distinctly which are found correct, and which incorrect, and to show clearly the several corrections and revisions made by the court.

Appeal from district court, Rusk county.

Suit to revise the settlement of a guardianship account. Judgment for plaintiff. Defendant appealed. The facts are stated in the opinion.

G. H. Gould and W. C. Buford, for appellant. J. H. Turner, for appellee.

GAINES, J. One J. B. Murray, who was a defendant in the court below, but who is not a party to this appeal, was appointed, in 1873, guardian of the estate of appellee, who was then a minor. He resigned his trust in May, 1880, and made his final settlement. Appellant was, on the twenty-first day of that month, appointed guardian both of the person and estate of appellee, and duly qualified as such. Upon the theory that the ward had arrived at full age on March 15, 1882, appellant on that day filed his account for a final settlement, which was approved by the court. In August, 1884, the judge of the county court being disqualified to try the cause, this suit was brought in the district court against Murray and appellant to revise the final settlements of their respective guardianships. The causes of actions against the defendants would seem to be distinct, and the proceeding therefore anomalous. But we find no exception to the petition on this ground, and we cannot consider the question. It may be that, under the statute which makes the second guardian responsible for the property which came to the hands of the first, appellee may have had right to go behind the final settlement of Murray, and to charge appellant for any part of his estate for which Murray had not properly accounted. Rev. St. arts. 2619, 2620. But would it follow from this that a suit against the first guardian by the ward, after he became of age, to revise his final settlement, could be joined with a like suit against the second? The disposition of the case in the court below renders it unnecessary to decide either of the points suggested. A judgment there was rendered in favor of Murray against appellee, and the latter has not appealed. The court below found that appellant was not chargeable with any of the assets of the former guardianship except such as he had actually received and accounted for; so that he has no right to complain on that score.

There are many points raised by appellant's numerous assignments of error; but, in the view we take of the case, there are not many that we need to consider.

One of the most prominent is the question of the statute of limitations. It is conceded that if appellee had attained his majority when appellant made his final settlement in March, 1882, he is barred of his action by limitation of two years. The petition alleges, however, that he did not arrive at full age until December of that year. The judgment of the county court upon appellant's final account (which account this suit sought to revise) recites that it appears to the court "that the said Augustus C. Parker has arrived at the age of twenty-one years;" and it is now contended that this is conclusive upon the appellee, and that he was estopped to deny in this action the truth of that recital. We do not think this proposition can be maintained. If the appellee was in fact a minor at the date of the judgment, as the petition alleges, then, in order to estop him by a finding by the court of a jurisdictional or other fact, he must have been represented by a guardian *ad litem*. At common law a judgment rendered against an infant not so represented, although he is served with process, is voidable; and it would seem that a motion for the purpose, or a writ of error *coram nobis*, is an appropriate remedy in the court where rendered in order to set it aside. 7 Waite, Act. & Def. 147, 148,

and cases there cited; Tyler, Inf. & Cov. 205, and cases cited; *McMurray v. McMurray*, 66 N. Y. 174. That such a judgment is irregular and erroneous is recognized by our own courts. *Puckett v. Johnson*, 45 Tex. 550. See, also, *Wheeler v. Ahrenbeak*, 54 Tex. 535. A writ of error is the proper remedy to vacate such a voidable judgment in the district court if the fact of the defendant's infancy appeared upon the face of the record; but, if not, it is apparent that sole resort would be to the forum that gave the judgment. *McClelland v. Moore*, 48 Tex. 855; *Milam Co. v. Robertson*, 47 Tex. 222; *Yturri v. McLeod*, 26 Tex. 84; *San Antonio v. Lewis*, Id. 318; *McAnear v. Epperson*, 54 Tex. 220; *Seguin v. Maverick*, 24 Tex. 526. It does not appear from the record before us whether the ward was cited to the settlement in the county court or not, but this may be presumed, because the statute required that it should be done. Rev. St. art. 2685. Nor does it appear that any guardian *ad litem* was appointed to represent appellee in the proceedings. The statute makes no provision for such appointment, for the obvious reason that the final settlement takes place after the minor has attained his majority, and is capable in law of acting for himself. Hence if, at the time of the settlement under consideration, the appellee was in fact a minor, the judgment of the county court as to him was voidable, and by no presumption of law or finding of the court can he be estopped to show the fact of his minority in order to vacate it. We conclude that the judgment of the county court did not preclude him from averring and proving his true age; and the court having found that he did not attain his majority until December, 1882, that his bill to review that judgment was brought in time.

But some of the assignments of error are well taken. These errors will necessarily require a reversal of the judgment unless we can say they did not prejudice appellant's rights in the controversy, and are therefore immaterial. We could only say this in the event the undisputed facts adduced in evidence showed that appellee was in law entitled to recover, in any state of the case, at least the amount of the judgment of the court below. Our statute applicable to the proceeding in this case is that "any person interested may, by a bill of review, filed in the court in which the proceedings were had, have any decision, order, or judgment rendered in such court, or by the judge thereof, revised and corrected on showing error therein." Rev. St. art. 2717. It has been held by our courts, in several decisions upon this and similar statutes, that a bill of review, under our system, need not conform to the rules, and is not limited to the restrictions, of the equitable practice as applicable to that remedy. *Janson v. Jacobs*, 44 Tex. 578; *Seguin v. Maverick*, 24 Tex. 526. But we are of opinion that, when a party interested seeks by bill to review the final or other account of a guardian or administrator, his petition should point out the items complained of, and show the errors therein, and that he should support these allegations by proof.

Appellee set up, in his original petition, certain specific omissions in the debit side of the account to be corrected; but upon these the court found against him. In a trial amendment (filed irregularly because no exception had been sustained to his petition) he alleges that certain credits in the account, amounting in the aggregate to about \$1,300, were improperly allowed by the court. About \$390 of this amount is stated on the face of the account as cash paid the minor. Most of the other items appear there as "store accounts." When we examine the very voluminous and confused transcript which is sent here, we find no direct evidence to show us what these items were for, or definitely the facts and circumstances attending each transaction. There are no vouchers accompanying the account in the record. There is some testimony on behalf of appellant, given by his clerks, to the effect that he attempted to restrain his ward from making extravagant purchases in his store. It being presumed that the county court did its duty, and allowed these items upon sufficient evidence, how are we to determine from this meager

testimony that such allowance was incorrect? The guardian may pay all claims against his ward's estate which he knows to be just. Rev. St. art. 2621. It is his duty to pay all such as have been allowed and approved, or otherwise established. The court below found that "but few, if any, of the claims paid by the appellant had been established before payment;" and, in view of the fact that no vouchers appear in the statements of facts, we may conclude that this finding is correct. The court also correctly held that the guardian should not be allowed credit for expenditures for the education and maintenance of the ward beyond the amount of the income of his estate, without proof of an order of court directing such expenditures. *Smythe v. Lumpkin*, 62 Tex. 242. But from the face of the guardian's account only, can we conclude that these credits set down in it as "store accounts" were expenditures solely for the maintenance of the ward? We think not. The evidence is equally unsatisfactory as to the other credits complained of in plaintiff's trial amendment. The statement of facts shows us with sufficient certainty what was a proper expenditure for the ward's support. The income, too, can be arrived at from *data* that are satisfactory enough. And, if it had been proved beyond controversy that the amount paid out for the ward's support exceeded his income by a sum equal to the judgment of the court below, we might affirm the judgment upon the grounds that no other result could have been reached under the evidence, and the errors complained of were therefore immaterial. But such is not the case, and some of the assignments of error become important, and we must therefore consider them.

It is assigned that the court erred in excluding the testimony of appellant. The objection was upon the ground that his testimony was in relation to transactions with himself and appellee during the time that the relationship of guardian and ward existed between them. We think the testimony was admissible, and that the court erred in excluding it. Article 2248 of the Revised Statutes reads as follows: "In actions by and against executors, administrators, or guardians in which judgment may be rendered for or against them *as such*, neither party shall be allowed to testify, against the other, as to any transaction with or statement by the testator, intestate, or ward, unless," etc. This was a suit brought by the plaintiff, who had formerly been a ward, against the person who had formerly been his guardian, to revise the latter's account. We think it comes neither within the letter nor spirit of the statute. The words "as such," used in the article just quoted, limit the application of the law to those cases in which a judgment could be rendered for or against the guardian in his representative capacity; that is to say, a judgment which is in effect a judgment in favor of or against his ward, and which does not affect him personally. The article applies to actions between the guardian as guardian and third persons, and not to suits in which the guardian and ward are opposing parties. It will be noted that nothing is said about transactions with and statements by the guardian, and hence it would follow that, if we place upon the article the construction contended for by appellee, the ward would be permitted to testify to what the guardian had said and done, while the mouth of the latter would be closed in reference to the same facts. The legislature evidently did not intend to enact a rule so clearly unjust.

It is also assigned as error that the court, in its judgment, disregarded the proof in support of appellant's plea in estoppel. This plea alleged, in substance, that many of the items of credit in appellant's account were for goods sold by appellant to appellee under a representation made by the latter that he would soon be 21 years of age, and under a promise that appellant should be allowed credit for them in final settlement. A representation, in order to estop, must be as to facts either present or past. A promise to do something in future may constitute a contract capable of being enforced, but does not work an estoppel upon the person making it. See *Edwards v. Dickson*, 2 S. W.

Rep. 718, decided at the present term, and authorities there cited. We cannot hold that such a statement, made by a ward to his guardian for the purpose of obtaining goods, would bind him, either by estoppel or as a contract, without virtually abrogating the statutes upon the subject of guardianship, and throwing down every safeguard created for the protection of the estates of minors.

It is alleged, however, that a sum of \$290 was paid to appellee by appellant to enable the former to go into business, and that this was done after the minor claimed that he had arrived at his majority. If this be a fact, and if appellant believed the representation, then this should be allowed him.

In view of another trial, we will say generally that for the support of the ward the guardian can only be allowed for expenditures to the extent of the income of the ward's estate, unless proof be made of an order of court authorizing it. And we do not think a mere verbal direction from the county judge is a legal order for this purpose. All expenditures for the safe-keeping and management of the estate ought, upon being established by evidence, also to be allowed. This would include all reasonable attorney's fees in suits to recover the ward's property, or to protect his interest, and would likewise embrace a reasonable fee for advice to the guardian as to the conduct of his guardianship, and for preparing his account and making settlements, etc.

As to the credit claimed for a fine against the ward paid by the guardian, this should also be allowed. It presents such a case of emergency that it was the guardian's duty to discharge the fine, and release the ward from the consequence of its not being paid, without awaiting an order from the court. So, also, as to the money paid out for a watch for the ward. If the court should be of opinion that the watch was necessary or proper to a person occupying a station in life similar to that of the ward, it would seem that appellant should have credit for the money expended for it. He would certainly be entitled to such credit if it appeared that the ward retained the watch after his majority, and failed within a reasonable time to return it.

We have not attempted to pass upon every item in appellant's account about which a controversy has been raised, but we think the principles laid down will be a sufficient guide to the court below to enable it to determine the justness of any credit which has not been specially discussed.

It is also assigned as error that the court did not restate the account. Upon a final settlement the statute requires the court, in case the account be found incorrect in any particular, to correct and restate it. Rev. St. art. 2689. Upon a bill of review, where the items alleged to be incorrect are numerous, and evidence is adduced to show the errors, the findings (when the trial is in the district court) ought to point out distinctly which are found correct and which incorrect, and to show clearly the several corrections and revisions made by the court. This was not done in the trial court. The result is that we have found it impossible to ascertain from the court's findings precisely in what particulars the appellant's account was determined to be incorrect.

On account of the errors pointed out in this opinion, the judgment is reversed, and the cause remanded.

WILLIAMS v. STATE.¹

(Court of Appeals of Texas. November 17, 1886.)

LARCENY—INFORMATION—EVIDENCE—CHARGE OF THE COURT.

See the statement of the case for an information held sufficient to charge misdemeanor larceny. Note the opinion for a special charge on the subject of such larceny which should have been given, and for evidence held sufficient to establish the venue.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

Appeal from the county court, Rains county.

The conviction was for the theft of property of value less than \$20, and the penalty assessed was a fine of \$25, and confinement in the county jail for one hour.

The charging part of the information reads as follows: “* * * T. A. Williams, on or about the fourteenth day of December, A. D. 1884, in Rains county, Texas, did fraudulently take, steal, and carry away seven hundred and thirty feet of lumber, of the value of one dollar per hundred feet, and of the aggregate value of seven dollars and thirty cents, which said lumber was the corporate personal property of M. A. Vincent, A. N. Abercrombie, and W. M. Reeves, who owned and controlled said lumber as trustees of Brooklyn school community, and for the use of said community; that said Williams so fraudulently took said lumber without the consent of the said owners, or either of them, and with intent to deprive the owners, one and all of them, of the value of said lumber, and with intent to appropriate the said lumber to the use and benefit of him, the said T. A. Williams, and that said lumber was obtained and taken from the possession of J. T. Stivers by the said T. A. Williams by means of false pretexts and pretenses; and said false pretexts and pretenses were in substance and to the effect that the said Williams was properly authorized to demand and receive such lumber, and by presenting to the said Stivers a due-bill for said lumber, which said due-bill the said Williams denied having when the same was demanded of him by one C. C. Hawkins, who was at the time of making said denial acting as trustee of said Brooklyn school community, which said false pretexts and pretenses, made by the said Williams, was wholly false and untrue, and that he did not have the authority to demand and receive said lumber, and he well knew that he held and presented said due-bill with the fraudulent intent to get possession of said lumber, and with a purpose and intent to deprive the owners and each of them of the value of said lumber, and to appropriate the same to the use and benefit of him, the said T. A. Williams; and that the said Williams did so appropriate said lumber, against the peace and dignity of the state.”

The testimony showed, substantially, that the school trustees sent the defendant to the Boss Mills to receive and transport certain lumber purchased by them for the school community. Defendant received only part of the lumber, because unable at that time to transport all of it. He received at the same time a due-bill for the balance of the lumber. On the day alleged in the information, he presented this due-bill, received the balance of the lumber, which is the lumber he is charged to have stolen, and executed his receipt for the same as follows: “Received of J. F. Stivers, 730 feet of lumber, bought for the Brooklyn school community by W. F. Montgomery and T. A. Williams, in 1883. [Signed] T. A. WILLIAMS.” The defense offered no evidence, but, on the motion for new trial, raised the questions discussed in the opinion, and urged them again in this court on this appeal.

E. W. Terhune, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. On a former appeal in this case, (19 Tex. App. 409,) the prosecution was dismissed on account of the omission of an essential averment in the information. By striking out and eliminating as surplusage certain unnecessary statements and averments, we are of opinion the present information can be held good for the theft of 730 feet of lumber belonging to Vincent, Abercrombie, and Reeves, as trustees, etc., which was taken from the possession of one Stivers, holding the same for the owners, by means of a false and fraudulent pretext, to-wit, that defendant, by virtue of a certain due-bill, was authorized to demand and receive the same. Appellant's counsel is mistaken in asserting that the venue of the offense was not proven on the trial. Abercrombie, the second witness for the prosecution, says: “Our lumber was at the Boss Mills, in Wood county.” The witness Vincent says: “I live in

Brooklin school community, in Rains county. I saw defendant pass my place in Rains county about the middle of December, 1884, with some lumber. He was driving one team, and I think a negro was driving another." And the witness Fleuellen says that, in a conversation had with defendant, defendant said: "I went down to the mill and got that lumber; now let them kick." "He pointed out the lumber at the Widow Williams', in Rains county, Texas. I saw the lumber."

Several bills of exception were saved by defendant to the admission of evidence. They appear in the main to be unimportant and immaterial. After the evidence was through, defendant asked the following special instructions, which were refused, and exception thereto duly saved, viz.: "(1) If you believe from the evidence that defendant took the lumber he is charged with stealing, openly, and without any effort at concealment or intent to steal, he would not be guilty of theft. (2) If the defendant took and held the lumber he is charged with stealing in order to secure him in the payment of an indebtedness due him from the Brooklin community, he would not be guilty of theft. (3) If you believe that the trustees of the Brooklin school community placed defendant in possession of the lumber charged to have been stolen, [or the money with which the lumber was purchased,] and defendant subsequently converted the lumber to his own use, he would not be guilty of theft, and you should acquit him."

The first two of these instructions were unquestionably the law, as was also the third, after striking out the words we have embraced in brackets. These instructions were, moreover, directly and pertinently applicable to the facts. No charge of any character, written or oral, appears to have been given by the court. For error in refusing to give the special instructions of defendant, the judgment is reversed, and the cause remanded.

WASHINGTON v. STATE.¹

(Court of Appeals of Texas. October 16, 1886.)

1. PERJURY—INDICTMENT.

Indictment for perjury, which alleges that the false statement was material to the issue on trial, is sufficient, without alleging the facts which show the materiality of the same.²

2. SAME—FALSE STATEMENT—COLLATERAL ISSUE.

Perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of the witness.

3. SAME—CHARGE OF THE COURT.

Omission to charge the jury in a perjury case that a conviction for that offense cannot be had unless upon the testimony of at least two credible witnesses, or one credible witness corroborated strongly by other evidence, is fundamental error.

Appeal from district court, Bexar county.

The conviction was for perjury, and the penalty assessed was a term of five years in the penitentiary. The false statement assigned as perjury appears in the statement of the case.

The state introduced, first, the records of the district court of Bexar county for the April term, 1886, showing the proceedings upon the trial of Jack Green for theft from the person. Several witnesses for the state testified

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

² In an indictment for perjury, it is not necessary to state the legal conclusion that the evidence was material, when that is apparent from the facts averred, *Partain v. State*, (Tex.) 2 S. W. Rep. 854; *State v. Nees*, (Ark.) Id. 184; *Lea v. State*, (Miss.) 1 South. Rep. 51; and the statement of such conclusion, without the facts on which it was based, was held insufficient, *U. S. v. Robinson*, (Dak.) 23 N. W. Rep. 90. An indictment which does not directly allege what the evidence is, nor that it is material, is bad. *State v. McCone*, (Vt.) 7 Atl. Rep. 406.

that they were present on the trial of Green, and that, on that trial, they heard the oath administered to the defendant as a witness for the defense in that case, and heard him testify on that trial; that his testimony was, in effect, that he knew the defendant, Jack Green, and that he knew one Rhody Thomas, who testified to the inculpatory facts against the said Green; that, about two weeks after said Green's arrest for the offense then on trial, the said Rhody Thomas sent him, defendant, (then witness,) to the jail in which said Green was confined, to tell Green that she (Rhody Thomas) knew nothing about the charge against him, and would not and could not be a witness in the case. He stated emphatically that it was either a day or two before or a day or two after Emancipation Day, in June, 1886; that he so went to the jail, and delivered the said Rhody's message to the said Green. He declared positively that he was not a prisoner in the calaboose of the city of San Antonio at that time, but was at large, and under no manner of restraint or confinement. Rhody Thomas, testifying upon the trial, denied that she sent the defendant or asked the defendant to go, or that the defendant at her instance did go, to the county jail in June, 1886, with a message of any kind from her to Green. She denied that she saw or spoke to the defendant during the time covered by his testimony, and testified that defendant was confined in the city calaboose, as a city convict, at the time that Green's offense was committed, and for more than two weeks thereafter; and that it was therefore a physical impossibility for Washington's testimony to be true, so far as it charged her with the interview and message testified to by said Washington. The calaboose officials, and the records of the calaboose, showed that Washington was placed in confinement on the tenth day of June, and was not released until July 5th. Green was arrested June 15th for the offense committed by him on the day before.

No brief for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. It is sufficient allegation, in an indictment for perjury, that the alleged false statement was material to the issue on trial, without setting out the facts which show its materiality. *Massie v. State*, 5 Tex. App. 81; *Mattingly v. State*, 8 Tex. App. 345. In this case the indictment contains the general allegation of materiality, and in all respects we hold the indictment to be a good one.

As to the materiality of the alleged false statements, we think it was made apparent by the evidence. These false statements were adduced on the trial of Green for the purpose of affecting the credibility of the state's witness Rhody Thomas, and were calculated to have the effect to impeach, or at least cast suspicion upon, her testimony. It seems to be well settled that perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of a witness. Such statement is material to the principal issue. 2 Bish. Crim. Law, §§ 1032-1038; 3 Greenl. Ev. § 195; 2 Whart. Crim. Law, § 1278. There was no error in any of the rulings of the court complained of in relation to the admission of evidence offered by the state. We think the evidence was all admissible.

It is objected to the charge of the court that it fails to instruct the jury in all the law of the case. This objection is well taken. This being a trial for perjury it was incumbent upon the trial judge to instruct the jury that they could not convict the defendant except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statement under oath. Code Crim. Proc. art. 746; *Gartman v. State*, 16 Tex. App. 215.

It was fundamental error to omit such instruction, and because of this error the judgment is reversed, and the cause is remanded.

JONES v. STATE.¹

(Court of Appeals of Texas. November 17, 1886.)

1. MURDER—EVIDENCE—RES GESTÆ.

Declarations of a defendant subsequent to the commission of the offense, if wanting in spontaneity and instinctiveness, and are but the party talking about the facts, and not the facts speaking through the party, form no part of the *res gestæ*, but are self-serving declarations, and as such are properly rejected as evidence.

2. SAME—INSTRUCTION.

Charge of the court in a murder trial properly omits the law of manslaughter, in the absence of evidence mooting that degree of homicide.

3. SAME—EVIDENCE.

See the statement of the case for evidence held sufficient to support a capital conviction for murder.

Appeal from district court, Bowie county.

The death penalty was assessed against the appellant upon his conviction in the first degree for the murder of Cate Hicks, in Bowie county, Texas, on the sixth day of August, 1886.

The evidence for the state was to the effect that the defendant was a tie-cutter, employed at the camp of a squad of tie-cutters in Bowie county. Deceased was the cook for the squad. Defendant did not work on the day of the homicide, but remained about the camp. Near noon he went into the camp kitchen, where the deceased was preparing dinner, got a cup of water, and started out. Deceased told him that he must not take his cooking water. Defendant went off, but soon returned, with a pistol in his hand, and asked if deceased did not like his taking the water. Deceased replied that he did not, when defendant struck him with his fist, and thrust the pistol in his face. Deceased, followed by defendant, retreated towards a bunk, near which an empty gun was standing. Deceased caught the side of the bunk when he reached it, and defendant, exclaiming, "Don't put your hand on that gun," fired his pistol, and killed deceased. As he walked out of the kitchen, defendant said: "I have shot the d—d ——'s brains out. If anybody wants to take it up, I will shoot his brains out. I told him to put down that gun." Two witnesses testified that the defendant had but recently examined the gun, and knew that it was not loaded. One witness testified that, a few minutes before the shooting, the defendant, then outside of the kitchen, exhibited a pistol, and said that he was going to "blow some d—d nigger's brains out." The defense offered but one witness, by whom it was proposed to prove the statement made by defendant 15 or 20 minutes after the shooting. The evidence was excluded as self-serving declarations.

King & Vaughan, for appellant, complained of the action of the court excluding proposed defensive evidence.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. 1. It was not error to reject the declarations of the defendant as to why he did the killing. They did not come within the rule of *res gestæ*. They were not *spontaneous*, but were concocted, self-serving declarations; not the *facts* talking through the party, but the party's talk about the facts. They were wanting in the essential characteristic of *instinctiveness* to make them a part of the *res gestæ*. *Bradberry v. State*, 2 S. W. Rep. 593; *Whart. Crim. Ev.* § 691. Their truth was disproved by all the evidence in the case.

2. There is no error in the charge of the court. It presented to the jury fully, clearly, and correctly all the law applicable to the facts of the case. It was more liberal to the defendant than the evidence demanded. It might

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very well have omitted any instructions as to self-defense, that issue not having been fairly raised by the proof. The issue of manslaughter was not presented by the evidence, and hence it was not error to fail to charge the law of that offense.

3. The conviction is amply sustained by the evidence. There is no room to doubt that defendant committed the murder, and that he was actuated by express malice. It was a deliberate homicide, unprovoked and without mitigation. It is but justice that he should suffer the extreme penalty of the law, and the judgment is affirmed, there being no reason appearing to us why it should be set aside.

STOUT v. STATE.¹

(*Court of Appeals of Texas.* November 17, 1886.)

1. CRIMINAL PRACTICE—PROVINCE OF JURY—EVIDENCE.

It is the peculiar province of the jury to reconcile conflicts and inconsistencies in the evidence adduced before them, and their finding will not be disturbed by this court, if the evidence, though improbable, is sufficient to support the verdict.

2. ASSAULT TO RAPE.

See the statement of the case for evidence held sufficient to support a conviction for assault to rape a married woman in bed with her husband.

Appeal from district court, Red River county.

The conviction in this case was for an assault with intent to rape one Emma Gatz, in Red River county, Texas, on the twenty-ninth day of July, 1885. A term of two years in the penitentiary was the punishment assessed against the appellant.

The substance of the state's testimony was as follows: Mrs. Gatz testified, in effect, that she retired on the night alleged in the indictment a short while before her husband did. When her husband came to bed he closed and locked all the doors to the room, leaving the small window up, with the curtain drawn down. Some time later witness was awakened by the pressure of a hand on her chest. Thinking her husband was fondling her, she told him to desist, as she was sick. She dropped off to sleep again, and was again awakened by some one lifting her gown. She then attempted to rise up, but was pressed back by a hand on her chest. Witness then opened her eyes, and saw that the party pressing her down, and attempting to raise her gown, was the defendant. She called her husband, and the defendant sprang through the window, and escaped. Witness' husband saw defendant as he passed out of the window. The assault was made without the witness' consent. Cross-examined, witness said that the defendant did not get into her bed. He stood on the floor by the bed, and tried to press the witness down when she attempted to get up. He did not put his face or body on witness. Witness' husband was in the same bed with witness when the assault was made. Witness denied that she offered to release one Sallie Dyer from a debt on a pair of shoes to swear that defendant admitted to her that he made the assault. Confronted by her written testimony on the examining trial, witness admitted that she testified on that trial that defendant got into her bed, and placed his face on her face, and his body on her body; but affirmed that she considered standing on the floor by her bed, and "kinder" bending over, with his face near her, equivalent to the statements made on the examining trial. The substance of Mr. Gatz's testimony was that he saw and recognized the defendant as he escaped through the window. One witness for the defense testified that the defendant slept with her throughout the night of the alleged assault, and was not out of her room on that night. Sallie Dyer testified that, prior to this trial, Mrs. Gatz told her that she had heard, and assumed to know,

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

that defendant had confessed to her that he made the assault, and proposed to release her from a debt of 50 cents to so testify. Mrs. Gatz did not try to induce witness to so testify, whether truly or falsely, but insisted that defendant did make the confession to witness.

Sims & Wright, for appellant, denounced the verdict as unsupported by the evidence.

Asst. Atty. Gen. Burts, for the State.

WHITE P. J. While it would ordinarily appear exceedingly improbable and highly incredible that a party should attempt to ravish a married woman in bed with her husband, still it is by no means impossible, and circumstances may well be imagined in which the assailant would take the risk of such an attempt in the hope that it could be accomplished without discovery in his victim's mistaken belief that it was the act of the husband. It will not do to say that a thing is impossible because it appears unreasonable or improbable. To so argue is "purely a speculative attempt to sound the depths of human depravity, and to assign arbitrary limits beyond which desire and passion are to be held incapable of seducing or impelling human nature." In this case there are some apparent inconsistencies shown in the statements made at different times by the principal witnesses for the prosecution, but they do not occur as to the main facts that the assault was made, and that defendant was the guilty party. There is also some conflict in the evidence. This was matter exclusively for the jury to determine. They have seen fit to credit the testimony of the prosecuting witnesses, and we cannot see that that testimony is either improbable or untrue. The jury and the court below were in much better attitude to judge of the credit and weight to be given it than are we. That it is sufficient to support the judgment if entitled to credit we have no doubt.

Having found no error in the conviction, the judgment is affirmed.

THOMPSON v. STATE.¹

(Court of Appeals of Texas. December 13, 1886.)

HIGHWAY—ALTERATION OF THIRD-CLASS ROAD.

A condition precedent to the authority of the commissioners' court to change a third-class road to a first-class road is that the said court, in the manner provided by law, shall ascertain the damage accruing to the owner of the land over which the said change is to be made, and make compensation to him for the same. See the opinion *in extenso* on the question.

Appeal from county court, Rannels county.

The conviction in this case was for obstructing a public road, and the penalty assessed was a fine of \$100.

The opinion sufficiently discloses the case. The judgment was first affirmed without written opinion, but was reconsidered on motion for rehearing, and the cause disposed of by the opinion which follows.

C. O. Harris and Rector, Moore & Thompson, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. Upon a careful reconsideration of this case, we are satisfied that we erred in affirming the judgment of conviction. Conceding that the road in question was a *third-class* road at the time the commissioners' court established and classified it as a *first-class* road, and conceding that it was in the power of said court to so establish and classify said road upon its own motion, under authority of article 4361 of the Revised Statutes, as amended by the act of

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February 5, 1884, (Gen. Laws Sp. Sess. Eighteenth Leg. 21.) then in force, still it appears that said action was taken without compensating defendant for his damages for taking his land for said road, or without taking the steps required by said act to be taken to ascertain said damages, etc. Articles 4370-4372, Rev. St., as amended by act of February 5, 1884, (Gen. Laws Sp. Sess. Eighteenth Leg. 21.) Our constitution provides that "no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall first be made." Const. art. 1, § 17. To change a third to a first-class road, more of the owner's land must necessarily be taken, (Rev. St. arts. 4362, 4364;) and, furthermore, the owner of land over which a *third*-class road is established has the privilege of erecting gates across said road, (Rev. St. art. 4389,) which privilege, in many instances, would greatly lessen the damage to his land. It is therefore not only a *taking*, but a *damaging*, of his land, to change a *third* into a *first*-class road. It was not within the power of the commissioners' court to make this change without the consent of the defendant, who owned the land over which the road in question was established, without first having ascertained and compensated his damages in the manner provided by the statute. This was a condition precedent to the right of the county to take the land for public use. *Davidson v. State*, 16 Tex. App. 336. We conclude, therefore, that the action of the commissioners' court establishing and classifying said road over the defendant's land as a first-class road was in derogation of section 17, art. 1, of the constitution, and hence was without authority of law, and is void. Defendant had a legal right to obstruct said road by erecting gates across it, and the facts of the case show that in so doing he has not violated the law. There being no legal ground for this prosecution, the judgment is reversed, and said prosecution is dismissed.

HUNT v. STATE. HADLEY v. SAME. LESLARJETTE v. SAME.¹

(Court of Appeals of Texas. November 4, 1886.)

1. CONSTITUTIONAL LAW—MANDATORY OR DIRECTORY PROVISIONS.

Constitutional provisions are absolutely mandatory, and can in no case be regarded as directory merely, to be obeyed or not within the discretion of either or all of the departments of the government. See the opinion *in extenso* for an elaboration of the doctrine, and for a review of the authorities *pro* and *con*.

2. SAME—INTERPRETATION OF THE CODES.

In determining the validity of a statute, assailed upon the ground that its enactment was not in conformity with some express requirement of the constitution, the courts of Texas are not confined to the verity usually imported on the face of the statute, if *prima facie* valid, but may go behind it, to ascertain if the express requirement of the constitution was observed in its enactment.

3. SAME—PASSING LAW.

Section 38 of article 3 of the constitution of this state provides as follows: "The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature, after their titles have been publicly read before signing; and the fact of signing shall be entered on the journals." *Held*, that the effect of this section of the constitution is to expressly and imperatively require the presiding officer of each house to sign every enactment in the presence of the body over which he presides, and after it has been read by caption, and that the fact of signing shall be entered upon the journals; and, in order to determine whether such requirements of the constitution were complied with, the courts are authorized to go behind the statute itself, and ascertain the facts from the journals. See the opinion on the question.

4. SAME—CONSTITUTIONALITY OF A STATUTE.

The act of March 19, 1885, (Gen. Laws Nineteenth Leg. 34,) amendatory of article 358 of the Penal Code, which prescribes the penalty for the offense of keeping and

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exhibiting a gaming bank, is unconstitutional, because the journals of the senate fail to disclose its proper signing, in open session, by the presiding officer of that body.

Appeals from county court, Tarrant county.

The conviction in each of these cases was for exhibiting a gaming bank, and the penalty assessed in each case was a fine of \$25, and confinement in the county jail for 10 days.

W. S. Pendleton and B. G. Johnson, for appellants. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. These are convictions for keeping and exhibiting a gaming bank, and the punishment assessed in each case is fine and imprisonment under and by virtue of the act of March 19, 1885, (Gen. Laws Nineteenth Leg. 34,) amendatory of article 358 of the Penal Code; which act enlarges the punishment for said offense by adding to the punishment by fine, as prescribed by said article 358, the punishment of imprisonment in the county jail.

The question presented for our determination is the validity of this said act of March 19, 1885. It is contended by defendants that said act is invalid, because it was not enacted in conformity with section 38 art. 3, of the constitution, which reads as follows: "The presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature, after their titles have been publicly read before signing; and the fact of signing shall be entered on the journals." It is asserted that this provision was disregarded by the legislature in that the fact of the signing of this bill by the presiding officer of the senate was not entered upon the journals of the senate. The truth of this assertion is unquestionably established by reference to said journals, and if such omission can be noticed by the court, and invalidates the act, then said act is void, and these convictions must be set aside.

In considering the subject, we think it necessary to first determine whether, in the construction of the organic law, we may, as we might in the construction of a statute, apply the distinction between *directory* and *mandatory* provisions, or whether we must construe all provisions of the organic law to be *mandatory*. There is considerable conflict of decisions upon this point. In support of the doctrine that courts are at liberty to hold, under the rules governing the construction of statutes, a constitutional provision to be merely directory, the leading case perhaps is that of *Miller v. State*, 3 Ohio St. 483. With reference to the question under consideration, the decision referred to is *obiter*, the case not calling for a discussion of the subject. In a subsequent case, however, decided by the same court, the views announced in the *Miller Case* were affirmed. *Pitt v. Nicholson*, 6 Ohio St. 176. And it may be said to be the settled rule in Ohio that it is not every provision of the constitution that is mandatory. In New York the same rule has been adopted, (*People v. Supervisors of Chenango*, 8 N. Y. 328;) also in California, (*Washington v. Page*, 4 Cal. 388;) and in Mississippi, (*Hill v. Boyland*, 40 Miss. 618; *Swann v. Buck*, Id. 268;) and in Missouri, (*Cape Girardeau v. Riley*, 52 Mo. 424; *St. Louis v. Foster*, Id. 518;) and in Maryland, (*McPherson v. Leonard*, 29 Md. 377;) and perhaps in some other states.

But, notwithstanding these decisions are by able courts, the great weight of authority seems to be the other way, holding that the courts nor any other department of the government are at liberty to regard any provision of the constitution as merely directory, but that each and every of its provisions must be treated as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes. Judge Cooley, in his great work on Constitutional Limitation, upon this subject says: "The courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a con-

stitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the things to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or mode of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end; especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leaving as little as possible to implication." Pages 94, 95. In referring to decisions holding a contrary doctrine to his text above quoted, the author says: "There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions, as they now stand, do not sanction the application." Id. page 95.

In our own state we know of no instance in which a constitutional provision has been held to be directory merely. This court has more than once held that constitutional provisions are always mandatory, and has adopted the doctrine laid down by Judge Cooley, which we have quoted above. *Cox v. State*, 8 Tex. App. 254; *Holley v. State*, 14 Tex. App. 505. We believe this to be the sound and only safe doctrine. It seems to us that the rule which gives to the courts and other departments of the government a discretionary power to treat a constitutional provision as directory, and to obey it or not, at their pleasure, is fraught with great danger to the government. We can conceive of no greater danger to constitutional government, and to the rights and liberties of the people, than the doctrine which permits a loose, latitudinous, discretionary construction of the organic law. "We are taught by the constitution itself that those who administer this government are divided into three co-ordinate departments. Each of these can only act within its own limited sphere, and they, respectively, are the servants of the sovereign power, the people. There is no power above the people. There is no discretionary power granted in the constitution for either of these departments, nor for all of them united, to exercise a discretionary expansion and flexible power against its rigid limitations, even though such limitations were imposed by improvident jealousy. If abuse exist by reason of defects in the constitution, present or prospective, the true source of authority, the people, have the power, and doubtless the wisdom and patriotism, to correct them; and this, in the American idea, is the safe and only depository." Potter's Dwar. St. 655.

And here we deem it proper to again use the language of Judge Cooley. He says: "Whatever constitutional provision can be looked upon as directory merely, is very likely to be treated by the legislature as if it was devoid of even moral obligation, and to be therefore habitually disregarded. To say that

a provision is directory seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so is conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And, if the legislature habitually disregards it, it seems to us that there is all the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law so great as that which is done by the habitual disregard by any department of the government of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed." Const. Lim. 183.

Upon the weight of authority, and, to our minds, upon the soundest of reasons, we conclude that the provision of the constitution under consideration, and all other provisions of our constitution, are mandatory, and can in no case be regarded as directory merely, to be obeyed or not within the discretion of either or all of the departments united of the government.

We will next consider whether, and to what extent, the courts may inquire into and determine the validity of a statute which upon its face purports to be a valid law, but which is attacked as invalid because the legislature, in enacting it, did not conform to the requirements of the constitution. Upon this subject, also, there is much contrariety and conflict of authority. Judge Cooley says: "Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence, and adjudge the statute void. But, whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of a legislative body. It will not be presumed in any case, from the mere silence of the journals, that either house has exceeded its authority or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered." Const. Lim. 164. In the instance we are considering, the constitution *expressly* requires that the journals shall *show the fact of the signing of the bill by the presiding officer of each house*, etc. This is an imperative requirement, and as plain as the English language could make it. As we understand the rule stated in the quotation just made, the fact of such signing of the bill *must* appear from the journals. Such fact cannot be presumed or established by any other evidence, while the journals are in existence, because the constitution expressly requires the journals to show the fact, and thereby, as long as said journals exist, makes them the best, the only, and the conclusive evidence of the fact. If there was not an express requirement that the journals should show the fact of signing, then the mere silence of the journals as to such signing would not affect the validity of the statute, because in such case the legal presumption would prevail that the bill had been signed in the manner required.

The distinction between cases in which the law will presume that all the requirements of the constitution have been observed in the enactment of a statute, and those in which such presumption cannot be entertained, is very clearly stated by Judge STONE in *Perry v. Railroad Co.*, 58 Ala. 546, as follows: "We think the only safe rule for interpreting clauses of the constitution which command certain things to be done, or certain methods to be observed in the enactment of statutes, is to hold that when it is affirmatively shown by legal evidence that, in the attempt to legislate, some mandate of the constitution has been disregarded, such attempt never becomes a law. We do not mean to be understood as affirming that in all cases the silence of

the journal proves some constitutional requirement was omitted. It is only when the constitution requires that certain things shall be spread on the journal that its silence affects the constitutionality. The presumption, in the absence of proof, is always in favor of official propriety; and, except as to those matters which the constitution declares shall appear in the journal, the rule is to infer everything was rightly done, unless the journal shows affirmatively that some constitutional command was disregarded." The same able court, through the same judge, in a previous case in which the constitutionality of a statute was assailed upon the ground that the yeas and nays upon its passage had not been entered upon the journals as required by the constitution, used the following language: "The inquiry naturally presents itself, what intendments, if any, are to be indulged for or against the constitutionality of legislative enactments? On the question of the yeas and nays required to be spread on the journal there can be no reasonable ground for doubt. The journal is the record which the legislature keeps, and is required to keep, of its proceedings. Like all other records required by law to be kept, it imports verity. Taking into account the character of the body whose record it is,—a co-ordinate department of the government,—we hold that it imports absolute, indisputable verity. The constitution, then, requiring that the yeas and nays shall be matter of record, no other evidence can be received of this requirement, nor can its want be supplied by intendment. Of this fact the record [journal] must speak, and, if silent, the fact, in legal contemplation, does not exist." *State v. Buckley*, 54 Ala. 599.

In *Spangler v. Jacoby*, 14 Ill. 297, it is said: "In our opinion it is clearly competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether. The constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of a law, shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And, when a contest arises as to whether the act was thus passed, the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the speakers and the executive should furnish conclusive evidence of the passage of a law. The presumption indeed is that an act thus verified became a law pursuant to the requirements of the constitution, but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the law, for it will be intended that the proper entry was made on the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome, and the act must fall."

We could quote from many other authorities to the same effect, but it would not be profitable to do so. We conclude that the weight of authority is with the text and decisions we have quoted, and that, in a case like the one before us, where the constitution expressly requires, in the enactment of a statute, that certain facts shall be entered upon the journals, the courts will look behind the statute to the journals, and ascertain if such entry was made; and, if the journals fail to show affirmatively that such entry was made, the statute will be held void.

This conclusion is in opposition to the views expressed by our supreme court in *Blesing v. City of Galveston*, 42 Tex. 641, and to views of this court as expressed in *Usener v. State*, 8 Tex. App. 177. In both the cases named the conclusion seems to be that the courts will not look behind a statute which

upon its face is valid, which has been signed by the proper officers of each house, approved by the governor, and filed in the office of the secretary of state, to ascertain whether or not the statute was enacted in conformity with the requirements of the constitution, but will conclusively presume that all the requirements of the constitution with regard to the passage of the statute were observed and obeyed. In support of this view, in the *Blessing Case* but one authority is cited, that being *Miller v. State*, 3 Ohio St. 483, which opinion, as we have already observed, is not only *obiter*, but is at variance with the great weight of authority. In *Usener's Case*, *supra*, the *Blessing Case* is cited in support of the opinion; also *Pangborn v. Young*, 32 N. J. Law, 29; *State v. Swift*, 10 Nev. 176; *Sherman v. Story*, 30 Cal. 253; and *Miller v. State*, 3 Ohio St. 483. The opinion in the *Usener Case* is *obiter*, the court holding that in fact the provision of the constitution in question had been fully complied with. In neither the *Blessing* nor *Usener Case* is the distinction between a constitutional provision which expressly requires an entry of a fact concerning the passage of a statute to be entered upon the journals, and a provision which contains no such express requirement, discussed or noticed. In regard to the latter character of provision, these decisions are unquestionably correct, but with respect to provisions of the former character we cannot agree to the apparently unqualified, unlimited rule therein announced; nor do we believe that either of the courts delivering those opinions would have so held had the precise question now before us been called to their attention, or so presented as to demand thorough investigation. We are unwilling to adhere to and affirm the broad language of those opinions, although they are not only good authority themselves, but are supported by the decisions of other courts of high authority. We cannot approve the policy and wisdom of the doctrine they announce, because we believe it to be contrary to the spirit and genius of a constitutional government, and, as we have before said, dangerous to the rights and liberties of the people. It is the plainly expressed will of the people that each house of the legislature shall keep a journal, and in those journals *shall* be entered the fact of the proper authentication of the enactment of statutes. We regard this as a prudent and wise requirement, but, whether it be so or not, it is the mandate of the sovereign power of the state, and should, and in our opinion *must*, be obeyed before any bill can become a law. We hold, therefore, that we may and should look behind the enrolled act, to the journals of the houses, and inquire whether or not this provision of the constitution has been obeyed in the enactment of the statute. Finding that it has not been obeyed, we hold that the act of March 19, 1885, amendatory of article 358 of the Penal Code, never became a law, and is void. This being the case, these convictions must be set aside. Article 358 of the Penal Code is in no way affected by said act, but is still in full force and effect, and the punishment therein prescribed for the offense of which defendants have been convicted may, upon trials of these cases hereafter had, be meted out to these alleged offenders.

The judgments are reversed, and the causes are remanded for new trials.

SMITH v. STATE.¹

(Court of Appeals of Texas. November 17, 1886.)

1. BURGLARY—INDICTMENT.

Indictment for burglary need not allege the want of the owner's consent to the entry of the house.

2. SAME—CONJOINT OFFENSES—CONSTITUTIONAL LAW.

Note the opinion sustaining the constitutionality of article 712 of the Penal Code, which provides that "if a house be entered in such manner as that the entry comes

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit larceny or any other offense, he shall be punished for burglary, and also for whatever offense is so committed;" and approving the decision in *Howard's Case*, 8 Tex. App. 447, to the effect that when, besides burglary, another offense was committed in connection with it, separate prosecutions for each offense may be maintained.

3. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

A motion for new trial, unless it discloses proper diligence to secure on the trial the newly-discovered evidence upon which it is based, is properly overruled.

Appeal from district court, Hunt county.

The conviction in this case was for the burglary of the hide store-house of S. J. Dowling, in Hunt county, Texas, on the ninth day of April, 1886. A term of two years in the penitentiary was the punishment assessed against the appellant. The evidence affirmatively established the unlawful entry of the house by the defendant.

Montrose & Grubbs, for appellant, maintaining the converse of the doctrines announced in the opinion.

Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. Appellant's conviction in the lower court was had upon an indictment charging him with burglary. After conviction, he assailed the sufficiency of the indictment by a motion in arrest of judgment, upon the ground that there was no allegation negativing want of consent of the owner of the house to the burglarious entry. In *Brown v. State*, 7 Tex. App. 619, such allegation was said to be essential; but that case was expressly overruled on that point in *Sullivan v. State*, 13 Tex. App. 462; *Reed v. State*, 14 Tex. App. 662; *Mace v. State*, 9 Tex. App. 110; *Buntain v. State*, 15 Tex. App. 485; *Langford v. State*, 17 Tex. App. 445; *Black v. State*, 18 Tex. App. 124.

Appellant, in addition to his plea of not guilty, interposed a plea of former conviction and jeopardy, in that he had been tried, convicted, and punished for the theft perpetrated in connection with the burglary herein charged against him; that the transaction out of which the two offenses grew was one and the same, and that the state could carve and hold him liable for but one offense, growing out of a single transaction. It is a statutory provision that, "if a house be entered in such manner as that the entry comes within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit theft or any other offense, he shall be punished for burglary, and also for whatever offense is so committed." Pen. Code, art. 712. The contention is that this statute is unconstitutional in that it renders nugatory the provision against twice in jeopardy. An answer to this position might be found in the fact that this article of the Code was enacted by the legislature on the twelfth of February, 1858, long before the adoption of either of our last three state constitutions, and that said constitutions were adopted with reference to it as part of the law of the land. But we do not propose to go anew into a discussion of this question. It was thoroughly discussed in *Howard v. State*, 8 Tex. App. 447; and, though it was admitted in that case that the authorities were in conflict, it was held that burglary and theft, committed in one and the same transaction, could both be prosecuted and punished as separate offenses, though not as joint offenses. See, also, *Miller v. State*, 16 Tex. App. 417.

In *Ex parte Peters*, 2 McCrary, 403, 12 Fed. Rep. 461, it is said: "According to the great weight of authority, it may be regarded as settled that a person who breaks and enters a house with intent to steal therefrom, and actually steals, may be punished under separate indictments, for two offenses or one, at the election of the power prosecuting him. 1 Bish. Crim. Law, § 1062, and cases cited. The case of *Josslyn v. Com.*, 6 Metc. 236, is directly in point. See, also, *State v. Ridley*, 48, Iowa 370, and *Breese v. State*, 12 Ohio St. 146.

The opposite view was ably stated by Chief Justice WAITE, in his dissenting opinion in *Wilson v. State*, 24 Conn. 57, and his reasoning is so strong that, if it were a question of first impression, I should be inclined to adopt his opinion. Looking, however, to the adjudicated cases, I find the law to be very well settled against the position assumed by counsel for the petitioner." See same case reported in 12 Meyer, Fed. Dec. 2221.

No proper diligence was shown to obtain the newly-discovered testimony mentioned in the motion for a new trial, and it was not error to overrule it. Because there is no error in the conviction, the judgment is affirmed.

WARREN v. STATE.¹

(Court of Appeals of Texas. November 24, 1886.)

1. ASSAULT TO MURDER—AGGRAVATED ASSAULT—CHARGE OF THE COURT.

See the opinion for a charge of the court, on a trial for assault to murder, held erroneous as an instruction upon the weight of evidence, as a direction to find the defendant guilty at least of aggravated assault, as against the legal presumption of innocence, and as an invasion of the province of the jury. It was otherwise erroneous, because it declares that an assault with a knife is, without any qualification whatever, an aggravated assault, and leaves the jury no discretion but to find the defendant guilty of one or the other of the offenses named in the charge.

2. SAME—SELF-DEFENSE.

See the statement of the case for evidence held to demand of the trial court a correct charge upon the law of self-defense; and note the same for a charge upon self-defense held insufficient and erroneous. Note the same for a special charge on the subject, which, being a correct statement of the law, was erroneously refused.

Appeal from district court, Smith county.

The indictment charged an assault to murder one Brooks. The conviction was for an aggravated assault, and the penalty assessed was a fine of \$150.

The state proved, in substance, that the injured party, Brooks, was a tenant of the defendant. Of the two horses in Brooks' possession, the defendant furnished one, retaining a vendor's lien for the unpaid purchase money of the same. He held a chattel mortgage on the other horse in the possession of Brooks, to secure payment for supplies furnished. With the avowed purpose of reclaiming some meat furnished to Brooks, and resuming possession of the horse on which he held the vendor's lien, the defendant, with two others, went to Brooks' house on the morning of the difficulty. In reply to his demand for the meat, Brooks permitted defendant to search his house for it. Failing to find the meat, defendant proceeded to curse and abuse Brooks, demanded possession of the horse, and asked where it could be found. Brooks pointed to a stable in a small inclosure. Defendant went into the stable, and secured the horse. Returning from the stable with the horse, he met Brooks at the gate, on the inside of the inclosure, Brooks being on his way to the stable to secure the door against the escape of his other horse. Defendant said nothing to Brooks as they passed each other, but, when Brooks got beyond him, defendant suddenly turned, caught Brooks by the shoulder with one hand, and jerked him around, and, with his other hand, plunged a knife into his side. Brooks and his several witnesses denied that Brooks made any threats or demonstrations against the defendant, or attempted to strike him with a pole, and affirmed that both of Brooks' arms were hanging at his side when he was stabbed.

It was shown for the defense that defendant went to Brooks' house to obtain, if possible, peaceable possession of the horse he had furnished Brooks. While defendant was in the house looking for the meat, the wife of Brooks was heard to ask him why he did not kill defendant, instead of permitting him

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

to search his house, to which Brooks replied that he would "get" the defendant when he went to the stable after the horse. Subsequently he followed the defendant to the stable, securing a heavy pole by the way. As the defendant, leading the horse, stepped out of the stable, Brooks drew the pole back, and attempted to strike defendant with it, when defendant cut him in the side. Brooks did not object to the defendant taking the horse, but pointed out where he could be found. A physician testified that he examined the cut on Brooks' side. It was impossible that Brooks's arm was hanging at his side, as stated by witnesses for the state, at the time he was cut. Had his arm been down, the knife would have cut it. It must have been held up or extended at the time the cut was made.

The charge of the court upon the question of self-defense, referred to in the first head-note of this report, reads as follows: "The defendant had a right to defend himself against any deadly assault upon him by the witness Brooks, if such took place under the following circumstances: (1) It must reasonably appear by the acts, or by words coupled with the acts, of the witness Brooks, that it was the purpose and intent of such person to make a deadly assault upon said defendant. (2) The killing or the infliction of the injury must take place while the witness Brooks was in the act of committing an assault, or after some act done by the said Brooks showing evidently an intent to commit such offense; so that if, at the time the defendant cut and stabbed the witness Brooks, said Brooks was attempting to make a deadly assault upon the defendant, such cutting would be in self-defense; or if, at the time, it reasonably appeared to the mind of the defendant by the acts, or by the words coupled with the acts, of said Brooks, that it was his intention to make a deadly assault upon the defendant, and the defendant, to prevent the said assault, cut and stabbed the witness Brooks, such act on the part of defendant would be in his own self-defense, and you will acquit. But, gentlemen, if the proof shows that the defendant held a mortgage or lien on the horses of the witness Brooks, and he, the defendant, went to the house and lot of the witness Brooks to take said horses, the witness Brooks had the right to use all means necessary to prevent said defendant from taking said horses, even to the use of force by violence; and, if he was resisting said defendant by opposing force necessary to prevent the said defendant from taking said horses from the lot, and if the defendant, in order to destroy the resistance offered by the witness Brooks, and to carry said horses off, the defendant drew a knife, and cut the witness Brooks, he cannot plead such cutting was in his own self-defense; and this right of said witness Brooks to resist the said defendant taking the horses home with him, as long as the property was on his premises, and though the defendant may have had the horse by the bridle, leading him through the lot, the witness Brooks might oppose such taking by such necessary force to prevent the taking of said horses; and, if the defendant cut and stabbed the defendant [witness Brooks?] while offering such resistance, such cutting would not be in his self-defense, though such resistance was in the nature of a threatened assault by Brooks upon the defendant. A party has the right to defend the taking of his property even to death, but he must resort to all other means at hand to prevent the taking of property before he can resort to violent means."

The special charge referred to in the second head-note of this report reads as follows: "Gentlemen of the jury, you are further charged that, although the defendant went upon the premises of Joe Brooks, yet if he went upon the said premises without the intent to injure the said Brooks or his property, and with the consent of the said Brooks, then he would not be a trespasser; and if, after he went upon the premises, you believe from the evidence that defendant cut said Brooks, but also believe that Joe Brooks was attacking defendant at the time, or had done some act showing an immediate intent on his part, to attack defendant, and that such attack or the acts of defendant

[Brooks?] done at the time produced in defendant a reasonable expectation or fear of death or some serious bodily injury, then defendant would be justified in cutting said Brooks, and it would make no difference whether such danger was real or imaginary, if it had the appearance to defendant of being real, and if he acted on such belief or apparent danger."

Hogg & Marsh, for appellant, maintaining the principles of law, announced in the opinion, and the insufficiency of the evidence to support the conviction.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. 1. After charging the law relating to an assault with intent to murder, the court charged as follows: "The jury are further charged, however, if they believe from the evidence that the defendant, Warren, did, at or about the time and place alleged in the indictment, assault the said Brooks with a knife, under circumstances not amounting to an intent to murder as hereinbefore explained, you will, if you so believe from the evidence, find the defendant guilty of an aggravated assault, and assess the punishment therefor." This charge was promptly excepted to at the time of the trial. We are of the opinion that said charge is erroneous. As was said by this court in passing upon a similar charge in *Hayne v. State*, 2 Tex. App. 84, "it assumes, against the legal presumption of innocence in all criminal cases, that the defendant must be guilty of one or the other offenses named, * * * and it invades the province of the jury, and instructs them to find him guilty, at any rate, of the lesser grade of offense, and was, in that respect, a direct violation of that portion of the statute which prohibits the judge from expressing any opinion as to the weight of evidence." Furthermore, this charge does not correctly state the law. An assault with a knife is not necessarily an aggravated assault, and yet this charge declares such an assault, without any qualification whatever, to be an aggravated assault, and leaves the jury no discretion but to find the defendant guilty of one or the other of the offenses named in the charge.

2. In charging upon self-defense, the court defines the right to protection against a *deadly* assault. What is meant by a *deadly* assault is nowhere in the charge explained to the jury. Nor do we find this character of assault named in the statute prescribing the rules governing self-defense. There was evidence calling for a charge upon self-defense, and the law of that issue, as laid down by the statute and the decisions thereon, should have been fully explained to the jury. This duty, in our opinion, was not discharged by the court, and the charge given upon such issue was not the correct law. Penal Code, arts. 570, 572-574; *Short v. State*, 15 Tex. App. 370; *Cartwright v. State*, 16 Tex. App. 473; *Hunnicutt v. State*, 20 Tex. App. 632. The charge of the court upon self-defense was promptly excepted to by defendant at the time of the trial.

3. The third special charge requested by defendant, and refused, was, we think, correct, and was applicable to the facts of the case. It was error to refuse it, and the error was promptly excepted to by the defendant.

Because the court erred in its charge, and in refusing special charge No. 3 requested by defendant, the judgment is reversed, and the cause is remanded.

DOWNES v. STATE.¹

(Court of Appeals of Texas. November 24, 1886.)

1. TAXES—ASSESSMENT—OWNERSHIP OF PROPERTY—NATIONAL BANK.

Article 113 of the Penal Code, which requires the tax-payer to render his property for assessment, applies, not only to the property actually owned by him, but

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

to all property held by him in a fiduciary capacity, and includes national bank officials with respect to the shares, stocks, etc., owned by the individuals of the corporation.

2. CRIMINAL PRACTICE—APPEAL.

The submission of an appeal upon an agreement in writing, signed by the counsel for each party, expressly waiving all but a certain question or questions in the case, is binding upon the parties as to all questions so waived, and this court declines to grant a rehearing to review any question so waived.

Appeal from county court, Bell county.

The opinion discloses the case. The penalty assessed was a fine of \$1,000.

Harris & Saunders, for the appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. By agreement of the parties filed herein, the only question in this case which we are called upon to determine is whether it is an offense for the president of a national bank, when called on by an assessor of taxes to make out and render to such assessor a list of the taxable property owned by the bank, and a sworn statement showing the number and amount of shares of stock of such bank, and the names of the owners of such shares of stock, and the number and amount of stock owned by each shareholder, to refuse or neglect to make out and render to said assessor such list and statement. We must answer this question in the affirmative. Article 113 of the Penal Code, in our opinion, is broad enough to embrace the case. It is contended by defendant's counsel that said article is only applicable to the individual owner of taxable property, and cannot be applied to persons who hold or control taxable property in a fiduciary capacity, as an agent, trustee, etc. A literal construction of the article would, perhaps, justify this position. But when the purpose of the article is considered, in connection with the tax laws of the state, it is evident to our minds that the intention of the law is that not only the owner of the taxable property, but the person who may hold or control or manage the same as the agent or representative of the owner, is amenable to said article. In support of this view we refer to Rev. St. arts. 4675, 4679, 4680; Act March 31, 1885, (Gen. Laws 19 Leg., Reg. Sess., pp. 105, 106, § 2a.) The object of this penal law is to secure a full and fair rendition of all taxable property in the state, and the case of the defendant falls fairly within the plain import and intent of the provision, though it may not come within the exact letter of it. We hold, therefore, that the question presented to us must be determined in favor of the state, and the judgment is affirmed.

ON MOTION FOR REHEARING.

WILLSON, J. This case was submitted to us upon a single question, by an agreement in writing signed by counsel for both parties, and by said agreement all other questions that might arise in the case were expressly waived. We determined the question thus submitted to us against the appellant, and he now seeks, in this motion for a rehearing, to present another question than that stated in said agreement decided by us,—a question which was not even alluded to by appellant's counsel on the original hearing of the case; a question which does not involve the correctness of our decision of the law as it existed at the time of the trial, but which presents the issue as to what was the law at the time the alleged offense was committed. We decline to consider and determine this question, in view of the aforesaid agreement of the parties, and we therefore overrule the motion for rehearing.

CAMPBELL and others v. HILDEBRANDT and others.

(*Supreme Court of Texas. January 13, 1887.*)

1. ASSIGNMENT—PARTIAL—VALIDITY.

An order for \$600, in favor of M. & Co., drawn by a contractor having a claim against a county for \$898, directed "to the county commissioners," payable out

of the amount due him for putting blinds in the court-house, and containing a recital that a part of his claim, sufficient to pay the amount of his order, was thereby transferred to M. & Co. for a valuable consideration, is a valid assignment, and operates to make the assignees the owners of the part of the debt so assigned, at and from the date of the order.¹

2. SAME—DESIGNATION OF FUND.

But a simple order upon the county judge for \$150 is not a valid assignment *pro tanto*, although supported by a valuable consideration, there being nothing in the order to show that it was made payable out of any particular funds.¹

3. MECHANICS' LIENS—SUBCONTRACTOR—PRIOR ASSIGNEES.

One who, having furnished material to a contractor engaged on work for a county, delivers his attested account to the county judge, and notifies the contractor that he has done so, does not thereby acquire a lien upon the money due the contractor for the work, and he will be postponed, in the distribution of the fund, to partial assignees of the contractor's claim, who took their respective assignments prior to the date of the delivery of his account.

4. CONTRACT—PERFORMANCE—WAIVER—ESTOPPEL.

An instruction in an action against a county by a contractor to recover a balance claimed to be due under a contract for putting inside blinds in the court-house, that, if the jury found that the contractor had done the work for the county, and the county had accepted the work, or had gone into possession of and had used the blinds, they should find for the plaintiff for the reasonable value of the blinds, although they should find that the contract had not been complied with, is correct as a principle of law, and is warranted by the evidence, where it appears that the blinds remained in the court-house, were used, and were not rejected by any formal order of the commissioners' court until after the contractor had sold his claim to innocent *bona fide* purchasers.

5. APPEAL—CONFLICT OF EVIDENCE.

In an action to recover a balance claimed to be due for work done under a contract, where the evidence is conflicting as to whether the contract was complied with or not, that question is for the jury, and their verdict upon the point is conclusive upon the appellate court.

Appeal from district court, Harris county.

Mitchell & Co. and *Mr. Dumble*, for Campbell and others, appellants. *Frank S. Burke*, for Hildebrandt and others, appellees.

GAINES, J. On the seventeenth day of September, 1884, P. H. Campbell entered into a contract with Harris county, through the proper authorities, to put inside blinds in the court-house of the county. The price agreed upon was \$1,398. He claimed to have completed his contract, which the county denied on the ground that the blinds put in by him were not in accordance with the terms of the agreement. During the progress of the work the county paid him \$500, but the commissioners' court finally rejected his claim for the balance of \$898. In October, 1884, he gave an order upon the county judge of the county in favor of one De Waal for \$150, which was subsequently transferred to Herman Keller. On the ninth of December, 1884, Campbell also drew an order for \$600 in favor of Mitchell & Co., directed "to the county commissioners of Harris county," payable out of the amount due him for putting blinds in the court-house, and in the same instrument expressly transferred to the payees, for a valuable consideration, a sufficient amount of his claim against the county to pay said sum. On the third day of January, 1885, he gave a like order and transfer to George Dumble for \$150. On the eleventh day of March, 1885, Hildebrandt & Co., having an account against Campbell for the blinds furnished him by them, and which he had put in the

¹ At law, an order drawn by a creditor on his debtor in favor of a third person will not give the third person a right of action against the debtor, unless he accepts the order. *Brokaw v. Brokaw's Ex'rs*, (N. J.) 4 Atl. Rep. 68; *Poole v. Carhart*, (Iowa,) 32 N. W. Rep. —; *Lewis v. Lawrence*, (Minn.) 14 N. W. Rep. 587. But equity will treat an unaccepted order for payment out of a specific fund as a valid assignment of the debt, if the order has the support of a valuable consideration, but not if it is without such support. *Brokaw v. Brokaw's Ex'rs*, (N. J.) 4 Atl. Rep. 68; *Kirtland v. Moore*, (N. J.) 2 Atl. Rep. 269; *Conselyea v. Blanchard*, (N. Y.) 8 N. E. Rep. 490.

court-house under his contract, delivered an attested copy to the county judge, in order to secure the benefit of the provision of article 3176 of the Revised Statutes. A notice of the presentation of this account was given to the original contractor by the authorities, and he gave no notice that it was disputed by him. Campbell brought suit against Harris county, for the use of himself and of Mitchell & Co. and of Dumble, and made Hildebrandt & Co. parties defendant. Keller intervened, setting up his claim to a part of the sum sued for. The case was submitted to a jury, and resulted in a verdict and judgment against the county for the balance of the contract price for putting in the blinds, in favor of Hildebrandt & Co. for the amount of their claims, and in favor of Mitchell & Co. and Dumble for the remainder of the judgment against the county, after satisfying Hildebrandt & Co.'s debt, to be divided between them in proportion to the amounts of their respective claims, and that Keller take nothing by his plea of intervention. From this judgment all the parties except Hildebrandt & Co. have appealed to this court.

We think the county of Harris has nothing to complain of in the proceedings of the court below. The evidence was conflicting upon the question whether the contract was complied with or not; and this court cannot undertake to say, from inspection of the written agreement, under the testimony adduced, that it was not. It was a question for the jury, and one upon which their verdict is decisive. But it is assigned, in substance, that the court erred in charging the jury that, if they found that the contract had not been complied with, yet if they found that Campbell had done the work for the county, and the county had accepted the work, or gone into possession of and had used the blinds, then they should find for plaintiff for the reasonable value of the blinds. The charge, abstractly considered, is certainly correct; and we think it was warranted by the evidence. It does not appear when the work was finished, but plaintiff testified it was completed according to contract. W. C. Anders, who was county judge during 1885, testified that the orders were presented, and were rejected by him, or by the commissioners' court, because the work was not then completed. The last order was given in January of that year, and it may be inferred from this testimony that the blinds were then unfinished. But the work was evidently begun long before; and if the blinds were a foot too short, as is claimed, the authorities of the county must have known it. Yet we have no evidence of any notice to plaintiff that they would be rejected, except from the witness Ellis, who testified he told him they would not be received, but whose authority to do so does not appear, and from E. B. Hamblin, formerly county judge, who stated that he told Campbell the blinds would not be received when it was discovered they were too short, but that he went out of office before anything was done about it. The blinds remained in the court-house, and were used, and not rejected by any formal order of the commissioners' court, until June, 1885. We think this evidence amply warranted the charge of which complaint has been made by the county. We find no error in the judgment prejudicial to the defendant county.

But, as between the conflicting claimants of the fund, some serious questions arise. Did Mitchell & Co. and Dumble acquire any right to any part of this fund by their respective orders and transfers from plaintiff Campbell? Did De Waal, who assigned to Keller, acquire any? And, if so, are these claimants to be postponed until Hildebrandt & Co. are satisfied? It is well settled that at common law a chose in action cannot be assigned in part, so as to enable the assignee of such part to bring suit upon it. The reason of the rule is that it is unjust to the debtor to permit the creditor to split up the debt, and thereby subject him to more than one suit for its collection. Following the analogy of this rule, there are authorities which hold that such a transfer does not even convey an interest in equity, unless it be assented to by the debtor himself. The leading case supporting this proposition seems to

be *Mandeville v. Welch*, 5 Wheat. 277, in which this doctrine was enunciated, but which was a suit at law, and consequently did not involve the question. Since all the claimants of a fund or debt may be made parties to a suit in equity, the reason of the rule does not apply to cases of equitable cognizance; and when one has agreed, for a valuable consideration, that another shall have a part of a debt due to him from a third party, and has accordingly made a transfer of such part, justice manifestly requires that the agreement should be enforced, when it can be done without prejudice to the debtor. Accordingly, it now seems to be held by the great weight of authority that an assignment of a part of a chose in action for a valuable consideration is good in equity, and that it may be made either by direct transfer, or by an order drawn upon the particular fund. *Goldman v. Blum*, 58 Tex. 630; *Caldwell v. Hartsupee*, 70 Pa. St. 74; *Hall v. Buffalo*, 2 Abb. Dec. 301; *Brill v. Tuttle*, 81 N. Y. 454; *Moody v. Kyle*, 34 Miss. 506; *Fteld v. Mayor of New York*, 6 N. Y. 179; *Burn v. Carvalho*, 4 Mylne & C. 690; *Row v. Dawson*, 1 Ves. Sr. 331; *Ex parte Smyth*, 2 Swanst. 392. In support of this doctrine we have the very decided opinion of recent text writers of very high authority. See 1 Daniel, Neg. Inst. § 23, p. 25; 3 Pom. Eq. 291, § 1280, and note 1 on page 292. Mr. Parsons in his work on Bills and Notes seems to admit that this is the rule in courts of equity. 1 Pars. Bills & N. 334, 335. Such is also the opinion of Judge STORY, who delivered the opinion of the court in *Mandeville v. Welch*, *supra*. 1 Story, Eq. Jur. § 1144.

Both the order of Mitchell & Co. and that of Dumble contained an express transfer of so much of the fund from the county as was required to pay them, respectively; and it follows from what we have said that we are of opinion they became the owners, at the dates of the orders, respectively, of the respective parts of the debt so assigned.

The case of the intervenor, Keller, is different. The draft transferred to him by De Waal is supported by a consideration, but is not expressly drawn upon the fund in question. An order expressly for part of a particular debt is a transfer of such portion, because it shows a manifest intention to assign to the payee the sum so ordered. 1 Daniel, Neg. Inst. § 23. But this cannot be said when there is nothing in the instrument to show that it is made payable out of any particular fund, and it is therefore held that such an order is not an assignment. *Phillips v. Stagg*, 2 Edw. Ch. 108; *Harrison v. Willamson*, Id. 430; *Winter v. Drury*, 5 N. Y. 525. See, also, *Brill v. Tuttle*, *supra*. It is not necessary for us to decide whether or not the intention of the parties to make the order payable out of the debt to become due from the county could be shown by parol evidence, and by the circumstances of the case. It is sufficient to say that it was not shown on the trial below, and that the court did not err in instructing the jury to find against intervenor, Keller. It may be remarked, however, that Campbell testified that, after he gave the order to De Waal, he paid them \$25 upon it, which would seem inconsistent with the idea that an assignment was intended.

We have seen that the debt of defendants Hildebrandt & Co. is a claim for material furnished to Campbell to enable him to complete his contract with the county; that the account was attested and presented as required by the statute then in force, and was admitted to be just by Campbell. But in *Horan v. Frank*, 51 Tex. 401, and *Loonie v. Frank*, Id. 406, it is held that this statute does not give the subcontractor a lien upon the property, but a right to fix a liability from the owner to him for his debt, not, however, to exceed the amount then due to the original contractors. Mr. Pomeroy says, when a part of a debt is assigned, the assignee acquires a right of action in equity against the debtor, and not only a lien upon the fund, but a property in the fund itself. 3 Pom. Eq. § 1280, p. 292. There are cases not going to this extent, but we think it the better doctrine, and well supported by authority. No reason is seen why one having a right to a part of a debt should not be

permitted, in courts of equitable cognizance, to bring in all the parties at interest, and force the payment of the obligation, and the distribution of the proceeds among those entitled to it. The assignments were made to Mitchell & Co. and Dumble, and the county had notice of them before Hildebrandt & Co. filed their account. It is a necessary deduction, therefore, from the principles just laid down, that the latter have no claim against the county until the assignees above named have been fully paid. If, at the time they sought to fix the liability of Harris county, it owed Mitchell & Co. and Dumble the amount of their respective claims, it did not owe the same money to the original contractor; in other words, it was entitled to a credit on its debt to him to the amount of their respective claims. Hildebrandt & Co. were entitled to a judgment against their co-defendant, the county, for the balance that remained after paying the claims of Mitchell & Co. and Dumble, respectively; and because they had a judgment for payment of their claim in full the judgment will be reversed. It is to be remarked, further, that the parties who established claims upon the fund were entitled to be paid therefrom in order of the respective dates at which their rights were respectively fixed. The equitable rule applies that the first in time is the first in right.

The cases of *Lindsay v. Price*, 33 Tex. 280, and *Frank v. Kaigler*, 36 Tex. 305, have been considered in determining the questions we have had before us, and we have not found the points there decided in conflict with the propositions laid down in this opinion. There are, however, doctrines announced in the argument of these cases to which we do not assent.

Because of the error we have pointed out, the judgment is reversed, and the cause remanded.

ZADEK v. DIXON, for Use of BAUM.

(Supreme Court of Texas. November 12, 1886.)

1. JUDGMENT—RES ADJUDICATA—CLAIM OF PROPERTY LEVIED ON—APPEAL.

Where the trial court quashed the affidavit of a claimant filed for the purpose of trying a right to property which had been levied on, and the claimant took no appeal from the order, the judgment upon the sufficiency of the affidavit is *res adjudicata*, and cannot subsequently be reopened.

2. PLEADING—AMENDMENT—AFFIDAVIT—BOND.

Where a claimant to property proposed to amend her former affidavit, and substitute a new one in its stead, claiming the goods levied on as her own property, in contradiction of her former affidavit, in which she claimed them as the partnership property of herself and another, she will not be permitted to file such affidavit, whether she has the right to amend or not, without the execution of a bond as required by the statute.

Appeal from Navarro county.

In 1875, A. J. Dixon recovered a judgment in the Navarro district court against I. Baum (defendant in error) and A. Zadek, plaintiff in error. An execution was issued upon the judgment in favor of Dixon against Baum and Zadek, and they sued out an injunction in that court to restrain the levy and enforcement of the writ. On November 8, 1877, that cause was tried, and resulted in a judgment dissolving the injunction, and a judgment in favor of said A. J. Dixon, the plaintiff in the execution, which had been enjoined against the said I. Baum and A. Zadek as principals, and their sureties in the injunction bond. I. Baum, defendant in error, claims that he paid off this judgment of November 8, 1877. On the first of August, 1879, there was issued out of the said district court, on this judgment of November 8, 1877, aforesaid, an execution which recited the said judgment of November 8, 1877; that it was rendered in favor of said Dixon against said Baum and Zadek as principals, and the sureties (naming them) on the injunction bond, etc.; and further recited also that said judgment had been paid in full by said Baum, "one of the said defendants," and further recited that said Baum had

applied for an execution, for one-half of the amount paid, against the said Zadek, etc., directing one-half of said amount (naming it) to be made out of the property of Zadek. This last above-mentioned execution was levied on certain personal property, August 2, 1879. On August 4, 1879, Mrs. Bertha Caspar filed her affidavit and bond for the trial of the right of property, and it was delivered over to her. On September 22, 1879, I. Baum, for whose benefit the writ had issued, demurred to claimant's affidavit, and moved to quash it. This motion was, on May 11, 1880, heard and sustained. But the district court, although it had sustained the motion and quashed the affidavit, refused to enter judgment against the sureties on the claim-bond. From this judgment, I. Baum, the plaintiff in the execution, appealed. The cause was decided by the commissioners of appeals upon the one question presented, to-wit: Was it error for the district judge to refuse to enter judgment upon the bond against the sureties, he having dissolved the affidavit? This question being determined in the affirmative, the case was reversed, and remanded to the district court for a new trial. The claimant, Mrs. Caspar, filed a motion to set aside the judgment of May 11, 1880, quashing her affidavit. This motion was denied, and claimant then tendered an amended affidavit, which was stricken out on exception by appellee. She then answered that the property levied upon is not subject to the levy, because, at the time and before said levy, it belonged to her, and was not the property of Zadek. The cause was submitted to the judge without a jury, who held that the only issue that could be raised in the case was the value of the goods levied upon, and, so holding, found for the plaintiff I. Baum, and rendered judgment accordingly against claimants, and their sureties on the claim-bond, from which judgment this writ of error is prosecuted.

Frost, Barry & Lee, for appellant. *Simpkins & Neblett*, for appellee.

WILLIE, C. J. The original claim was filed in this case by A. Zadek & Co., a firm composed of A. Zadek and Mrs. Bertha Caspar. In accordance with a claim made, the sureties on the claim-bond obligated themselves, in case A. Zadek & Co. failed to establish their right to the property levied on, to return the same to the sheriff, and to pay to the plaintiff in execution all damages that might be awarded against said claimants. The district court, on the first trial, sustained a motion to quash the affidavit of claim filed by A. Zadek & Co., but refused to enter judgment against the sureties upon the bond. This judgment was a final disposition of these two questions, unless set aside below, or reversed by this court. The plaintiff appealed from so much of the judgment as refused a recovery against the sureties; and this court sustained that appeal, but remanded the cause for want of such proof, as to the value of the property in contest, as would authorize the appropriate judgment against the sureties upon the bond. The claimants did not appeal from the order quashing the affidavit, or assign errors thereon in the appeal taken by the plaintiff. The judgment below upon the sufficiency of the affidavit remained, therefore, in full force. The decision upon the question was *res adjudicata*, and it could not be subsequently reopened. The court, therefore, properly refused to reconsider its previous action setting aside the affidavit.

Mrs. Caspar then proposed to amend her former affidavit, and substitute a new one in its stead, claiming the goods levied on as her own property, in contradiction of her former affidavit, in which she claimed them as the partnership property of herself and Zadek. Without pausing to pass upon the right of a claimant to amend an affidavit in any case, it is sufficient to say that the affidavit proposed to be filed was not, taken in connection with the bond, sufficient to reinstate her in the cause as claimant. To occupy that position one must not only file an affidavit, but must accompany it with the bond prescribed by statute. The liability of a surety upon a claim-bond attaches only when the claimant fails to establish his claim to the property, and

not when some other person fails so to do. These sureties obligated themselves to respond in case Zadek & Co. did not establish that the goods levied on were their partnership property. They were not responsible for any one else's default in establishing title to the goods, and could not be liable if Mrs. Caspar did not sustain her individual claim to the property. The rights of the sureties were *strictissimi juris*, and, having undertaken to answer for the title of one claimant, they cannot be made responsible for another and different claim. Mrs. Caspar's claim not having been accompanied by a proper bond, the court, for this reason, if for no other, properly refused to allow it filed. The claimants were then in the same condition as if they had never set up any claim whatever to the property, excepting their liability upon the bond. There was no question left as to the title to the goods, and nobody left to contest it. There was therefore no room for an intervenor to come in and make the contest, or to attack the judgment or execution under which the goods were seized. Had the court allowed the appellants, either as claimants or intervenors, to make such a contract, or assail the execution, they would have enjoyed all the privileges of claimants in a strictly statutory proceeding, without complying with a single statutory requirement.

The only question left open was the value of the property, and upon this the appellants were heard. They were entitled to be heard no further, and the court did not err in refusing to allow them the privilege of raising any other issues in the case.

There is no error in the judgment, and it is affirmed.

MELLINGER and Wife v. CITY OF HOUSTON.

(Supreme Court of Texas. January 18, 1887.)

1. MUNICIPAL CORPORATIONS—TAXES—STATUTE OF LIMITATIONS RUNS AGAINST.

The statute of limitations will run against a municipal corporation, to operate as a bar to the collection of city taxes, when the defense thereunder is not expressly taken away by statute.

2. TAXES—COLLECTION—SP. SESS. TEX. 1879, GEN. LAWS, PAGE 15, APPLIES TO PURCHASER OF LAND—UNPAID TAXES—LIMITATION MATURED PRIOR TO.

The Texas act of July 4, 1879, (Sp. Sess. Tex. 1879, Gen. Laws, p. 15,) providing "that no delinquent tax-payer shall have the right to plead in any court, or in any manner rely upon, any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the state or any county, city, or town," applies to a purchaser of property incumbered with a lien for taxes, and such act does not avail to take away the defense of the statute of limitations to taxes already barred by it at the date of its enactment, but does so in those cases where such bar had not matured at that date.¹

3. CONSTITUTIONAL LAW—CONST. TEX. ART. 1, § 16—RIGHTS OTHER THAN THOSE TO PROPERTY.

Const. Tex. art. 1, § 16, providing that "no bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts, shall be made," was intended to protect every right, although not strictly a right to property, which might accrue under existing laws prior to the passage of any law, which, if permitted a retroactive effect, would take away such rights.

Appeal from Harris county.

Action to recover tax due. Judgment for City of Houston, plaintiff. Defendants appeal.

E. P. Turner, for plaintiffs in error. *S. Taliaferro*, for defendant in error.

STAYTON, J. This action was brought to recover taxes due to the city of Houston on lots owned by the plaintiffs in error. The petition was filed on October 20, 1884, and sought a recovery of taxes levied for the years 1875, 1876, 1877, 1878, 1879, and 1880. The defendants purchased the property taxed in the year 1881. Under the charter of the city of Houston the recov-

¹See *County of McCracken v. Mercantile Trust Co.*, (Ky.) 1 S. W. Rep. 588, and note.

ery of taxes on real property is authorized by suit, and the taxes constitute a lien on the property taxed. In defense of the action the defendants pleaded the statutes of limitation of two and four years. The cause was tried without a jury, and the court below held that limitation did not run against the city. An assignment of error questions the correctness of that ruling.

In *Galveston v. Menard*, 23 Tex. 408, it was held that the statute of limitations could run against a municipal corporation, and that by adverse possession a claimant might acquire title to land which constituted a part of a public street. In *Houston & T. C. Ry. Co. v. Travis Co.*, 4 Tex. Law Rev. 22, it was held that limitation would run against a county. The same ruling has been made in many cases in reference to rights and property held by municipal corporations for public use, or in trust for public purposes. *City of Wheeling v. Campbell*, 12 W. Va. 44; *Evans v. Erie Co.*, 66 Pa. St. 228; *School Directors v. Goerges*, 50 Mo. 195; *Lessee of Cincinnati v. First Presbyterian Church*, 8 Ohio, 310; *City of Cincinnati v. Evans*, 5 Ohio St. 594; *Knight v. Heaton*, 22 Vt. 482; *Varick v. Mayor, etc., of New York*, 4 Johns. Ch. 54; *Town of Litchfield v. Wilmot*, 2 Root, 288; *Armstrong v. Dalton*, 4 Dev. 570; *Rowan's Ex'rs v. Portland*, 8 B. Mon. 259; *Dudley v. Trustees of Frankfort*, 12 B. Mon. 617; *Clements v. Anderson*, 46 Miss. 597; *Peoria v. Johnston*, 56 Ill. 51; *City of Pella v. Scholte*, 24 Iowa, 293.

In the case of *City of Burlington v. Burlington & M. R. Co.*, 41 Iowa, 140, it was held that the statute of limitations would operate to bar a recovery of taxes levied by a municipal corporation. In disposing of the case it was said: "The right of the city to maintain this action can only be supported on the ground that the taxes are debts,—property held by it in its proprietary character. It appears in this action in that character, claiming to recover on the ground that the defendant is its debtor upon an obligation created by the assessment and levy of the taxes. In the debt thus created it has a right of property in its proprietary character."

In *City of St. Louis v. Neuman*, 45 Mo. 138, it was held that the city was the substantial plaintiff, and that an action to recover a special tax levied for street improvement was barred by the statute of limitations, there being in force in that state no statute exempting municipal corporations from the operation of such statutes.

In the case of *City of Jefferson v. Whipple*, 71 Mo. 521, an action was brought by the city to recover taxes due, and to enforce a lien against the taxed property, and it was held that as to the city the action was barred by the statute of limitations. It appears from the opinion in that case that the city held, under the statute, no lien for taxes; but a lien for municipal taxes was given to the state, and that under the terms of the statute it might by suit enforce the lien. In an action by the state to enforce the lien it was held that limitation would not run; but this difference between an action by the state and one by the municipality to which the tax was due, was not based on the fact that in the action by the state a lien might be enforced, while this could not be done by the city; but was based on the fact that, as against a state, limitation does not run unless permitted by statute, while, as against a municipal corporation, it will run unless restrained by statute. This is evident from the opinion, which declares that "the statute cannot be pleaded to an action brought by the state for taxes, whether state and county, or to enforce a lien for delinquent city taxes. In an ordinary suit between the city and the individual against whom the taxes are assessed, the plea of the statute is a good defense. This presents an anomaly. The statute can be pleaded against the city, while in an action by the state to enforce the lien for the same taxes the statute is not a bar to the action. This seems to be the condition in which the legislature has left the subject, and it is not the province of this court to bring order and harmony out of this confusion and discord."

We see no real ground of distinction on which the operation of the statutes of limitation may be denied when the collection of municipal taxes is sought, and still recognized in other cases in which the subject-matter of litigation, held as a public trust or for public use, as directly and materially may affect the public welfare as does the collection of taxes. The general statutes of limitation do not exempt municipal corporations from their operation, and the courts have no power to do so upon mere grounds of expediency, or to avoid a seeming hardship.

The only inquiry remaining is as to the effect to be given to the sixteenth section of the act of July 4, 1879, (Gen. Laws Sp. Sess. 1879, p. 15.) That section provides that "no delinquent tax-payer shall have the right to plead in any court, or in any manner rely upon, any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the state, or any county, city, or town." The manifest purpose of this statute was to deny to every person the right to defeat the collection of taxes through a plea of the statute of limitation, and it shows that such a statute was deemed necessary by the legislature to withdraw this right from the person indebted for taxes even to the state. It would seem that one who has purchased property incumbered with a lien for taxes should be deemed, as to such taxes, a delinquent tax-payer. Such a purchaser takes the property charged with the lien, and he cannot interpose any defense which his vendor might not had he continued to be the owner. It appears from the record that the taxes sued for were due at the end of the year for which they were levied; and the fourth subdivision of article 3203, Rev. St., is applicable to an action such as this, and fixes the period of limitation at two years. Under this the taxes due for the years 1875 and 1876 were barred at the time the act of July 4, 1879, was passed, but the other taxes claimed were not.

In the absence of constitutional restrictions upon the subject, it is almost universally accepted as a sound rule of construction that a statute shall have only a prospective operation, unless its terms show clearly a legislative intention that it shall have a retroactive effect. There is nothing in the statute before us to evidence the intention of the legislature to give a strictly retroactive effect to the statute under consideration, and it must be held to be a valid law, governing in all actions brought to recover taxes after its passage, against which some valid defense did not exist at the time it took effect. It is true that the statute does not in terms restrict its operation to such actions as might be founded on causes of action not barred by laws in force at the time of its passage, and that its broad and general language might make it applicable to all actions thereafter brought, even upon causes of action then barred; but, if the statute was in terms such as to require such a construction, we are of the opinion that the constitution of this state forbids such legislation.

There has been much controversy as to whether a statute giving a remedy for a debt barred by the statutes of limitation was not in violation of that part of the fourteenth amendment to the constitution of the United States which declares that no state shall "deprive any person of life, liberty, or property without due process of law," or in violation of equivalent constitutional provisions found in the constitutions of most of the states of this Union. That question was considered by the supreme court of the United States in the recent case of *Campbell v. Holt*, 6 Sup. Ct. Rep. 209, which arose under the forty-third section of article 12 of the constitution of this state, framed in 1868, which declared that the statutes of limitation should be considered as suspended from the twenty-eighth of January, 1861, until the acceptance of that constitution by the United States congress. In that case it was "held that in an action to recover real or personal property, when the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, that such act deprives the party of

his property without due process of law. The reason is that, by the law in existence before the repealing act, the property has become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law." The court, however, declared "that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on a very different ground," and held that the constitutional provision then under consideration, in so far as it removed the bar of the statute as to matters of debt, was valid.

It may be conceded under that decision—and we do not wish to be understood as questioning its correctness—that the statute under consideration, if required to be construed as a retroactive law, would not vitiate the provision of the constitution of this state, which declares that "no citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by due course of the law of the land." The people of this state have, however, provided, in all the state constitutions adopted by them, that "no bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts shall be made," (Const. art. 1, § 16); thus giving protection to rights, by prohibiting the enactment of retroactive laws, which the constitution of the United States does not give in terms. Rights based on contract are as fully protected by section 16, art. 1 of the constitution of this state, as they are by section 10, art. 1 of the constitution of the United States. It has been constantly held that the section of the constitution of the United States last referred to does not prohibit the passage of laws retroactive in their character, even though such law may divest antecedent vested rights of property, unless such rights be founded on contract. *Satterlee v. Matheuson*, 2 Pet. 412; *Watson v. Mercer*, 8 Pet. 110. Such rights as are held to be protected by that part of the fourteenth amendment to the constitution of the United States to which we have referred, are as fully protected by the nineteenth section of article 1 of the constitution of this state.

In the construction of a constitution it is to be presumed that the language in which it is written was carefully selected, and made to express the will of the people, and that in adopting it they intended to give effect to every one of its provisions; and it cannot be presumed that separate and distinct provisions were intended to have the same and no other effect than one of them has, unless the language used, when considered in connection with the whole instrument, shows that this must have been the intention. It cannot be presumed that in adopting a constitution which contained a declaration "that no retroactive law shall be made," that it was intended to protect thereby only such rights as were protected by other declarations of the constitution which forbade the making of *ex post facto* laws, laws impairing the obligation of contract, or laws which would deprive a citizen of life, liberty, property, privileges, or immunities otherwise than by due course of the law of the land. The character of laws which, within the meaning of the constitution, would operate as *ex post facto* laws and laws impairing the obligations of contracts were well understood, not only from the language descriptive of them used in the constitution but from adjudications made by the highest courts in the land prior to the time the constitution was adopted; and there can be no doubt that, by the clause in the constitution which forbids the making of retroactive laws, it was intended to give protection to every citizen against the arbitrary exercise of some power not forbidden by the other clauses of the constitution referred to, which might be lawfully exercised but for this prohibition. The section of the constitution which declares that "no citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land," is written in

plain language, but had not been so fully construed, as to its operation on laws retroactive in character, when the constitution was adopted, as it has since been by the decision of the supreme court of the United States, to which we have referred; but it must be held that the people intended, by that clause of the constitution, in so far as it is identical with the fourteenth amendment, to place thereby just such restrictions on the powers of the legislature as the highest court in the nation has declared is the true construction of like language made a part of the constitution of the United States for the purpose of placing a limitation on the power of the legislatures of the several states. As construed, that section of the constitution only forbids the making of laws retroactive in effect, whereby title to property which had vested under former laws would be divested. To give this protection against arbitrary legislation there was no necessity for the broader declaration "that no retroactive law shall be made." The making of it evidences an intention to place a further restriction on the power of the legislature; and it must be held to protect every right, although not strictly a right to property, which may accrue under existing laws prior to the passage of any, which, if permitted a retroactive effect, would take away the right. A right has been well defined to be a well-founded claim, and a well-founded claim means nothing more nor less than a claim recognized or secured by law.

Rights which pertain to persons, other than such as are termed natural rights, are essentially the creatures of municipal law, written or unwritten; and it must necessarily be held that a right, in a legal sense, exists, when, in consequence of the existence of given facts, the law declares that one person is entitled to enforce against another a given claim, or to resist the enforcement of a claim urged by another. Facts may exist out of which, in the course of time or under given circumstances, a right would become fixed or vested by operation of existing law, but until the state of facts which the law declares shall give a right comes into existence there cannot be in law a right; and for this reason it has been constantly held that, until the right becomes fixed or vested, it is lawful for the law-making power to declare that the given state of facts shall not fix it, and such laws have been constantly held not to be retroactive in the sense in which that term is used. This has been illustrated by so many decisions, made upon so great a variety of facts, that it has become the settled law of the land. When, however, such a state of facts exists as the law declares shall entitle a plaintiff to relief in a court of justice on a claim which he makes against another, or as it declares shall operate in favor of a defendant as a defense against a claim made against him, then it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation, if there be a constitutional prohibition of such laws. This, so far as we have been enabled to ascertain, has been the ruling in every state in this Union which has a constitutional provision in terms forbidding retroactive laws, in which any ruling upon the question has been made.

As early as the year A. D. 1784 the people of the state of New Hampshire placed in the constitution of that state the declaration that "retroactive laws are highly injurious, offensive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses," (Const. N. H. art. 1, § 23;) and the same provision was inserted in the constitution adopted in 1792, in that state, where it still remains. The question now before us came before the superior court of judicature of that state as early as the year 1826, in the case of *Woart v. Winnick*; and, basing its decision on the section of the constitution we have quoted, the court held that an action barred by the statute of limitations was forever barred, and that the right of the defendant to insist upon the bar of the statute could not be taken away by retroactive legislation. The principle involved in that decision has been asserted in many cases, arising on different facts, by the same court.

Dow v. Norris, 4 N. H. 16; *Clark v. Clark*, 10 N. H. 380; *Willard v. Harvey*, 24 N. H. 351; *Rich v. Flanders*, 39 N. H. 304; *Rockport v. Walden*, 54 N. H. 167; *Simpson v. Savings Bank*, 56 N. H. 470.

The declaration "that no retroactive law * * * shall be made," was inserted in the constitution of the state of Tennessee as early as the year 1796, and it has been inserted in the constitutions of that state subsequently adopted. We find no direct adjudication of the question before us by the supreme court of that state, but all the decisions found lead to the belief that the same ruling would be made in that state which has been constantly made in the state of New Hampshire. *Fisher's Negroes v. Dabbs*, 6 Yerg. 138; *Officer v. Young*, 5 Yerg. 220. In the case of *Girdner v. Stephens*, 1 Heisk. 280, it was held that the people of the state had no power, even by a provision placed in the constitution of the state, to take away the defense of statutes of limitations, when the facts which gave it had transpired before the adoption of the constitution. The same ruling was made in *Yancy v. Yancy*, 5 Heisk. 353; and these decisions leave no doubt as to what the ruling would be in a case in which the constitutional provision forbidding retroactive laws to be made could be applied, though one of them is in conflict with the decision of the supreme court of the United States to which we have referred.

As early as the year 1820 the people of Missouri incorporated into the constitution of that state the declaration "that no * * * law * * * retrospective in its operation can be passed," (Const. Mo. art. 13, § 17,) and this provision has been carried into all the constitutions since adopted in that state. We have not access to all the reports of that state, and do not know what all the rulings made in the supreme court of that state upon the question before us have been; but we find it decided in the case of *State v. Heman*, 70 Mo. 456, that an act of the legislature of that state reviving a cause of action already barred would be unconstitutional. In *Hope Mut. Ins. Co. v. Flynn*, 38 Mo. 484, it is said that "a statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions already past, is to be deemed retrospective or retroactive. * * * No new ground for the support of an existing action ought to be created by legislative enactment, nor any legal bar which goes to deprive a party of his defense." *Bar-ton Co. v. Walser*, 47 Mo. 200, is to the same effect.

The constitution of Louisiana has a provision declaring that no law shall be passed divesting vested rights unless for purposes of public utility and for adequate compensation made, and the state of Colorado has declared in its constitution, "No law retrospective in its operation shall be passed;" but from the reports of those states, to which we have access, we do not see that the question before us has been considered.

The states to which we have referred are the only ones which have constitutional provisions in effect the same as exists in this state.

The section of the constitution under consideration was considered in the case of *De Cordova v. City of Galveston*, 4 Tex. 480; and, while the facts in that case did not call for the decision of the question before us, it did call for a determination of the character of laws which the constitution forbids. It was said that "laws are deemed retrospective, and within constitutional prohibition, which by retrospective operation destroy or impair vested rights, or rights to do certain actions, or possess certain things, according to the law of the land, (*Brown v. Van Braam*, 3 Dall. 349;) but laws which affect the remedy merely are not within the scope of the inhibition unless the remedy be taken away altogether, or incumbered with conditions that would render it useless or impracticable to pursue it, (*Bronson v. Kinzie*, 1 How. 315;) or if the provisions regulating the remedy be so unreasonable as to amount to a denial of right,—as, for instance, if a statute of limitations applied to existing causes barred all remedy, or did not afford a reasonable

period for their prosecution; or if an attempt were made by law, either by implication or expressly, to revive causes of action already barred, such legislation would be retrospective, within the intent of the prohibition, and would therefore be wholly inoperative." We have no doubt that the law is thus correctly stated.

Such has been the holding in many of the states in which there was no express constitutional prohibition of retroactive legislation. The cases bearing upon this question are collected in notes to Cooley, Const. Lim. 449, 455; Sedg. St. & Const. Law, 160-173.

The entry of a personal judgment against the appellants was evidently an inadvertence.

For the errors noticed, the judgment of the court below will be reversed, and the cause remanded.

FOWLER v. STATE *ex rel.* GEORGE.

(*Supreme Court of Texas.* January 13, 1887.)

1. ELECTIONS—CONTEST—COUNTING VOTES—COUNTY TREASURER.

In a proceeding to test the title to a county office the district court may count the returns or the ballots, as the case may be, notwithstanding irregularities by the officers in holding the elections, where such irregularities are in breach of requirements which are directory only, and it is shown that they have in no manner changed the result of the election, or its fair and honest character.

2. SAME—FAILURE TO COMPLY WITH PROVISIONS OF ELECTION LAW.

In an election for county officers a failure to comply with such requirements of the election law as the following, to-wit: (1) No tally-sheets of the votes cast, or poll-list of the voters by whom they were cast, being kept or returned by the presiding officer and managers of the election; (2) the election returns which contained no more than a mere statement of the result of the voting, and the ballot-box containing the tickets voted, being sent to the county judge and clerk through the United States mail, instead of by the presiding officer, or any manager of the election; (3) the non-reception of the returns sent him by the county judge; (4) the returns not being made in triplicate; (5) the box used at the election, and in which the returns were made to the county court, not being a proper one,—will not vitiate the election, provided it is made to appear that the neglect or misconduct of the officers has not prevented an honest and fair election.

3. SAME—QUO WARRANTO—QUALIFICATIONS FOR OFFICE.

In an information asking for proceedings in *quo warranto* to place relator in the office of county treasurer, and to oust defendant therefrom, an allegation that such relator was a citizen of the county, and entitled to the office of county treasurer, is a sufficient averment, as to his being qualified to hold the office, against a general demurrer.

4. SAME—AVERMENT OF VOTES RECEIVED BY RELATOR.

In such proceedings an allegation that the relator received a majority of the ballots of the qualified voters of the county is sufficient, without setting forth the facts which constituted their qualifications.

5. SAME—DISTRICT ATTORNEY *PRO TEM.*

An attorney who is appointed by the court, under Code Crim. Proc. Tex., art. 38, during the absence of the district attorney, is the proper person to file an information for a *quo warranto* in such a case, and the authority of an attorney so appointed cannot be collaterally attacked.

Appeal from Nolan county.

These proceedings in the nature of *quo warranto* were commenced by the relator, J. C. George, on the petition of E. A. Chaffee, appointed by the court district attorney *pro tem.*, in the absence of the regular attorney of the state, on November 11, 1886, to oust appellant, J. H. Fowler, from the office of county treasurer of Nolan county, and to place the relator there. The relator alleged that on November 2, 1886, there was held in Nolan county an election for state, county, and precinct officers, at which the relator was a candidate for the office of county treasurer; that relator polled a majority of the votes; that because of irregularities in the returns of officers holding the election in precincts Nos. 3 and 4, in said county, the commissioners' court of said

county failed and refused to count the votes cast for relator at said precincts, and issued their certificate of election to one J. H. Fowler for said office; that relator was entitled to said office; and prayed the attorney of the state to institute proceedings to oust appellant herein, and place relator in possession, etc. A jury having been waived, the court gave judgment in favor of relator, ousting respondent. Respondent appeals.

Cowan & Fisher and J. F. Bidson, for appellant. J. B. Scarborough, for appellee.

WILLIE, C. J. Article 39 of the Code of Criminal Procedure authorizes the district judge, whenever the district and county attorneys fail to attend any term of the court, to appoint some competent attorney to perform their duties during such term. Such appointee represents the state in all matters in which it may be interested that may arise during the term. The state is interested in a *quo warranto* proceeding like the present, and its representative is named in the statute as the proper person to file the information; and this information was filed during the term of the court at which Chaffee was appointed, and during the absence of the district and county attorney. The above article does not require the appointee to give bond, as does article 244, Rev. St., which provides for an appointment by the governor when the office becomes vacant. Moreover, Chaffee, who was made district attorney *pro tem.* in the absence of the regular attorney of the state, was recognized as such by the court, and as the proper officer to file this information, and he was at least a *de facto* district attorney, whose authority could not be attacked in this collateral manner.

The information alleged that George was a citizen of Nolan county, and entitled to the office of county treasurer; and this was a sufficient averment as to his being qualified to hold it, at least as against a general demurrer.

The allegation that the relator received a majority of the ballots of the qualified voters of the county was sufficient, without setting forth the fact which constituted their qualifications. The statute enumerates what facts must exist in any case to qualify a person to vote for this office. Hence to aver that a voter is qualified so to do is in effect to aver that he possesses all these qualifications. More definite allegation might have been required if the relator had claimed that ballots had not been counted on the ground that the persons casting them lacked some of the qualifications named in the statute, when in fact they possessed them all, and that thereby the relator lost his election; but this was not the case, no question of the kind having been raised.

As to all other objections to the pleadings of the appellee, it is sufficient to say that, taken together, they show a perfect title to the office in controversy, and the exceptions which we have not noticed are not deemed of any importance, or are not sustained by the record. The objections to the admissibility of evidence, and to the conclusions of law and fact found by the court, are either disposed of in what we have already said, or will be by what we shall say in determining the main and important question in the case. It is proper to add that any want of allegation in the informations as to the manner in which the election was conducted, and the returns made, is fully supplied by the pleadings of the respondent, and evidence upon that subject thereby rendered admissible.

The important question is as to whether the court below erred in counting the ballots cast at precinct No. 3 for the respective candidates for county treasurer, and in estimating them in determining who was legally elected to that office. The returns of precinct No. 4 are also brought in question, but whether they should have been counted or not is unimportant, because they do not affect the result. If the votes of precinct No. 3 are to be estimated, the relator has received a majority, and is entitled to the office whether or not the returns of precinct No. 4, or the vote of that box, is taken into considera-

tion. The only objections to box No. 3 which require attention are: (1) No tally-sheets of the votes cast, or poll-list of the voters by whom they were cast, were kept or returned by the presiding officer and managers of the election; (2) the election returns, which contained no more than a mere statement of the result of the voting, and the ballot-box containing the tickets voted, were sent to the county judge and clerk through the United States mail, instead of by the presiding officer, or any manager of the election; (3) because the county judge did not receive the returns sent him; (4) because the returns were not made in triplicate; (5) because the box used at the election, and in which the returns were made to the county clerk, was not a proper one; (6) because the managers of the election were not properly appointed and qualified.

As to the last objection it is sufficient to say that it was proved that the presiding officer appointed by the commissioners' court refused to act as such, and the person who did preside was selected by the qualified voters assembled at the box on the day of the election, and took the oath required by law. Some of this proof was made after the argument had begun, but before it was entirely closed, by leave of the court, which course is authorized by our Revised Statutes, art. 1298.

The statute requires that the box in which the votes are kept and returned shall be of wood or metal, and securely fastened with nails, locks, or screws. The one used at precinct No. 3 was of wood, and fastened with nails. It seems to have been secure; at least, it safely preserved the election tickets, and was not tampered with. We do not think the use of such a box vitiated the election at this precinct.

Without separately considering each of the allegations raised to the manner of holding the election at precinct No. 3, and of returning its result, all such objections, including those we have already passed upon, may be disposed of on the ground that the requirements of the election law not obeyed by the managers were not mandatory, but directory. The statute does not say that a failure to pursue the course pointed out by it in these respects shall vitiate the election; nor is there anything in the nature of these provisions which requires us to give them that effect. The object of every popular election for officers is to ascertain the will of the people as to what persons shall serve them as such in the various positions to be filled. A free, fair, and full expression of the public will is sought, and certain means are prescribed by law as the most certain to bring about the desired result. Some of these, from their very nature, or from the manner in which they are prescribed, are deemed absolutely essential to the accomplishment of the desired result. Among these may be named the requirement that the voting shall be by ballot; that it shall take place on a certain day, and within certain precincts, etc. These are prescribed to insure perfect freedom of choice to the citizen, and to secure his convenience in getting to the polls, and to bring out a full vote at the election. Then there are other requirements, such as those which have been neglected in this case, that are merely formal in their character. The law deems that it is proper that they should be pursued in order to prevent frauds in the election, and tampering with the votes and returns. If strictly followed, they furnish the best evidence that the election has been fairly conducted, and the burden of proof to show that it was not, either wholly or in part, rests upon the party attacking the returns. But these requirements are always treated as directory, unless the law either expressly or in effect makes them essential to the validity of the election. Electors must not be deprived of their votes on account of any technical objection to the manner in which the election has been held, or for any misconduct on the part of its presiding officers, if these have not affected the true result of the election. *Cooley*, Const. Lim. 617, 618; *Prince v. Skillin*, 71 Me. 361. This would be to deprive the citizen of a great constitutional privilege for a mere informality,—to place it within the power of a few persons to defeat the right of suffrage

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altogether. The very means provided to insure a fair and proper election might become an instrument of fraud and dishonesty. Hence all such irregularities of the officers in the conduct and return of the election as have not prevented the electors from a free and fair exercise of the right of suffrage, and from having their votes fairly estimated for the candidate of their choice, and which the law has not declared shall set aside their ballots, must be treated as informalities not vitiating the election. This principle is to be taken with the qualification that it must be made to appear that the neglect or misconduct of the officers has not, in the particular case, prevented an honest and fair election. The returns must not be counted if the irregular way in which they have been transmitted has resulted in their being changed from what they were when made out by the officers. Ballots which have been tampered with by reason of a failure to secure or properly forward the ballot-box cannot be counted. *Owens v. State*, 64 Tex. 500. But when it is shown that the irregularities of the officers have in no manner changed the result of the election, or its fair and honest character, the acknowledged rule is to count the returns or the ballots, as the case may demand, in the same way as if the directory provisions of the statute had been rigidly pursued.

These principles have been enforced when the statute required ballots to be sealed up in a package, then locked up in the ballot-box, with the orifice at the top sealed; and ballots kept in a locked box, with the orifice open, have been allowed to be counted. *People v. Higgins*, 3 Mich. 233. When the returns were required to be sealed, and were not, in the absence of suspicion or fraud they were received. *McCrary, Elect.* § 166. When the returns were required to be sent by mail, and they were sent by private conveyance, they were received and counted. *Id.* 160. Where the vote was fairly given, but no returns at all were made as required by law, the vote was counted. *Id.* 554. So in our own state all such provisions as these prescribed for the conduct of and return of an election have been held directory, and elections held and returned in violation of them have been sustained. *Trueheart v. Addicks*, 2 Tex. 217; *McKinney v. O'Connor*, 26 Tex. 5.

It is true that our present statute says that election returns shall not be opened or estimated unless the same have been returned in accordance with its provisions, (article 1706;) but this applies to the opening and estimate provided for in the previous section to be made by the county judge. It does not prevent the district court from arriving at the true sense of the election in a proceeding to test the title to an office. The county judge deals with returns only; but in a suit for the recovery of the office the district court may disregard any unimportant formality in making them, or set them aside altogether when they do not speak the truth as to the state of the ballot.

It follows, therefore, that, as the ballots of precinct No. 3 showed a sufficient majority for George to elect him, when taken in connection with the vote of the other precincts of Nolan county, the court did not err in according him the office of county treasurer, notwithstanding the irregularities in conducting and returning the result of the election, no fraud or tampering with the returns or ballots having been shown; and the judgment is affirmed.

SMITH and others v. McELYEA and others.

(*Supreme Court of Texas.* January 21, 1887.)

1. TRUST—STATUTE OF LIMITATIONS—ACTION TO SET ASIDE DEEDS—COVERTURE.

In an action to set aside and cancel certain deeds alleged to have been executed by a trustee contrary to the conditions of his trust, the property having been conveyed by the mother of the plaintiffs to the trustee in trust for all her children, when it appears that one of the plaintiffs was a married woman at the time of the conveyance by the mother to the trustee, and that she so continued until the institution of this suit, the statute of limitations could not run against her.

2. SAME—RECORDING DEEDS.

The court was requested to charge the jury that, if they found that the trustee did not comply with the directions given him by the grantor at the time of the execution of the trust deed, but that he violated said instructions at the dates of the execution of the deeds to his co-defendants, then the statute of limitations would begin to run against such of the plaintiffs whose rights were violated by said deeds, from the date of the record of said deeds in the clerk's office of the county court, unless such plaintiffs were under disability of coverture. *Held*, that the request was properly denied.

3. SAME—DECLARATIONS—TRUSTEE TO CESTUI QUE TRUST.

The averments of the petition that the trustee and his grantees, during the lifetime of the grantor of the trust, induced the grantor and the plaintiff to believe that the trust would be carried out after the grantor's death, *held* to be sufficient to prevent the running of the statute of limitations as to plaintiff.

4. EVIDENCE—DECLARATIONS OF GRANTOR TO CESTUIS QUE TRUST—ACTS AND CONDUCT.

Where a trust on which land was conveyed was not evidenced by the deed, nor by any other writing, nor declared at the time the conveyance was made to the trustee, *held*, that evidence of the declarations made by the grantor to one of the *cestuis que trust* on the day before the deed was executed, but after the grantor had determined to do so, and had made all the necessary arrangements therefor, was properly admitted to establish the trust.

5. SAME—DECLARATIONS OF GRANTOR AFTER EXECUTION OF TRUST.

Declarations made by a grantor of a trust, many years after the conveyance in trust, as to the conditions of the trust, are not admissible in evidence.

6. SAME—DECLARATIONS TO TRUSTEE BEFORE EXECUTION.

To determine the question for whose benefit a trust is created, all the declarations made by the grantor of the trust before the deed was executed, and the subsequent acts and declarations of the trustee and his grantees, and the acts of all the parties who participated in the transactions which led to the making of the deed, ought to be considered; and a request to so charge the jury as to make the declarations made by the grantor to the trustee before the execution of the trust deed conclusive of the question was properly denied.

Appeal from Gonzales county.

This action was brought by Mrs. M. J. McElyea and Mrs. Elizabeth Murphy, two of the children of Mrs. Elizabeth Smith, against D. T. Smith and his grantees, to cancel and annul three deeds alleged to have been executed by him contrary to the conditions of his trust; the land having been conveyed to D. T. Smith by Elizabeth Smith in trust for all her children. The petition also prayed for a decree adjudging the title of their share of the land to be in plaintiffs.

In defendants' third request the court was asked to charge the jury that, if the trustee did not comply with the directions given him by the grantor at the time of the execution of the trust deed, but that he violated said instructions at the date of the execution of the deeds to his co-defendants, then the statutes of limitations would begin to run against such of the plaintiffs whose rights were violated by said deeds from the date of the record of said deeds in the clerk's office of the county court, unless such plaintiffs were under disability of coverture. The court refused to so charge, and the ruling was excepted to.

Harwood & Harwood, for appellants. *Ponton & Fly*, for appellees.

STAYTON, J. It is shown by the petition that Mrs. Murphy was a married woman at the time the conveyance was made by her mother to D. T. Smith, and that she so continued until the institution of this suit, from which it follows that limitations could not have run against her. The averments of the petition wherein it alleged that the defendants, during the life-time of Mrs. Elizabeth Smith, induced her and the plaintiffs to believe that the trust on which the conveyance to D. T. Smith is alleged to have been made would be carried out after her death, we are of the opinion are sufficient to prevent the running of the statute as to Mrs. McElyea. The fact that the trustee made conveyances of the entire tract of land to the four sons of Elizabeth Smith

would not cause the statute of limitations to run if these sons so acted as to induce the belief that on the death of their mother they would convey to each of their sisters an equal share of the land.

If the lands were conveyed to the trustee, D. T. Smith, on the trust alleged in the petition, then the plaintiffs had an equitable interest in the land, which would follow it into the hands of any person taking it through deeds, from the trustee, with knowledge of the trust, even if such persons had been purchasers for value, of which there is no pretense in this case. All the evidence shows that the property was conveyed to D. T. Smith in trust, and the contested question is whether in trust for the five sons alone, or in trust for all the children of Elizabeth Smith. The trust on which the land was conveyed was not evidenced by the deed, nor by any other writing, nor was it shown that the purpose of the trust was declared at the time the conveyance was made to the trustee. The appellants rely upon declarations claimed to have been made by Mrs. Smith several days before the deed was executed; and the appellees, we think, were properly permitted to prove the declarations made by Mrs. Smith to her daughter on the day before she executed the deed, but after she had determined to do so, and had made all the necessary arrangements therefor.

The court below submitted to the jury the following special issues: "(1) If Elizabeth Smith conveyed the land described in plaintiffs' petition to D. T. Smith, with the understanding, at the time, that such conveyance should be for the benefit of any one else other than the said D. T. Smith, state what persons she intended should be benefited by the conveyance. Give the names of each of such persons, if any. (2) When D. T. Smith accepted the deed from his grandmother, Elizabeth Smith, was there an understanding between Elizabeth Smith and D. T. Smith as to what disposition the said D. T. Smith should make of the land? And, if there was such an understanding, state what the understanding was, and to whom he was to convey it. (3) If either of the parties to this suit have had actual possession of the land sued for, give the names of the parties holding such possession, and also state the years during which such possession was held, and whether such possession was adverse to the defendants to this suit; also state, if either of the plaintiffs were married women, which were so married, and the date of the death of the husband."

The jury found, on the first issue, that the land was conveyed to the trustee in trust for all the children of the grantor. On the second, they found that there was an understanding as to the distribution of the land, and that it was to be divided between all of the children of the grantor in equal shares. On the third, they found that neither of the parties to the suit had been in actual adverse possession of the land. These findings embrace every material issue in the case.

As before said, the plaintiffs and defendants all agree that the land was conveyed to D. T. Smith in trust, and the evidence offered by each party, as to declarations made by the grantor before the execution of the deed, tending to show what the trust was, was of the same character, and made under such circumstances that it all ought to be considered in connection with the subsequent acts and declarations of the sons, to whom the trustee made conveyances.

The declarations made by Mrs. Smith to Mrs. Murphy many years after the conveyance was made to the trustee ought not to have been received. The rights of the parties were fixed when the deed was made to the trustee, and the general rule which rejects declarations made by a grantor after he has parted with title, when introduced for the purpose of affecting the title or right fixed by the deed, must have application in this case. The wish expressed by Mrs. Smith, on her death-bed, that the land should be divided equally between all her children, ought to have been excluded for the reason stated; but, if ad-

missible, it would only have tended to show what her wish was about 11 years after the rights of the parties were fixed.

The first charge requested would have made any declaration by the grantor, made to the trustee at any time before the land was conveyed to him, conclusive of the question, even though the jury might have believed from the evidence that Mrs. Smith, prior to making the deed and upon the eve of its execution, had declared to all her children, in the ultimate expression of her intention, but not in the presence of the trustee, that the property was conveyed in trust for the equal benefit of all. Neither the trustee, nor any of the sons of Mrs. Smith, stand as innocent purchasers. The real question was, for whose benefit was the trust created? and this we are of the opinion must be determined from all the declarations made by the grantor before the deed was executed, and from the subsequent acts and declarations of the trustee, and of the sons who took deeds from him; and, as bearing upon this question, the acts of all the parties who participated in the transactions which led to the making of the deed ought to be considered. The charge would have confined the jury to a consideration of only a part of the evidence, which, under the peculiar facts of this case, ought to have been considered; and, besides, was calculated to cause the jury to give weight to the conduct of the trustee, after the deed was made, to which it was not entitled. The second paragraph of the charge requested was subject to some of the objections stated to the first. Under the facts in evidence the court would not have been justified in giving the third paragraph of the charge asked.

For the error in admitting the evidence of Mrs. Murphy as to declarations made by Mrs. Smith long after the conveyance to the trustee was made, the judgment will be reversed, and the cause remanded.

BARRY and others v. SCREWMEN'S BENEV. ASS'N.

(*Supreme Court of Texas. January 21, 1887.*)

1. BONDS—ACTION AGAINST SURETIES ON TREASURER'S BOND OF BENEVOLENT ASSOCIATION—CONVERSION OF FUNDS—PLEADING.

Sureties on the bond of a treasurer of a benevolent association are not liable for any conversion of funds by their principal, made prior to the execution of the bond; and when the bond was executed on January 21, 1885, and suit was instituted to recover for the conversion of moneys which came into the treasurer's hands January 1, 1885, a complaint alleging only that the conversion occurred at and before July 24, 1885, is demurrable.

2. SAME—EVIDENCE.

In an action against the principal and sureties on the bond of the treasurer of a benevolent association to recover for a conversion of moneys claimed to have been in the treasurer's possession on January 1, 1885, the bond having been executed January 21, 1885, an official report of the treasurer, made in accordance with the laws of the corporation after the bond was executed, showing the funds in question to have been in his possession at the time of making the report, is admissible in evidence to charge the sureties, who would not be liable if the conversion occurred before the bond was executed. Such evidence is a part of the *res gestæ*.

3. SAME—EVIDENCE.

In such an action, the stub of the treasurer's private check-book is not admissible to show a conversion of such funds before the bond was executed.

Appeal from Galveston county.

James B. Stubbs and R. G. Street, for appellants. Finlay & Rose, for appellee.

STAYTON, J. This action was brought by the appellee against E. A. Smith, and the sureties on his bond, as treasurer of that corporation, to recover the sum of \$4,639.42, which it was alleged the treasurer had misapplied. The petition alleges that Smith was elected treasurer on December 24, 1884, and that he qualified by giving the bond sued upon on January 21, 1885, which

was conditioned that he should make faithful returns to plaintiff of all funds, papers, stocks, bonds, or other valuable papers or property entrusted to his safe-keeping. It contains the further averment "that, as treasurer of plaintiff association for the year commencing January, 1885, said E. A. Smith received and had intrusted to him by plaintiff divers large sums of money, and paid out divers sums of money for plaintiff, an itemized account of which receipts and disbursements, with the dates of each item, is hereto attached, marked 'Exhibit B,' and made a part of this petition, showing a balance due plaintiff by defendants on the twenty-fourth day of July, 1885, in the sum of four thousand and six hundred and thirty-nine 42-100 dollars." The account attached as Exhibit B shows this item: "January 1, 1885, to cash, as per report, \$5,142.92." The rest of the account is a statement of the cash received and disbursed by the treasurer from January 8 to July 11, 1885, the latter exceeding the former. There are averments that Smith was removed from office on July 24, 1885; that demand had been made for the sum claimed; that he had failed to pay it; and "that the said E. A. Smith, at and before the twenty-fourth day of July, 1885, being indebted as aforesaid, as treasurer aforesaid, to plaintiff in the sum of four thousand six hundred and thirty-nine 42-100 dollars for money had and held by him as aforesaid, converted all of said sum of money to his own use and benefit." All the sureties filed general demurrers, and two of them filed special exceptions, the substance of which is fairly set out in the first assignment of error, which is as follows: "The court erred in overruling defendants' fourth and sixth exceptions to the plaintiff's original petition, which fourth exception called in question the sufficiency of the petition in failing to allege that the first item of Exhibit B, to-wit, 'January 1, 1885, to cash, as per report, \$5,412.92,' represented that amount on hand or in the possession of the treasurer at the commencement of these defendants' alleged liability upon said bond, or that said amount was ever paid to said Smith by plaintiff at any time during the period when the said liability attached to defendants; and it does not appear from the petition that said sum was in the hands of the treasurer, subject to plaintiff's draft, on the date of the execution of said bond, and the attaching of defendants' liability thereunder." And the sixth exception was as follows: "Because it appears from the terms of the bond, a copy of which is annexed to the petition, that these defendants are not liable for any funds or other property intrusted to the safe-keeping of said Smith by said association before the execution of the bond sued on; defendants' liability, if any, being only for the faithful returns of such funds or property as might be intrusted to said Smith subsequently to the execution of said bond." These were overruled. There is no direct averment in the petition that Smith was treasurer for the year preceding January 21, 1885, or for any former period; but we are of the opinion that the averments, taken together, show that he was treasurer on January 1, 1885, and that in that character he is alleged to have received, and to have had in his hands on that day, the sum of money mentioned as the first item in the exhibit made a part of the petition.

It is an elementary rule of pleading that a plaintiff must allege such facts as entitle him to the relief which he seeks. The bond, made the foundation of this action, imposes no liability on its makers for any misappropriation of money which may have been made by the treasurer prior to the time it was executed. It can have no retroactive effect. *Hetten v. Lane*, 43 Tex. 288; *U. S. v. Boyd*, 15 Pet. 187; *Bruce v. U. S.*, 17 How. 442; *Bissell v. Saxton*, 66 N. Y. 55. If money belonging to the plaintiff came into the hands of the treasurer, and was in his hands as treasurer when the bond was executed, then his sureties are as much liable for its subsequent misappropriation by him as would they be for the misappropriation of money which came into his hands as treasurer after the bond was executed. If, however, money came into his hands as treasurer before the bond was executed, the sureties are

not liable for it if it was misappropriated before they became liable, by their contract, for his misconduct. The petition shows that more money than is claimed in this action came into the hands of Smith, as treasurer, prior to the time the bond was executed; but to state a cause of action against the sureties on that bond it is necessary that the petition allege that the money so in his hands was there when the bond was executed,—it appearing from the petition that the treasurer properly disbursed more money after the bond was executed than came into his hands after that date. If this is not averred, the demurrers ought to have been sustained. Do the pleadings aver this fact, giving them the benefit of all inferences which may be fairly drawn from the language used? The part of the petition which we have copied above, read in connection with the exhibit to which it refers, alleges, in effect, that during the period intervening between the last day of December, 1884, and July 24, 1885, large sums of money came into or were in the hands of the treasurer, and that the aggregate of these sums exceeded the disbursements during the same period in a sum equal to that sued for. From these averments the inference may be drawn that such facts existed as would fix liability upon the treasurer without reference to the bond, but no inference can be drawn, from the facts stated, that the treasurer misapplied or failed properly to account for the sum claimed, or any other, which was in his hands when the bond was executed, or which subsequently came into his hands. The petition shows clearly that the treasurer disbursed more money after the bond was executed than he received after that time; thus, on its face, admitting that, to fix liability on the sureties, they must be shown to be liable for money alleged to have been in the hands of the treasurer on January 1, 1885. Yet there is no clear statement that the sum alleged to have been in his hands at that time so continued until the bond was executed.

In the other paragraph of the petition, copied above, we have an averment that E. A. Smith, as treasurer, was indebted to the plaintiff in the sum sued for, on account of money which came into his hands as shown by the exhibit, which, *at and before* the twenty-fourth day of July, 1885, he converted to his own use. As said in *Hillebrant v. Booth*, 7 Tex. 501: "It is an elementary and primary requisite of a good plea that it be capable of proof, and consequently that it be true. The pleader must state the facts on which he relies according to the truth of the case, or his pleading will not avail him on the trial. Truth, and of course consistency, is essential to the validity of any pleading; hence, if it judicially appear to the court from the defendant's own admissions or statements in his plea that it is untrue, it will be of no validity. If the averments be inconsistent, and thus contradict and falsify themselves, they cannot be susceptible of proof. A plea setting up as a defense failure of consideration, which alleges that such failure consisted in the existence and non-existence of a given fact, presents on its face an absurdity, and of consequence must be invalid."

This rule applies to the pleadings of either party. If the conversion of the fund took place before July 24, 1885, it could not have occurred on that date; and, if it took place on or at that date, it could not have occurred before. The misapplication may have occurred before the date mentioned, and the sureties not be liable; for the word "before" covers all the time intervening the date named and the time the money came into the treasurer's possession; while a conversion by the treasurer during any part of that time preceding the date of the execution of the bond would not fix liability on the sureties. The defect in averment was clearly pointed out by demurrers. The plaintiff declined to amend, and insisted on the sufficiency of the petition as it stood, wanting in certainty, and equivocal as it was; and in such case the general rule that an equivocal expression in pleading is to be construed against the party using it ought to be applied. *Camp v. Gainer*, 8 Tex. 372; *Fowler v. Davenport*, 21 Tex. 634.

It may be that the plaintiff intended to rely upon the fact that the funds were in the hands of the principal on January 1, 1885, to fix the liability of the sureties on a bond subsequently executed, and so without reference to the time at which the misapplication occurred. If so, the law, as we understand it, declares that fact insufficient to affect the sureties. If it expected to prove that the conversion occurred after the bond was executed, it should have alleged that fact.

In a report filed by the treasurer after the bond was executed, in accordance with his official duty, and in pursuance of the laws of the corporation, he showed that the money was in his hands after the bond was executed; and it is urged that the court erred in admitting it. Such evidence we think was admissible even as against the sureties, but they might show that the report was not true. *U. S. v. Boyd*, 5 How. 50; *Bank of Brighton v. Smith*, 12 Allen, 249; *Blair v. Insurance Co.*, 10 Mo. 567; *Casky v. Haviland*, 13 Ala. 321; *Bissell v. Saxton*, 66 N. Y. 61; *Rodes v. Com.*, 6 B. Mon. 362; *Keowne v. Love*, 65 Tex. 158. Such statements by a person while in office, in the course of official duty, are very generally held admissible as *res gesta*.

A check-book used by the treasurer in his private business, containing stubs showing that drafts had been drawn by him from time to time, was offered for the purpose of proving that the funds which his report showed he had in hand on January 1, 1885, had been converted by him before that time, or before the bond was executed, and upon objection it was excluded. We do not see any ground on which it could have been admitted.

For the error of the court in overruling the demurrers the judgment will be reversed, and the cause remanded, and it therefore becomes unnecessary to consider the other assignments of error. It is so ordered.

SYDECK and others v. DURAN and others.

(Supreme Court of Texas. January 25, 1887.)

1. GRANT—MEXICAN—UNCERTAIN BOUNDARY.

On account of the difficulty of establishing the line called for in Power & Hewitson's colonial contract, to "run parallel with the coast," titles fairly granted by the Mexican or colonial authorities cannot now be disturbed by showing that the land granted may be two or three miles within or without the true boundary.

2. SAME—FORFEITURE BY NON-OCCUPANCY.

Although title to land obtained by a settler under Mexican law was not, under articles 26 and 27 of the decree of March 24, 1825, perfected until after a certain period of occupation or cultivation, yet the title would not lapse of itself upon failure to perform such condition, but could only be forfeited at the instance of the government, through its proper authorities.

3. SAME—ABANDONMENT.

A settler under Mexican law, however, lost his title when he ceased to occupy, with the intention of relinquishing his claim.

4. SAME—FACTS STATED—APPLICATION FOR SECOND GRANT SAVING RIGHT TO FIRST.

A settler, S., under Mexican law, in 1832, after receiving a grant from an alcalde of land supposed to be without the limits of a concession to a certain colony, discovered, as he thought, that it was within such limits, whereupon he applied to the commissioner of the colony for another grant, basing his application on the nullity of the first grant, but using the expression "saving my right to claim [*reclamas*] that which was given to me by mistake." The commissioner thereupon granted him another tract, and two days later granted the first-named tract to another settler, B., who in his application described the land as that relinquished by S. Although B.'s title was of record, S. neither set up any claim to the land thus granted to B., nor exercised any acts of ownership over it, nor paid any taxes on it for a period of more than 30 years. *Held*, that the facts showed an intention on the part of S. to abandon the title to the tract; the expression in the application for the second tract being susceptible of the construction that he wished to retain the first grant only in case he did not get another.

5. ESTOPPEL—TO CLAIM LAND—ACTS SHOWING INTENTION TO ABANDON.

In such case, under the common law, although title to real estate is not subject to be divested by abandonment under that system, the heirs of S. would be estopped to claim the land against the heirs of B.

6. STATUTE OF LIMITATIONS—WHEN BEGINS TO RUN—MEXICAN GRANT—CLAIM OF BENEFICIARY TO INDEPENDENT TITLE.

In case of a grant of land under Mexican law to a colony for the benefit of the citizens of a certain place, the statute of limitations will begin to run immediately upon a claim of one of such citizens to the tract, based upon an earlier grant to him.

Appeal from Victoria county.

Trespass to try title. Defendants had judgment below.

George P. Finlay, for plaintiffs in error. *Stayton & Kleberg*, for defendants in error.

GAINES, J. This was an action of trespass to try title brought by appellants, as heirs of Antonio Sydeck, against Juan Duran and M. L. Labosky to recover a league of land in Refugio county. The suit was originally instituted in the county in which the land is situated, but was subsequently transferred to the district court of Victoria county. Before the change of venue, the surviving widow and heirs of John Welder and the heirs of James Power appeared, and made themselves parties defendant, alleged that the original defendants were their tenants, and pleaded their respective titles. Appellants claimed under a grant issued to their ancestor, Antonio Sydeck, on the fourth day of August, 1832, by the alcalde of Goliad. The heirs of John Welder claimed a portion of the land sued for under a title extended to one Manuel Blanco on the twenty-ninth day of October, 1834, issued by the commissioner of Power & Hewitson's colony; and the other appellees, the heirs of James Power, set up title to the other portion of the premises in controversy under a grant of two and a half leagues of land, conceded to Power & Hewitson, on the twelfth of October, 1834, as a part of the premium lands to which they became entitled under their contract.

The cause was submitted to the judge in the court below without a jury, and the findings of his conclusions of fact and law appear in the record. There is but little controversy about the facts. We state such of them as we think necessary to be considered in the decision of this case. The land in controversy lies between the Guadalupe and the Nueces rivers, and is within the limits of the augmentation to Power & Hewitson's colony if it be within 10 leagues from the sea. On the twentieth day of April, 1831, Antonio Sydeck made application, on behalf of himself and a sister, as heirs of their deceased father, for the land. His application was favorably reported by the *ayuntamiento*, with a statement that the grant applied for lay without the littoral leagues. The order granting the application, dated July 27, 1831, directed that the commissioner of the colony to which the land belonged, or, in case it belonged to no colony, the first or only alcalde of the municipality, should put the applicant in possession, and extend the final title, which was accordingly done on the fourth of August, 1832, by the alcalde of Goliad. On the twenty-seventh day of October, 1834, Sydeck made application to the commissioner of Power & Hewitson's colony, stating that he was convinced that his previous grant was within the littoral leagues, and that the "judge" (meaning the alcalde) had no authority to make it, and prayed that the commissioner would issue to him "a formal title to land upon the same run" "according to the surveys recently made," etc. His application was favorably indorsed by one of the contractors, and a final title extended, all on the same day, to a league lying on the other side of the river from his original grant. On the twenty-ninth day of October, 1834, Manuel Blanco (who also seems to have been called Jose Manuel Blanco) made application to the commissioner of Power & Hewitson's colony for the league in controversy, describing it as "the land which was

owned by Antonio Sydeck, and has been relinquished by him," and on the same day final title was issued to him for the land applied for.

The court below finds, as a matter of fact, that the land now sued for lies within the littoral leagues. The correctness of this finding is questioned by appellees on the ground that the evidence does not support it, but we need not decide the point. If not within the colony of Power & Hewitson, (which embraced the littoral league,) it was certainly very near its boundary. This is shown by the fact that it adjoins, if it be not in conflict with, a portion of the premium lands granted to those contractors. It is now settled law that, on account of the difficulty of establishing the line called for in Power & Hewitson's contract, to "run parallel with the coast," titles which have been fairly granted by the authorities cannot be disturbed by showing, after this long lapse of time, that they may be "two or three miles" within or without the true boundary. *Hamilton v. Menfee*, 11 Tex. 718; *Ledyard v. Brown*, 27 Tex. 998. It follows, we think, that the title extended by the alcalde of Goliad to Sydeck was good, although it should now be found to be within the littoral leagues, and very near the boundary of the colony; and that for the same reason that extended to Blanco was good, if the land be without and adjacent to that boundary, provided the league was vacant at the date of the latter grant.

The question, therefore, is as to the effect of Sydeck's declarations, contained in his application to the commissioner of the colony, and the title extended to him for another league of land in compliance with that application. It is contended, on behalf of appellants, that by the grant to Sydeck, dated August 4, 1832, he acquired the legal title to the land, and that it could only be divested by a conveyance, or by a forfeiture at the instance of the government through its proper authorities. The first of these propositions must be conceded. It is established by numerous decisions of this court. *Swift v. Herrera*, 9 Tex. 268; *Jones v. Montes*, 15 Tex. 351; *Hancock v. McKinney*, 7 Tex. 384; *White v. Holliday*, 11 Tex. 606; *Hamilton v. Menfee*, Id. 724. It is also held that a settler who has received the final title does not forfeit his right, or that of those who have purchased from him, by merely ceasing to occupy the land. As to the latter, they took the land charged with the performance of the conditions attached to grants by the colonization laws.

The restriction upon alienation, which was removed by the thirty-sixth article of the decree of March 26, 1834, was contained in articles 26 and 27 of the decree of March 24, 1825, and is as follows: "(26) It shall be understood that the new settlers who shall not, within six years from the date of their possession, have cultivated or occupied, agreeably to their class, the lands that shall be granted them, have renounced the same, and the respective political authority shall immediately proceed to take back from them the lands and title. (27) The contractors and military in their turn, and those who have acquired land by purchase, can alienate the same at any time, provided the successor obligates himself to cultivate the same within the same time as was obligatory on part of the original proprietor, likewise reckoning the time from the date of the primitive titles. The other settlers shall be authorized to alienate their land when they shall have completed the cultivation thereof, and not before." The construction placed upon these provisions seems to be that the land must have been cultivated for the full term of six years before the title was released of its conditions. *Clay v. Cook*, 16 Tex. 72.

It follows from what we have said that, in our opinion, while the settler to whom the final grant had issued had a title, not subject to lapse of itself by his failure to perform the conditions annexed to it, upon such failure it was liable to be defeated by the action of the "political authority." It would seem, therefore, the question of the relinquishment of his title to land by a settler under the colonization laws as they existed at the date of the transaction now under consideration is very different from that of an abandonment

of title by one holding under a patent from the state. This latter question was discussed in *Dikes v. Miller*, 24 Tex. 417, but was not decided. Yet the opinion in that case shows that the court were strongly inclined to hold that, although there was no officer in the state empowered to accept a deed of relinquishment, yet when such a deed was executed by a land-owner, and deposited in the general land-office, it would be deemed a divestiture of title of the land so relinquished, so far as he was concerned. The court then was treating of a title absolutely perfect in the grantee, and applying to it the principles of a system of jurisprudence which requires that conveyances of land shall be in writing. The doctrine that title may be divested by abandonment has been recognized by the courts of other states. It is, however, doubtful whether the point has ever been directly involved in any authoritative decision. 3 Washb. Real Prop. (4th Ed.) c. 2, § 5, p. 61 *et seq.*

But Sydeck's application for the second grant, in which he declared void his title under the first, took place in 1834, and the effect of his act must be determined by the laws then in force; and we think there can be no question that, under the jurisprudence of Spain and Mexico, the owner of land lost his title when he ceased to occupy it, with the intention of relinquishing his claim upon it. We extract the following from the Partidas: "If a man be dissatisfied with his immoveable estate, and abandons it, immediately he departs from it corporately, with the intention that it shall no longer be his, it will become the property of him who first enters thereon." Partidas 3, tit. 4, law 50. See Hall's Mexican Law, p. 458, § 1489. See, also, Escreche's Dictionary, "Abandono de Coras." The question of abandonment under the laws of Spain has come up in several cases in the supreme court of Missouri, where that system of jurisprudence prevailed until the adoption of the common law in 1816. In *Landes v. Perkins*, 12 Mo. 256, the provision of the Partidas from which we have quoted is construed, and it is held, in effect, that the relinquishment of possession, with the intention of abandonment, divested the title of the owner. See, also, *Clark v. Hammerle*, 36 Mo. 639, and cases cited in that opinion.

The judge who tried this case in the court below found, in effect, that Antonio Sydeck abandoned his title to the land in controversy when he made application for the second grant, and that since that time neither he nor his heirs had ever set up claim to it until this suit was instituted, in 1878. The finding that Sydeck abandoned his claim is assigned as error. But for one clause in Sydeck's application for the second league there would be no difficulty in deciding the question. In that application, after asserting that his former grant was issued without authority, and praying for another, he says, (according to the translation in the record,) "saving my right to claim that which was given to me by mistake." This admits of several constructions: (1) That he reserved the right to claim both grants in the event a second were conceded; (2) that he intended to maintain his claim to the original grant provided his application was rejected; (3) that he claimed the privilege of electing to take as his new grant the land granted to him by mistake, or one of "the surveys recently made" "upon the same river," as requested in the former part of his petition. Of these constructions the learned judge in the court below adopted the last. The word "*reclamas*," in the original, which is translated "to claim," means also "to reclaim," and may indicate that the second supposed construction is the proper one. But it matters not whether the second or third be the true one, the result is the same. Either clearly manifests the intention of Sydeck, in the event he secured another concession, to abandon his former grant. That he did not mean to claim both we think apparent from the end he was attempting to attain. He was not entitled to two grants, and his application is based upon the assertion of no such right. On the contrary, he set up the nullity of the former grant as the reason which entitles him to another concession. It is to be presumed

that if it was his purpose to claim both in the event his application was granted, that he would not in such emphatic terms have alleged facts which showed the nullity of his first title. That such was not the construction placed upon the transaction at the time is shown by the fact that, two days after he obtained the concession applied for, Blanco made application for the land, describing it as that relinquished by Sydeck, and that on the same day the same commissioner who issued the second grant to Sydeck extended to him a formal title to the league; and, further, although Blanco's title was of record, no claim was ever set up to the land, acts of ownership exercised over it, or taxes paid upon it, on part of Sydeck or his heirs, for a period of more than 30 years.

It has been repeatedly held that the presumption which is ordinarily indulged in favor of the validity of official acts applies with additional force to the acts of the officers whose duty it was to extend titles under the colonization laws of the former government; and, in cases in which the construction of the laws then existing appeared doubtful, that put upon them by the contemporaneous authority has always been adopted by this court. We think the commissioner must have considered that Sydeck had abandoned his claim to the land in controversy when he extended the Blanco title, and that he was warranted in that conclusion. For these reasons we are of the opinion that Sydeck abandoned the land, intending to relinquish his claim to it, and that, under the law then in force, he lost whatever title he then had, and that, therefore, his heirs cannot recover it.

It is to be remarked that there are numerous decisions of the court holding that the settler or his purchaser did not forfeit his land by the mere fact of an abandonment of possession; but we think none can be found that under the laws of Mexico a title to land was not divested by ceasing to occupy it, with the intention of relinquishment. This is conclusive of the case. But it may be remarked that if the rules of the common law were to be applied to the transaction, that Sydeck's conduct was such as to estop his heirs from setting up claim to the land against those claiming under Blanco. *Mayer v. Ramsey*, 46 Tex. 371; *Harrison v. Boring*, 44 Tex. 269; *Lamar Co. v. Clements*, 49 Tex. 347. The court below found, however, that only a part of the land was covered by the Blanco grant; but that as to that portion claimed by the defendants, the heirs of Power, their title was perfect by limitation of 10 years. It is contended, however, that, according to the terms of Power & Hewitson's last contract, they were bound to issue title to Sydeck to the land in controversy, he being, as is argued, one of the citizens of Goliad provided for in that contract, (see *Hamilton v. Meniffee*, *supra*;) and that, when they took a concession of the land, they held it in trust for him, and that hence the statute would not run in their favor. It is clear, however, that the acceptance of the grant by Power & Hewitson was a repudiation of any right on part of Sydeck, and that the statute was put in operation as soon as the land was actually occupied by them, or those claiming under them.

We find no error in the judgment, and it is affirmed.

STAYTON, J., did not sit in this cause.

MILLS and others v. SWEARINGEN and others.

(Supreme Court of Texas. JANUARY 25, 1887.)

1. TRUSTS—TRUSTEE—LIABILITY FOR LOSS OF FUNDS—DEPOSIT IN OWN BANK.

If a trustee deposits the trust funds in a private bank in which he is a partner, where the funds will draw interest, upon the request of one beneficiary and by the consent of the other, he will not be liable for their loss merely because the bank afterwards fails, the investment being a safe one when made, and there being no evidence that he, at any time, knew the money was unsafe.

2. SAME—RELATION OF BANK TO TRUST FUNDS.

If trust money is, for the purpose of investment, loaned to or deposited in a bank to the credit of the trustee as such, it is held, as all other money of the bank, upon the relation of debtor and creditor, is not charged with a trust in the bank's hands, and, upon the failure of the bank, no preferred claim on account of it arises in favor of the *cestuis que trust*.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—DISCHARGE—CLAIM AGAINST TRUSTEE.

A claim against a trustee for mismanagement, resulting in loss of the trust funds, stands no differently from any other debt as regards its discharge by an assignment containing a provision for the discharge of accepting creditors' claims.

4. PLEADING—CONSTRUING AGAINST PLEADER—ASSIGNMENT.

Under the rule requiring a pleading to be construed most strongly against the pleader, an assignment referred to will be regarded as one exacting releases from the creditors in case it is material to know whether the assignment is one of that character or not.

5. ACTION—PARTIES—INTERVENTION—SUIT CLAIMING PRIORITY—GENERAL CREDITORS.

In a suit against assignees under a general assignment seeking to establish a claim to priority of payment from the assigned funds on the ground of a trust, held, that general creditors were entitled to intervene.

Appeal from Washington county.

Suit brought by Ronald Mills and others, *cestuis que trust* and a trustee, against the assignees of Bassett & Bassett, and against B. H. Bassett individually, to recover a trust fund of \$5,415.52. B. H. Bassett had received that amount of money as trustee for plaintiffs Ronald Mills and his daughter, Georgiana Mills, and had deposited it in the bank of Bassett & Bassett, in which he was a partner, to the credit of B. H. Bassett, trustee. Subsequently the other member of the firm of Bassett & Bassett died insolvent, whereupon B. H. Bassett, as surviving partner and for himself individually, made an assignment. Other creditors of Bassett & Bassett intervened in the suit.

C. R. Breedlove, for appellants. *Garrett, Searcy & Bryan, J. T. Swearingen*, and *John Sayles*, for appellees.

WILLIE, C. J. We think the demurrer of B. H. Bassett was properly sustained. The petition shows that he deposited the trust funds with the banking-house of Bassett & Bassett, of which he was a member. It is not alleged with any certainty what was the nature of the deposit. It is merely said that it was to the credit of B. H. Bassett, trustee of Roland Mills and his daughter, who were the beneficiaries of the trust, and that the interest on it was paid, for the whole time it was there, to the said Ronald Mills. As the trustee did not make the deposit for his own personal benefit, we cannot infer that it was a misappropriation of the funds. The whole theory of the plaintiffs' case is that Bassett & Bassett obtained the money from B. H. Bassett, and used it in their business, knowing that it was trust funds. The allegations as to the deposit, taken in connection with that as to the payment of interest, make it a case of loan by B. H. Bassett to the bank, the money being passed to his credit as trustee, as evidence that the bank was indebted that amount to the trust fund. It is not pretended that he drew out any of the money for any purpose. The duty of the trustee was to loan the money so as to make it yield interest to the beneficiaries. This was accomplished by means of the deposit. That this was a safe investment when originally made is not disputed; and at what time before the assignment was made it ceased to be so is not shown. There is nothing to show that B. H. Bassett, by reasonable diligence could have prevented this loan from sharing the fate of the bank's other debts. We cannot resort to uncertain and indirect inferences, and presume the fact, when, if it had been the case, the pleader might easily have alleged it. But, if B. H. Bassett mismanaged the trust in any way, the result is no more than to create a debt against him in favor of his beneficiaries. There is nothing in the statute to show that such a debt cannot be brought into an

assignment as well as any other; and that, if the assignment provides for a release by accepting creditors, such a debt is not as well released by acceptance as any other. That it may be entitled to preference out of the assigned funds is another matter, and not a question which we have to decide in passing upon Bassett's demurrer. No matter what may be the rights of the holders of the claim as against the assigned property, it is very certain that they cannot go into the assignment agreeing to release Bassett & Bassett, and each member of that firm, and at the same time proceed against one of the members to recover the debt in full. The owners of the claim must litigate with the assignees and opposing creditors as to the amount they shall receive upon their claim. They cannot make one of the assignees a party to the suit, as judgment cannot be rendered against him to be paid out of the assigned property.

We have, in deciding the demurrer, treated the assignment as one exacting releases from accepting creditors. This is not alleged in the petition; but, in construing its allegations most strongly against the plaintiffs, we must treat the assignment as being of that character. To hold it such is most unfavorable to their case; and, as they have failed to aver a fact which if true is important to a recovery on their part, we must presume that it was not true. By no reasonable intendment can the allegations be made to amount to a charge that the assignment did not provide for a discharge of the assignees from all further liability to accepting creditors. *Sanborn v. Norton*, 59 Tex. 308.

This brings us to consider the right of the plaintiffs, under the facts, to recover from the assignees. The assignment was found to be for the benefit of creditors consenting to release the assignors. It was shown that the money was loaned to Bassett & Bassett, and that they paid the interest regularly to Ronald Mills, and that his daughter indorsed this action by claiming no interest upon the debt when it was proved up before the assignees. The loan to the firm was made at the instance of Mills, and was sent from Virginia, where it had previously been on interest, directly to Bassett & Bassett, to be lent them. There was certainly no breach of trust on the part of B. H. Bassett, in carrying out the provisions of the trust in accordance with the expressed wish of one beneficiary, and with the consent of the other. The money remained with the bank, without objection on the part of the *cestuis que trustent*. That B. H. Bassett knew that the money was unsafe in the hands of the bank at any time, and that, if he had known this fact, he could have withdrawn the money, is not shown. There is therefore a total failure to show any indebtedness from B. H. Bassett to the appellants on account of the trust fund. The bank was indebted by reason of their having borrowed the money, but their relation to it was the same as towards any money that they had borrowed for banking purposes. We know of no law that makes the borrower of trust funds, loaned in pursuance of the express requirements of the trust, himself a trustee for its beneficial owners. That would be a startling doctrine, and would prevent loans being made by trustees, and investments of this character for the benefit of *cestuis que trust*, though these were the very objects for which the trust was created.

This is not a case where money or property has reached the hands of third parties charged with a trust. When borrowed by the bank, it was divested of its trust character, and became the property of the bank, and subject to its disposal in the same manner as money deposited with it on open account, or acquired in any other manner during the course of its business. The bank became its absolute owner, and owed a debt of corresponding amount to B. H. Bassett for the benefit of Mills and his daughter. The trusteeship of B. H. Bassett was not transferred to Bassett & Bassett. They owed the debt, and B. H. Bassett was trustee for its collection. Much less was a trust fastened upon other money property of the bank, which had no connection what-

ever with the borrowed funds. Hence the money and property acquired by Bassett & Bassett in the course of business of 12 years, which they conveyed to their assignees, passed to the latter charged with no trust whatever in favor of the appellants in this case. Even admitting that the trust debts must be paid in full by a statutory assignee before the general creditors can receive their *pro rata*, the appellants were not entitled to the relief they sought, because they established no trust against the assigned estate, and the court did not err in giving judgment against them, nor was there error in allowing the intervening appellees to come into the case. To allow the claim of the appellants as demanded by them was to diminish, and perhaps totally destroy, all their rights in the assigned property. They were therefore deeply interested in the judgment to be rendered. The assignee could fight their battles for them, but these creditors were not bound to leave their interest in the hands of the assignees. Having the right, under the statute, to see that no other creditor obtained more than his share, to their injury, we see no reason why they should not appear in a suit where this was the very question at issue, and make common cause with the assignees against creditors seeking to encroach upon their rights to a share of the assets. *Lovenberg v. National Bank*, 2 S. W. Rep. 874, (decided at present term.)

There is no error in the judgment, and it is affirmed.

HILL v. NEUMAN.

(*Supreme Court of Texas. January 25, 1887.*)

1. EJECTMENT—APPEAL—NON-JOINDER OF CO-OWNER—WAIVED.

Where, in an action to recover an undivided half interest in personal property and damages, in which the petition does not allege who is the owner of the other interest, no plea in abatement or exception raising the question of proper parties is filed, and judgment is rendered for plaintiff, the defendant cannot, on appeal, obtain a reversal of the judgment for the non-joinder of the co-owner.

2. ESTOPPEL—OWNERSHIP OF PROPERTY—EXECUTION SALE.

In an action to recover personal property by a plaintiff claiming under an execution sale on a judgment against the defendant, the defendant is not estopped by the fact of the execution against him from denying that he owned the property, and asserting that it belonged to a third person; and this though he had declared previous to the execution sale that the property belonged to him.

Appeal from Washington county.

Action to recover personalty. Judgment for plaintiff, Neuman. Defendant appeals.

Bassett, Muse & Muse, for appellant. *Garrett, Searcy & Bryan*, for appellee.

STAYTON, J. This action was brought by the appellee to recover an undivided half interest in a house, mill, gin, and other machinery situated on a lot belonging to a third person, and to recover damages for its use. It is admitted that the property was placed on the lot under such circumstances as to make it personal property. The petition did not allege who was the owner of the other interest. No plea in abatement, or exception raising the question of want of proper parties, was filed, but it is now urged that the judgment rendered should be reversed for the non-joinder of the co-owner. If such objection had been urged at the proper time, and in the proper manner, it should have been sustained; but it cannot be raised in this court for the first time, nor can such a question be considered under a general demurrer. *May v. Slade*, 24 Tex. 209. The petition stated a good cause of action in favor of the plaintiff against the defendant, and, if the latter was content to waive the non-joinder of some other person who ought to have been joined, the judgment cannot now be reversed. The cause was tried without a jury, and the judge, at request, filed conclusions of fact and law, to which excep-

tion was taken. The defendant also moved the court to correct the conclusions of fact, suggesting in the motion what the conclusions should be, and this motion was overruled. This is assigned as error.

If the conclusions of fact were not supported by the evidence, this matter could be corrected here, on a proper assignment of errors, if a full statement of facts be brought up, or the court below would doubtless re-examine its finding on motion for new trial based on the insufficiency of the evidence to support the findings. Erroneous findings may be corrected in either of these methods. It is the duty of a judge trying a cause to make findings upon any material issue in a case when requested to do so, as the findings become the basis of the judgment; and a failure to do so would be ground for reversal, unless it clearly appear that the evidence would have required, on the issue not passed upon, a finding adverse to the party complaining that no finding was made. As this case is presented, and in view of other matters presented by the record, we deem it unnecessary to inquire whether the court should have made findings other than those made.

The appellee purchased the property in controversy under an execution against the appellant. The execution, which appears to have been an original, issued on August 8, 1884, on a judgment rendered in favor of Shepard & Garrett on February 25, 1878; and it is urged that such a purchase, made at a sale under an execution, would not pass title. It has been very generally held that a sale made under an execution issued on a dormant judgment is only voidable, and that, as to a stranger who purchases, it cannot be attacked in a collateral proceeding. *Bogges v. Howard*, 40 Tex. 158. The appellee showed no other title than that he may have acquired under the sale before referred to, and on the trial the court excluded evidence offered by the defendant to prove that he had no interest in the property at any time, and to show that the property belonged to a third person. The objections made to this evidence were that it was irrelevant, and "that the defendant was estopped to set up title in a third person by reason of the sale of the property under an execution against himself. The plaintiff's right to recover depended upon his title. He alleged that he was owner, and the pleadings of the defendant put that matter in issue. Upon proof that the plaintiff bought the property under an execution against the defendant while he was in possession, nothing further appearing, the plaintiff would have been entitled to a judgment; but the fact of such purchase did not preclude the defendant's proving that the property belonged to a third person, and thereby showing that the plaintiff's averment of title in himself was untrue. The evidence should have been admitted; for there is no fact shown which would estop the defendant from proving that the property belonged to a third person. From the fifth conclusion of the court it is evident that the judge excluded the evidence on the sole ground of estoppel, as it is from the bill of exceptions. It is claimed in the brief of counsel that the defendant declared, before the execution sale, that he owned the property, and that he therefore ought not now to be heard to deny that fact. It is not made to appear that the appellee was influenced to purchase by any such declaration; but, if it did so appear, we do not see that this would estop the defendant in this action from asserting the title of a third person for the purpose of showing that the plaintiff has no right to recover. Such declarations, if acted upon, might preclude the defendant from asserting an after-acquired title, but it could not operate to pass to the purchaser the title of a third person. The law denies a recovery of property to one whose right depends on his title to the thing the recovery of which is sought, when it is shown that the title and right to possession is in a third person, not simply because the law will not do or require a useless act to be done, but because it will not interfere with the right of a third person, even though, as between the litigants, the plaintiff may be shown to have the better claim. This is well illustrated by the case before us. The plaintiff sues to recover the pos-

session of the property, and the defendant offered to prove that the interest in the property sued for belonged to a third person, in whose employment he was engaged in operating it. Is the true owner to be dispossessed by dispossessing her employe, from the mere fact that the employe has declared even to the purchaser that he is the owner? Certainly not, unless the true owner has done some act which will preclude her from asserting title; and whether she has done so can be determined only in an action to which she is a party.

For the error noticed, the judgment will be reversed, and the cause remanded.

FIEVEL v. ZUBER.

(Supreme Court of Texas. January 28, 1887.)

1. LIMITATIONS—MORTGAGE—POWER OF SALE.

The power to make a sale under a deed of trust given to secure the payment of a debt may be exercised, although the right of action on the debt is barred, and although the rights of a third person as purchaser of the equity of redemption have intervened. Such purchaser, therefore, cannot, because the debtor has made a new promise sufficient to postpone the bar of the statute so far as he is concerned, and because a sale has been made under the power after the right of action on the debt, but for the new promise, would be barred, assert a right in the land paramount to the right of the purchaser at the sale under the power.¹

2. MORTGAGE—SUBROGATION—PAYMENT—AGREEMENT.

Where, in the absence of an agreement or understanding, a stranger to the title to land conveyed by deed of trust to secure a note discharges the debt, it is deemed extinguished, and the doctrine of subrogation has no application; and the trustee in the deed of trust is a stranger to the title. It is otherwise, however, where the debt is discharged under an agreement with the debtor, or under circumstances from which an agreement may be implied, that the note shall be held until the money is repaid; and this, although the creditor is not a party to the agreement.

Appeal from Galveston county.

McLemore & Campbell, for appellant. *Ballinger, Mott & Tery*, for appellee.

GAINES, J. On the fifteenth day of June, 1874, Eliza H. Wakeman sold the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of lot 43, in the city of Galveston, to one Lawson, for \$3,000. The sum of \$1,000 was paid at the time of the transaction, and two notes were given for the balance, each for \$1,000, and bearing 10 per cent. interest, payable, respectively, at one and two years after date. The notes were secured by a deed in trust upon the lot conveyed, executed to one R. A. Brown, as trustee, at the time of the sale, and authorized him, in case of default in payment of either of them, to sell the property at public sale in order to satisfy the debt. The first note was paid. When the second sums fell due, the interest was paid, and an extension of 12 months was given. Before the maturity of this note, however, appellee, Zuber, loaned Lawson \$7,000, and took a deed in trust from him on the east half of the lot to secure the debt; and in March, 1880, Lawson and wife conveyed to Zuber the premises so mortgaged in satisfaction of the loan. Lawson's note to Miss Wakeman was sent to Ball, Hutchings & Co. for collection, and, when the 12-months extension had run out, was, at the request of Lawson, made to R. A. Brown, taken up by the firm of which the latter was a member, Lawson promising to arrange to pay it in a few days. The note was held by this firm until it was paid by money furnished by Kaufman & Runge for that purpose. This occurred some seven or eight days after Brown took up the note. There is evidence tending to show that, when Kaufman & Runge agreed to let Lawson have the money, he promised that they should hold the note as security. On the fifteenth day of December, 1879, Lawson indorsed a new promise upon the

¹See *First Nat. Bank v. Thomas*, (Ky.) *ante*, 12, and note.

note sufficient to postpone the bar of limitation, so far as he was concerned. On March 10, 1881, the note being unpaid, Brown was requested by Kaufman & Runge to sell the property under the deed of trust to pay the debt, but declined to do so. The deed of trust having provided for such a contingency, Kaufman & Runge appointed one Ruhl substitute trustee, who immediately advertised the entire mortgaged property, and sold it on the twenty-ninth day of the same month. At this sale appellant, Fievel, became the purchaser, and shortly after obtained possession of the premises. Zuber brought suit, and obtained a verdict and judgment in the court below, and Fievel now appeals.

The court below charged the jury, in substance, that, after the deed in trust upon the lot was executed to Austin to secure Zuber's debt, Lawson could not affect the latter's rights by making a new promise, and that, if the note to Miss Wakeman was barred by the lapse of four years from its maturity, the sale from Ruhl, trustee, to Fievel passed no title. This charge of the court is assigned as error. The latter proposition is in accordance with the latest decision of this court upon the question at the time the charge was given. *Blackwell v. Barnett*, 52 Tex. 331. But in the more recent case of *Goldfrank v. Young*, 64 Tex. 432, that decision was overruled, and it was held that the power to make a sale under a deed of trust could be executed although the right of action in the courts upon the debts secured by it was barred by the statute of limitations. In that case the controversy was between the original parties to the transaction. In this the rights of a third party as a purchaser have intervened. But we are of opinion that, as a matter of substantial justice, there is no difference between the two. Any one has the right to purchase the equity of redemption in mortgaged property, or, to express it in a manner more in accord with the doctrine of our courts, he has the right to purchase the property subject to the mortgage debt. And it may be admitted that neither the mortgagor or mortgagee, after the purchase, can do any act prejudicial to his interest. But it cannot be conceded that a vendee of an estate with notice of an existing lien upon it acquires any greater right than his vendor, or that his conveyance deprives the prior mortgagee of any remedy for the collection of his debt which existed at the time of its execution. It follows, we think, that, if the power in a deed of trust can be executed after an action upon the debt is barred, while the property remains in the hands of the mortgagee, this remedy of the mortgagee cannot be taken away by a sale to a third party who has notice of the incumbrance.

But it is contended on behalf of appellee that the doctrine laid down by this court in *Goldfrank v. Young*, *supra*, should not be adhered to, and it is due to the able and exhaustive argument filed by their counsel that the question should not be passed unnoticed. But for the fact that the former decisions of this court seemingly tend to a different conclusion, we think the authority of that case not likely to have been called in question. But with one exception, if there be a seeming inconsistency between that and former cases, we think it more apparent than real. The doctrine in *Duty v. Graham*, 12 Tex. 427, and in the subsequent cases approving it, is that the mortgage is a mere incident of the debt, and that, when the action on the latter is barred, there is no remedy in the courts to enforce the mortgage. This does not necessarily lead to the conclusion that the statute operates as well upon any remedy the debtor may have outside of the courts. The statute does not say that no debt shall be collected, but that no action shall be brought; nor does it provide that the debt shall be considered extinguished. And statutes of limitations worded likewise are generally held to operate solely upon the remedy in the courts, and not to destroy the debt. The one case we have holding the contrary doctrine is *Blackwell v. Barnett*, 52 Tex. 331, which is itself in conflict with the decision in *Sprague v. Ireland*, 36 Tex. 655. The opinion in *Goldfrank v. Young* shows that *Blackwell v. Barnett* was overruled after

most careful consideration, and we think the principles announced in that opinion supported by sound reasoning and high authority. We are of opinion, therefore, that the doctrine there laid down should be adhered to, and that it is controlling upon the question upon the trial of the cause of the correctness of instructions to the jury. We therefore hold that the court erred in its charge to the jury, and that the judgment must be reversed, unless the uncontroverted facts show that, under the law, no other judgment could have been lawfully rendered in the court below.

It is insisted, on behalf of appellee, that the note of Lawson, secured by the deed in trust from him to Miss Wakeman, was paid in so far as the rights of Zuber are concerned. There is evidence in the record tending to this conclusion; but, whether all the facts proved establish a payment or a subrogation, is a question which we cannot here determine. A party who has an interest in property to be protected by discharging an incumbrance upon it has the right to pay it, and to substitute himself to the rights of the lienholder, whether either the creditor or debtor give his assent or not. But neither Brown nor Kaufman & Runge had such right. As long as the note remained undischarged in the hands of the holder or her indorsees, they were strangers to the title. Brown, as mere trustee in the deed in trust, had the power to make a sale if the debt were not paid, but had no interest in the property to be protected by the discharge of the lien. If any subrogation took place, therefore, it must have been by agreement of parties. That this can be accomplished by a payment in accordance with an express understanding between the debtor, the creditor, and a third party, to the effect that if such third party pays the debt he may hold the surety for his reimbursement, there can be no doubt. *Dillon v. Kauffman*, 58 Tex. 696; *Flanagan v. Cushman*, 48 Tex. 241. It is also recognized law that a payment upon a like agreement between a stranger and the creditor will have the same effect. In both these cases, however, this would seem a virtual assignment, without reference to the doctrine of subrogation. But upon the proposition that a substitution can be brought about by a contract between the debtor and a volunteer, to which the creditor is not a party, the law is not quite so clear. That it cannot be done as to a part of the debt, or in any manner to affect the rights of the creditor to his prejudice, does not admit of doubt. But there are numerous decisions which recognize the doctrine that, if a third party pay the entire debt in pursuance of an agreement between him and the debtor, that, upon his doing so, he shall be subrogated to the creditor's rights, the agreement will be given effect, and such third party will stand in the place of the creditor as to all persons interested in the property or the security. In some of the cases the point is directly decided. *Fuller v. Hollis*, 57 Ala. 435; *Owen v. Cook*, 3 Tenn. Ch. 78; *Mitchell v. Butt*, 45 Ga. 162; *New Jersey M. R. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Morgan v. Hammett*, 23 Wis. 30; *Caudle v. Murphy*, 89 Ill. 352. See, also, Jones, Mortg. § 877; 3 Pom. Eq. § 1212, note 2; Sheld. Subr. §§ 247, 248.

We have not found the rule otherwise except in the state of Louisiana, (*Harrison v. Bislard*, 5 Rob. 204; *Hoyle v. Cazabat*, 25 La. Ann. 438; *Brice v. Watkins*, 30 La. Ann. 21;) and the opinion in the case first cited (*Harrison v. Bislard*) shows that the law upon this subject is governed by statute in that state, (see Civil Code La. art. 2156.) Such is not the rule of the civil law. Domat says: "One may acquire the privilege of a creditor without substitution, in the same manner as a mortgage, by agreement with the debtor that he who shall pay for him shall have the privilege, and it makes no difference whether the payment be made to the creditor by him who lends the money, or by the debtor with whom the money has been intrusted." 2 Strahan's Dom. Civil Law, (Cushing's Ed.) p. 698, § 1783. The reason of the rule is thus admirably stated in the author's notes to the text quoted: "The manner of acquiring the right of the creditor without his substitution is just

and equitable, in order to facilitate the payment of debts. It is but just that the debtors themselves should have the power to put in place of the creditors those who pay for them, since nobody receives any prejudice thereby, and since it is the interest of the debtor that he should have the power of making his condition easier by changing his creditor."

If, therefore, when Brown paid the note to Ball, Hutchings & Co., there was an express agreement between him and Lawson that his firm should hold the note until the money was repaid, or if the payment was made under circumstances from which such an understanding might reasonably be implied, then Brown, or the firm of which he was a member, became substituted to the rights of the holder of the note at the time of payment; and, under a like agreement or understanding, the same rights would be transferred to Kaufman & Runge when they paid the money to Lawson to be paid to Brown. If, on the other hand, when Brown paid the note he did it merely as an advance upon Lawson's individual credit, and relied solely upon Lawson's promise to pay it back, then the mortgage debt was extinguished, and no subsequent act on part of Lawson could revive it as to appellee, Zuber.

From what we have said it will be seen that the case must be reversed and remanded. There are other points raised in the brief of appellee's counsel questioning the validity of the sale, but, since they have not been argued on behalf of appellant, we shall decline to pass upon them here.

For the error in the charge as pointed out, the judgment is reversed, and the cause remanded.

RICHARDSON, Ex'r, and others v. HUTCHINS.

(*Supreme Court of Texas. January 28, 1887.*)

1. HUSBAND AND WIFE—GIFT, EVIDENCE OF.

Where a husband surrenders an obligation for bonds, and takes in its place a new obligation in his wife's favor, and delivers this to a third person, with instructions to collect and hold the interest for the wife's benefit, and, although afterwards resuming possession of the obligation, and using its proceeds, repeatedly declares, before and afterwards, that he intended a gift to his wife, the fact of the gift is clearly established.

2. SAME—GIFT—VALIDITY AS TO HUSBAND'S CREDITORS.

Property worth \$75,000 is not an unreasonable provision for a husband owing \$150,000, but worth at the time, and always afterwards, not less than \$300,000, to make for his wife. His creditors cannot impeach such a gift.

3. SAME—WIFE'S SEPARATE ESTATE.

If a husband diverts his wife's separate estate, and uses it in the community business, no express promise to repay its value need be proved to enable the wife to recover the amount from the husband's executor.

4. INTEREST—HUSBAND CONVERTING WIFE'S SEPARATE ESTATE.

As, in Texas, the revenue of the wife's separate estate is community property, which the husband may use without liability to the wife, in an action by her against his executor to recover the value of the separate estate diverted by her husband, interest is recoverable only from the date of his decease.

Appeal from Harris county.

Baker, Botts & Baker and *Hutcheson & Carrington*, for appellants. *Jones & Garnett*, for appellee.

STAYTON, J. On October 21, 1869, and for a long time prior to that date, W. J. and Elvira Hutchins were husband and wife. During their marriage they acquired a large community estate, the value of which, during the years 1869, 1870, and 1871, some of the witnesses estimated at not less than a half million of dollars in excess of the indebtedness. All the evidence shows that during the years named he was a wealthy man. About September 30, 1869, W. J. Hutchins held the obligation of the Houston & Texas Central Railroad Company for 105 of its first mortgage bonds, each for \$1,000, and bearing 7 per cent. gold interest. On the day last named he surrendered that obligation,

and received in its place one in favor of himself for 30 bonds, and another for 75 of such bonds payable to his wife, who is the plaintiff in this cause. These obligations for bonds, as between the railroad company and their holders, for the purpose of collecting interest and like purposes, stood as would the bonds had they been issued and delivered. After the obligation to Mrs. Hutchins for 75 bonds was issued, her husband forwarded them to A. L. Reid, a resident of New York, who seems to have been an old and intimate friend of the family, and the following letter accompanied the obligation:

"HOUSTON, October 21, 1869.

"*Mr. A. L. Reid, N. Y.*—DE. SIR: I send you herein note against the Houston & Texas Central R. R. for 75 one thousand \$ bonds in favor of my wife. The N. Yk. agent is instructed to pay the interest regularly in N. Yk. You will please hold it for my wife's benefit.

"I am very respectfully,

W. J. HUTCHINS."

Mr. Reid received the obligation soon after the date of that letter, and held it until the eighteenth February, 1871, during which time he collected the interest falling due on the bonds for the sole use and benefit of Mrs. Hutchins, who was then in Europe. Mr. Reid testified in the case, and, after stating that he held the obligation as the separate property of Mrs. Hutchins, testified as follows: "During the time I held said note, as stated, I had several conversations, at different times, with W. J. Hutchins, in which he spoke of and treated said note as the separate and individual property of the plaintiff in this suit, which he had given to her, and which he had placed in my hands by said letter of October 21, 1869, to hold for plaintiff." "W. J. Hutchins told me the reason why the note was made payable to his wife, that he intended the note, at the time of its execution, as a gift to his wife." In accordance with request made by W. J. Hutchins, Reid returned the note or obligation for bonds to him about February 18, 1871, after which he surrendered it to the railroad company, and received in its place, two other obligations of the company, in the aggregate for the same number of bonds, each payable to himself, which he held, or at least collected interest upon, until the end of the year 1876, after which they went into the hands of another holder to whom the obligations were paid. Soon after the obligation was placed in the hands of Reid, Mrs. Hutchins, then in Europe, was informed by a letter from her husband that he had placed it in his hands as a donation to her. She was also informed by Reid. In the year 1877, in a conversation with Thomas L. Rushman, an acquaintance and intimate friend for 40 years, W. J. Hutchins stated that he had given to his wife \$75,000 in securities, which he had subsequently used in his business, but that he intended to secure her against loss.

That the obligation was placed in the hands of Reid, with intent to make a donation to Mrs. Hutchins, seems to have been well understood in the family, from declarations made by W. J. Hutchins before and after he received the obligation from Reid. Mrs. Stewart, a daughter, testified to repeated declarations of her father to that effect, and of his expressions of intention to reimburse his wife. She stated that "these conversations occurred frequently both before and after February, 1871. Sometimes my mother was present, and sometimes was not, when my father spoke of it. I do not know the exact date when the plaintiff ascertained the fact that said bonds and note for bonds had been delivered by A. L. Reid to W. J. Hutchins. She learned it from W. J. Hutchins some time in the spring of 1871. He said he wanted to use the note, and would reimburse her for it. I do not remember what my mother said."

W. J. Hutchins died on fifth of June, 1884; and this action was brought against the executor of his will on the tenth of October, 1885, by Mrs. Hutchins, to recover the value of the bonds, with interest thereon. The cause was

tried without a jury, and resulted in a judgment in favor of the plaintiff for the estimated value of the bonds, and for interest thereon from February 18, 1871, at the rate of 8 per cent. per annum. The City Bank of Houston, claiming to hold an indebtedness against the estate of W. J. Hutchins, existing on October 21, 1869, intervened. The defendant and intervenor appeal.

The trial court found that W. J. Hutchins intended to make and did make a gift to his wife, and that the donation was no more than a reasonable provision, considering the donor's wealth and standing at the time it was made. It was further found that, at the time the gift was made, W. J. Hutchins owed about \$159,000, and that he was never, at any time from September, 1869, to the time of his death, worth less than \$300,000, and that, after making the gift, "he had over six hundred thousand dollars' worth of property in Texas belonging to him, which was more than three times the amount of any and all indebtedness by him." From an inspection of the evidence offered we are not able to say that the finding, as to the estate of the deceased at the time the gift is claimed to have been made, was not justified. We are unprepared to hold that \$75,000 was an unreasonable provision, for a husband possessed of such an estate, to make for his wife.

The appeal of the intervenor need not be further noticed, except as the assignments of error involve the same questions presented by the other appellant.

That a husband may make a gift to his wife, of his separate estate or of community property, without the intervention of a trustee, is well settled in this state, if not in all the other states of this Union. *Story v. Marshall*, 24 Tex. 306; *Smith v. Boquet*, 27 Tex. 512. That W. J. Hutchins intended to make a gift of so much of the community property to his wife the evidence makes too clear for controversy. If the obligation, made at the request and under the direction of the husband in favor of his wife, had never been delivered to Reid to be held for her as her separate property, the evidence is ample to show that, by the act of taking the obligation payable to the wife, the husband intended to vest in her, as her separate estate, every thing or right the obligation on its face professed to secure to her.

In transactions between husband and wife, when this is made clearly to appear, the contract is held to be consummated, though the paper which evidences the right of the wife was never actually delivered to her, or to any third person for her, or though the thing donated has remained in the possession of the husband. *Higgins v. Johnson*, 20 Tex. 393; *Smith v. Boquet*, 27 Tex. 512; *Brown v. Brown*, 61 Tex. 58; *Hillebrant v. Bewer*, 6 Tex. 49; *Crawford's Appeal*, 61 Pa. St. 52; *Deming v. Williams*, 26 Conn. 226. The obligation was the evidence of the right, and the only thing at the time, susceptible of a delivery; and the delivery of it to Reid, to be held by him for the benefit of Mrs. Hutchins, would satisfy the rule of law which requires delivery of the thing given to complete the donation, had not the transaction been one between husband and wife. The right to the 75 bonds became the separate property of Mrs. Hutchins; and that the benefits of this right were subsequently appropriated by her husband to purposes having no relation to her separate estate is fully shown. The only inference which can be drawn from the evidence is that the proceeds of the obligation for bonds were used in the course of his business, which pertained to the community, it not being shown that he had any separate estate.

It is not denied, if the right to the bonds, or their value, became the separate estate of Mrs. Hutchins, and was subsequently used by her husband in the community business, that the community estate would be liable, upon the express provision of the husband, to reimburse the wife for her property so used; but it is denied that the community estate, or separate estate of the husband, were there any, is liable in the absence of an express contract. It is not shown that W. J. Hutchins owned any separate property, nor that he carried on any

business other than that which pertained to the community of which he was the representative. There is evidence tending to prove that W. J. Hutchins, after he had used the separate property of his wife, promised to reimburse her; and we know of no rule of law which requires promises to be in writing when made by a husband to his wife under such circumstances as are presented in this case. A promise in writing may import a consideration which a verbal promise will not; but, when a consideration for a promise is shown, a verbal contract, when the law does not require the particular contract to be in writing, is as valid as though it were written. It may be more difficult to prove, but it is no less binding. The court, however, did not base its judgment on an express verbal promise, but upon the broad ground that the community estate of a deceased husband is liable for the value of the separate estate of the wife used by him even in the business of the community. The separate estate of a husband or wife is as distinct from the community estate owned by them, as to title, as is the estate of any person in no way related to another to such other's estate. The separate estate of a wife by mere operation of law can never be made liable for community debts, while both the community estate and the separate estate of a husband will be liable for any debt he may contract. What shall be the separate estate of a wife is declared by the constitution as well as by statute. Const. art. 16, § 15; Rev. St. 2851. The law, however, provides that "during the marriage the husband shall have the sole management of all such property." As said in *McKay v. Treadwell*, 8 Tex. 180: "This invests him with such control and powers as are incident and necessary to the due exercise of his authority, but gives him no power over matters affecting her right or title to the property, or to perform any act by which such title may be endangered."

While a husband does not here *hold title* to his wife's separate estate in trust for her, as he is held to do in England and in the states of this Union generally, when a conveyance is made to a wife for her separate use and benefit, and no trustee named, yet it does not follow from this that the husband is not, as to the wife's separate property, essentially a trustee, charged with duties, for the violation of which any estate subject to the payment of his debts will be liable. A person is said to be a trustee in whom a power over property, or affecting it, vests for the benefit of another; and a person having such power is as essentially a trustee as is one in whom the title to the property which he has the right to control is vested for the benefit of another.

The husband is here made by statute the trustee for the wife, with power to manage and control her separate property; and we see no reason why he shall not be held to the duties and liabilities which ordinarily attach to that relation. So long as he manages the separate estate of his wife with reasonable care, not diverting it from the purposes for which the law places it in his hands and control, though loss may result from his management, he is not liable therefor. But can it be said that such a trustee may convert the separate estate of the wife into money or other property, and appropriate that to the benefit of himself, or to the benefit of the community, and not be liable for its value? If the wife's separate estate consists in money, or in securities which he may convert into money legally, may he pay a debt of his own, for which the wife's separate estate is in no way liable, with it? May he mingle such separate estate with funds of his own, or of the community, so that it cannot be identified, or may he so invest it in property in his own name that it cannot be followed and thereby escape liability? If so, the separate estate of a married woman, notwithstanding the solicitude shown by the legislature to protect it, has no protection at all, and the husband, whose duty it is to preserve, has the unrestrained power to destroy, such estate, unless it consists in such things as the husband cannot dispose of without the wife's consent, in which case the wife may preserve her estate by refusing to sell, and thus keep up its identity. The rule is that every trustee is liable for the

diversion of a trust fund, and upon the death of the trustee this liability rests upon his legal representative, and must be satisfied out of such funds in his hands as are subject to the payment of the claims of creditors generally. That the husband is made a trustee by operation of law does not change the rule.

In the case of *Gover v. Owings*, 16 Md. 99, it appeared that a husband had collected a note, the separate property of the wife, and the court, after declaring that he became a trustee by operation of law, said that "he, as such, has the right to reduce into possession her *choses in action* for her sole use and benefit; and, like any other trustee, he and his representatives are responsible to her separate estate for whatever funds he may receive belonging to it. In virtue of this principle the husband of the plaintiff became her trustee, and was entitled to collect the note in question. If he misapplied the proceeds, his estate is liable to her claim." In *Dent v. Slough*, 40 Ala. 523, it appeared that a husband had invested funds, which belonged to his wife's statutory estate, in a mercantile partnership, and it was held that the wife was entitled to be classed as a general creditor of his estate after his death. The same ruling, in effect, was made in *Andrews v. Huckabee's Adm'r*, 30 Ala. 156, and in *Green v. Brooks*, 25 Ark. 324; *Walker v. Walker*, 9 Wall. 753.

The relation of the husband to the property which the wife brings in marriage to him, as dowry, under the civil law, bears a very close analogy to his relation to the separate estate of his wife under the statutes of this state, as does his relation to the wife's paraphernal property when it is not administered by the wife. In reference to the right of the wife to restitution of the dowry, the rule is thus stated: "The last engagement of the husband is to restore the dowry whenever the case happens that it ought to be restored; as, if the wife dies without children before the husband; if the marriage is declared null and void; if they are divorced or separated from bed and board; or if the wife obtains a separation of goods only because of the husband's poverty; if the dowry was given to the husband at the time of espousals, and the marriage was not accomplished. And, when the husband dies, his engagement to restore the dowry passes to his heirs, executors, or administrators." Dom. Civil Law, § 870. The same rule applies in reference to paraphernal goods when administered by the husband, and in neither case is it based on an express contract.

In Louisiana the separate property of the wife is dotal or extradotal, which embraces that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment, and termed "dowry," and that which by the civil law is termed paraphernal. Civil Code, 2315. That Code provides, in substance, the same rules to which we have referred for the adjustment of the rights of the wife in reference to her separate estate after the death of the husband, and its provisions but adopt and illustrate the rules of the civil law. *Degrux v. St. Pe's Creditors*, 4 Mart. (N. S.) 407; *Gasquet v. Dimitry*, 9 La. 588. In that state, for separate property of the wife misapplied by the husband, his estate, which embraces the community, has been steadily held liable, and her standing, even as a preferred creditor, recognized. *Cassou v. Blaque*, 3 Mart. (La.) 390; *Hannie v. Browder*, 6 Mart. (La.) 14; *Dreux v. Dreux*, 3 Mart. (N. S.) 239; *Daigle v. Crow*, 15 La. Ann. 597; *Rachal v. Le Roux*, 18 La. Ann. 588; *Gillett v. Deranco*, 6 La. Ann. 590; *Barbet v. Roth*, 16 La. Ann. 271; *Breaux v. Blanc*, Id. 145.

A rule which would deny a wife's right to recover from a deceased husband's estate the value of her separate estate which he diverted, unless he expressly promised to pay for it, would make her right to depend upon the sense of justice or arbitrary will of a husband, and not upon facts which will ordinarily entitle a beneficiary to recover from a trustee.

The court below allowed interest on the value of the 75 bonds, from February 18, 1871. This we think was error. The interest accruing on the bonds, it is true, was a revenue derived from the separate estate of the wife, but the

law of this state declares that to be community property, and this the husband may use without liability to the wife. The deceased was entitled to such sum so long as he lived, and no use he may have made of the bonds, can entitle the wife to interest, unless there be that in the evidence which shows that he gave to her the revenue to be derived from the bonds. There was no declaration to that effect, and not that in the conduct of the donor from which it appears that such was his intention; and, in the absence of this, it cannot be held that the revenue was not community property, as all such income, in the absence of proof to the contrary, is presumed to be.

The judgment will be reversed, and here rendered in favor of the appellee, for the sum of \$67,500, the value of the bonds as found, with interest on that sum at the rate of 8 per cent. per annum from the fifth day of June, 1884. It is so ordered.

MORRIS and others v. THE SCHOONER LEONA and another.

(*Supreme Court of Texas. February 1, 1887.*)

TOLLS—FRANCHISE—FREIGHT—CITY OF CORPUS CHRISTI—CONDITIONS.

A franchise of collecting tolls on all freight passing over a certain channel was granted to the city of Corpus Christi, which was transferred by the city to M. & C. upon certain considerations, among them that of keeping the channel of the depth of 8 feet, and of the width of 100 feet, throughout its entire length, as required by the laws of the state. There was evidence to show that during the entire month of May, 1881, the channel was not 8 feet deep, or 100 feet wide, for its whole length; and that the city council, after having given notice to M. & C. to restore it to its contract dimensions, passed an ordinance suspending the collecting of tolls till the channel should be restored, and that the order was in force during that month. *Held*, in a suit by M. & C. to recover tolls on freight transported during the month of May, 1881, that, as they had failed to keep the channel of the depth and width required by the state and their contract with the city, they were not entitled to maintain the suit.

Appeal from Nueces county.

McCampbell & Givens, for appellants. *Welch & Givens*, for appellee.

WILLIE, C. J. This suit is by the appellants against the schooner Leona and her owner, N. Gussett, for the sum of \$431.34, alleged to be due the appellants as double tolls on freight transported during the month of May, 1881, in the Leona, over an artificial channel connecting the passes of Aransas and Corpus Christi. The defense of the appellees was the failure of Morris & Cummings to keep the channel of the depth of 8 feet, and of the width of 100 feet, through its entire length, as required by the laws of the state and a contract entered into by them with the city of Corpus Christi. The appellees alleged that it was of much less depth and width than was required at the time the freight for which the tolls were charged, passed over the channel, and had been in this condition for a long time previous thereto. They further claim the city had, as far back as 1877, caused the width and depth of the channel to be ascertained by proper soundings, and, finding it narrower and shallower than the contract required, had notified Morris & Cummings of the fact; that they had refused to restore its proper dimensions, and thereupon the city council had suspended their right to collect tolls, and that this suspension was in force at the time the Leona transported the said freight over the channel. The appellants denied these allegations as to the dimensions of the channel at that time; and further insisted that, if the facts alleged were true, this would not defeat their right to collect the tolls, as this right was a franchise which could be forfeited, if at all, only by a direct proceeding on the part of the state, and that it was not subject to the collateral attack made upon it in this case. The court below found the facts to be in accordance with the defenses set up by the appellees, and that the suit could not be maintained, because the channel was not up to contract requirements at the time

the *Leona* passed over it with the freight upon which the tolls were charged, and gave judgment for the appellees. From that judgment this appeal is prosecuted.

There was abundant proof produced upon the trial to show that during the entire month of May, 1881, the canal was not 8 feet deep, or 100 feet wide, for its whole length; but that at the time, and for more than three years previous thereto, it had been allowed to shoal and narrow to much less dimensions. It was also shown that, as far back as 1877, the channel had become so obstructed as to interfere with the transit of vessels drawing less than eight feet of water; that the city council of Corpus Christi had ascertained this fact by an actual survey; had given notice to Morris & Cummings to restore it to proper dimensions; but that they had failed to do so until September, 1881. The city council had passed an ordinance suspending the collecting of tolls till the channel should be restored, and that the order was in force during the month of May, 1881. Some of this evidence was objected to by the appellants, but, as these facts were important upon the question of the right of appellants to demand toll, as will be seen hereafter, there was no error in the court's taking it into consideration.

Questions as to the relation of Morris & Cummings to the city of Corpus Christi, in reference to the right to take these tolls, have been before this court on three different occasions. See *Morris v. The Leona*, 62 Tex. 35; *Same v. State*, Id. 728; *Same v. State*, 65 Tex. 53. The result of these decisions is that the right to construct and maintain the channel, and demand toll for the passage of vessels through it, which had been granted to the city of Corpus Christi, was by her transferred to Morris & Cummings upon certain considerations and conditions, and until the bonds issued by the city in payment for the channel should be paid off by the amount received for such tolls. This agreement as to the transfer was held to be valid in all respects, and a contract which the state could not impair by subsequent legislation. Every part of the contract was binding, and might be enforced. Hence that portion which provides for a suspension of tolls so long as the channel was not of proper dimensions cannot be eliminated from the contract, but must be rendered effective according to its terms. It was inserted for the purpose of securing a compliance with the other provisions of the contract, and effecting its objects, which was to excavate and keep constantly in good condition a channel which would open the port of Corpus Christi to the commerce of the world. To dig such a channel, and then allow it to fill up, would be of little service to commerce, or the interests of the city; hence the requirement that it be kept at the proper depth was as important as that it should be of sufficient dimensions when originally constructed. The city council reserved no other means of enforcing this important provision of the contract except the right to suspend the tolls if it was not fulfilled. If she cannot enforce these terms, then the reservation is void, and the contract stands as if no such right was reserved, and the city is powerless to compel the contractors to keep the channel in the condition they have agreed that it should at all times remain.

But it is said that the state must proceed by an information in the nature of a *quo warranto* to forfeit the franchise, and this is the only remedy for any default in maintaining the channel at proper depth and breadth. The *quo warranto* proceeding is used to forfeit, not to suspend, a franchise. It is used to reclaim a privilege granted by the state, not to punish for a breach of private contract. The present contract contemplated no such penalty as the permanent deprivation of the right to collect tolls for a failure on the part of Morris & Cummings to keep the channel of prescribed dimensions. The penalty was a suspension of tolls till the proper size of the channel should be restored. This stipulated penalty was imposed to compel the maintenance of a channel which would admit vessels of sufficient draught to serve the pur-

poses of the commerce of Corpus Christi. If it should become shoaled, it was to the interest of the city that its depth should be restored, and the fact that no tolls could be received till this was done was a spur and an encouragement to the contractors to restore it as soon as possible. Whatever may be the right of the state to proceed for a forfeiture of franchise under the laws by which it was granted to the city, it is very clear that the existence of such a power in the state would not interfere with the right of the city to enforce her contract with the constructors of the channel. These rights were entirely consistent with each other. The one, as we have held, must be directed against all parties having an interest in the franchise, viz., the city and the contractors, (*Morris v. State*, 65 Tex. 53;) the other was to be enforced between the city and the contractors, without any reference to the state whatever. We have, then, a valid contract, with a binding stipulation contained in it that, if the agreements on the part of Morris & Cummings as to deepening and maintaining the channel are not complied with, their right to toll shall be suspended.

Their agreement as to maintaining the channel was not fulfilled. It was then the right of the city to suspend the tolls until the channel was restored. This right she exercised upon proof satisfactory to herself, and which was shown in this case to be true; and she exercised it in the only manner she could, viz., through action on the part of her council. She gave notice to Morris & Cummings, and allowed them an opportunity of performing their duty before enforcing the stipulated penalty. This they refused to do; and we can see no reason why, in accordance with their contract, the right to suspend the collection of tolls should not take place, and be put into practical effect, when they are sought to be collected during the suspension. This would be the effect of a breach of a like character when no franchise was involved. If a suspension of the right to receive money from third persons for a failure to perform an agreement was stipulated for, upon such failure the receipt of the money could no longer be enforced. There is nothing in the nature of a franchise which makes a contract between parties in reference to it less obligatory than when made with reference to other matters. As to its forfeiture for anything which the state alone can take advantage of, this is between the state and its owners; but, as to any lawful contracts made between the grantee and other parties, no interference of the state is necessary to enforce them, and no failure on her part to interfere can prevent the grantee from insisting upon their performance. The stipulation under consideration was, in effect, an agreement on the part of Morris & Cummings that they would not charge tolls while the channel was in a shoaled condition. This stipulation inured to the benefit of each vessel that used the channel, and the suspension was inoperative if vessels could be compelled to pay toll after it was declared in the same manner as before. When the contingency happened for which the tolls might be suspended, and the suspension took place, the agreement was that any vessel might pass over the channel without paying tolls, and it was a violation of their agreement to collect them. If the agreement had been that any vessel which should be grounded on her passage through the canal should not pay toll, such a contract could certainly be enforced by pleading this fact in a defense of a suit to recover tolls from her. This would be a suspension of the franchise in a particular case. If it can be suspended at all, it can be suspended to any extent the parties can agree upon. If a contract to the effect that the franchise of Morris & Cummings should cease, and revert to the city, in case of their non-performance of any part of their contract, had been so authorized by the state, there could be no objection to its enforcement, though it deprived them of the franchise altogether, and reinvested it in the city. No proceeding on the part of the state would have been necessary, as the franchise was not to be resumed by the state, but by her grantee. In that event their right to tolls would be divested by virtue of

their contract, and that it was suspended by the action of the council does not admit of a doubt.

We think the conclusions of the court that this suit could not be maintained were correct, and the judgment is affirmed.

MOORE v. MOORE, Ex'x.

(Supreme Court of Texas. February 1, 1887.)

TRIAL—SPECIAL VERDICT—ISSUES.

Plaintiff claimed one-half of a tract of land as assignee of a widow's interest in the land, and the other one-half as creditor of the deceased husband. Defendant claimed the whole tract under a deed from the husband, which plaintiff charged was fraudulent. The jury found specially for defendant for one-half of the land, and thereupon the court entered judgment for defendant for one-half of the land. *Held*, a special verdict must determine all the issues made by the pleadings, and in language not to be misunderstood, and a verdict finding only part of the issues is fatally defective. Therefore the verdict in this case did not authorize the judgment in favor of defendant for one-half of the land, nor any other judgment.

Appeal from Houston county.

J. R. Burnett, for appellant. *D. A. Nunn*, for appellee.

GAINES, J. This litigation has grown out of the decree of divorce rendered in favor of Jane Rice against C. A. Rice on a writ of error sued out by the former. The decision is reported in 31 Tex. 174. George F. Moore became the assignee of the wife's interest in the community property of that marriage, and also of a probated claim in her favor against her divorced husband's estate, he having died after the decree of divorce was granted. He instituted this suit to recover, as such assignee, of appellant one-half of the tract of land now in controversy, and to subject the other half to the payment of the probated claim. C. A. Rice's heirs were made parties to the proceedings, by amendment. The case has heretofore been twice before this court. On the first appeal the judgment was reversed on account of a want of service upon one of the heirs of Rice. Upon the second, however, the case was discussed upon its merits, and the law as applicable to it made clear. See *Moore v. Moore*, 59 Tex. 54. The same issues, in substance, seem to have been presented upon the second as were made upon that from which the present appeal was taken. The judgment now appealed from is for appellee for one-half of the land in controversy, and in favor of appellant for the other half. The verdict of the jury was as follows: "We, the jury, find for the defendant, H. W. Moore, one-half of the 1,020 acres of land claimed by him."

The first assignment of error is that "the court erred in overruling defendant's motion to amend and reform the judgment, and the judgment rendered in favor of appellee for half the land sued for is without a verdict to support it, and judgment should have been rendered for appellant on the verdict, there being no finding for appellee for any portion of the land."

The issues presented on the trial, briefly stated, are as follows: Plaintiff claimed that the land was conveyed to defendant, H. W. Moore, by C. A. Rice, the husband, during the pendency of the divorce suit, with the intent to defraud the wife of her interest in the community estate, and that it was for that reason void as to her; and that, therefore, plaintiff, as the assignee of her rights, was entitled to recover directly one-half of the land, and to have the other half subjected to the payment of the probate claim against the husband's estate. The defendant, H. W. Moore, denied this, and alleged that the land was conveyed to him in good faith, and in consideration of services rendered by him in preservation of the community estate; and also, that the wife, after her claim was allowed, received from the husband's part of the community estate property sufficient to satisfy that debt. These issues are presented in the charge, and under one state of facts the jury are instructed

to find for the plaintiff, and under the other for the defendant, but they are nowhere directed to find a verdict for defendant for one-half of the land. Is this finding sufficient to authorize a judgment for plaintiff for one-half of the premises sued for? A special verdict is defective, and must be set aside, which does not find all the facts put in issue by the pleadings, although the evidence may establish beyond any controversy the existence of the facts not found. *Paschal v. Cushman*, 27 Tex. 74. This is equally true of a general verdict.

In the leading case of *Patterson v. U. S.*, 2 Wheat. 221, Mr. Justice WASHINGTON, in delivering the opinion of the court, says: "The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious: it results from the nature and end of pleading. Whether the jury find a general or special verdict, it is their duty to find the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issues, yet, if it appears to that court or to the appellate court that the finding is different from the issue, or is confined only to a part of the matter in issue, no judgment can be rendered on the verdict."

It may be said that there is a more cogent reason for the rule than that laid down in the passage just quoted. It is the right of the parties to have the jury pass upon all the facts controverted by the pleadings; and when they have omitted to do this, however clear and undisputed the evidence upon the issues not found, the court cannot render judgment without usurping in part the function of the jury, and thereby infringing a right guaranteed by the constitution and laws.

A very similar verdict to the one now before us was held bad in the case of *McCoy v. Rives*, 1 Smedes & M. 592. We quote from the opinion: "An execution was levied upon two slaves, Charles and Fanny, which were claimed by a party not named in the execution. An issue under the statute for the trial of the right of property was made up, and the jury returned a verdict that 'the following described property mentioned in the execution was not the property of the claimant,' and describing the property as slaves Charles and Lucy. * * * The judgment follows the verdict in setting forth the names of the slaves. There was no finding by the jury upon the right of property in the slave Fanny, or of her value, and there was a finding upon the right of property in the slave Lucy, and of her value, who was not mentioned in the return of the sheriff upon the execution, nor in the issue for the trial of the right of property." The court then say, in effect, that the verdict as to the slave Lucy might be rejected as surplusage, but that it is bad because it does not find the issue as to the slave Fanny. See, also, *Sawyer v. Fitts*, 4 Stew. & P. 365; *Crouch v. Martin*, 3 Blackf. 256; *Smith v. Raymond*, 1 Day, 189; *Schmitz v. Lauferty*, 29 Ind. 400; *People v. Doesburg*, 17 Mich. 135; *Phillips v. Hill*, 3 Tex. 397; *Crutcher v. Williams*, 4 Humph. 345; *Midleton v. Quigley*, 12 N. J. Law, 352; *Longcope v. Bruce*, 44 Tex. 434.

The judgment in the case before us shows that the court below construed the verdict as a finding in favor of plaintiff for one-half of the land, and in favor of the defendant for the other half. But we think such a conclusion unwarranted. It may be conceded that it matters not how a finding is expressed, so that the meaning of the jury is clearly intelligible; and it may be that what is not expressed may be implied, provided the implication be a necessary deduction from that which is directly stated. There is no such irresistible implication in the verdict in this case. It may be that the court correctly interpreted the language of the jury, or it may be that they agreed only that defendant was entitled to one-half of the land, and failed to agree upon the issues involving the question of title to the other half. As to the true construction of such a verdict, neither the lower court nor this court is per-

mitted to speculate. The verdict must find all the issues made by the pleadings in language which does not admit of mistake. It should be the end and not the continuation of the controversy.

Because there is no sufficient verdict to support the judgment of the court below, or any other judgment which might be rendered here, it must be set aside, and the case remanded for a new trial.

We think it unnecessary to consider any of the other questions raised by the assignments of error by appellant, or the cross-assignments by appellee. In the well-considered opinion delivered upon the second appeal, the law applicable to the case is fully and clearly stated, and we adhere to that opinion as the law of the case. From the third paragraph of the general charge it would seem, however, that the court below misconceived it upon the question of the revivor of the injunction in the case of *Rice v. Rice* by the suing out of the writ of error. The opinion holds that the bond given in that case was not a *supersedeas* bond, and that it did not revive the injunction, and expressly reserves the point as to the effect of a *supersedeas* in such a case. The principle laid down is that the writ of error was the continuation of the original suit, and not the beginning of a new one, and that one who bought after the judgment was rendered, and before the writ was sued out, was a purchaser *pendente lite*.

The judgment is reversed, and the cause remanded.

WILLIE, C. J., did not sit in this case.

ODUM v. McMAHON.

(Supreme Court of Texas. February 1, 1887.)

JUDGMENT—JUSTICE'S COURT—REVIEW—INJUNCTION.

A statute making the judgment of a justice of the peace final where the amount in controversy is less than \$20, such a judgment cannot be reviewed by means of an application to a superior court for an injunction restraining the enforcement of the judgment, it appearing that every defense which the applicant for the injunction had the right to urge might have been proved in the suit in the justice's court.

Appeal from Newton county.

Appellee, F. R. McMahon, filed suit in the district court of Newton county for an injunction, to restrain the enforcement of a judgment for \$15, rendered against him in a justice's court of said county in favor of appellant, W. T. Odum. The petition alleges that one Hines having sued one Trotti, and garnished appellee, judgment was rendered against appellee for \$15 which he owed Trotti, and that appellee paid the judgment, but that subsequently, appellant, Odum, claiming as assignee of Trotti, sued appellee for the same \$15 debt, and recovered judgment therefor. The district court granted a preliminary injunction restraining appellant from enforcing that judgment, and from that order appellant appeals.

H. C. Howell and Burnett & Hanscom, for appellant.

WILLIE, C. J. The court below should have dissolved the injunction issued in this cause. The appellee had every opportunity of pleading and proving, in defense of Odum's suit, all the matter which he set up in his bill, or proved upon the trial of this cause, as grounds for restraining the judgment of the justice's court. The amount in controversy was less than \$20, and the judgment of a justice of the peace in such a case is made final by our statutes. They did not intend that the justice's decision in such a case should be subject to review in another court, or that there should be a new trial of the case granted under any circumstances except in the court where the judgment was rendered. Yet the object of this suit, which was accomplished by the decision of the district court, was to give the benefit of an appeal to McMa-

hon, who had lost in the justice's court, and to allow him a new trial before the district court of the very cause which had been passed upon by the justice. There is nothing in our laws which allows a writ of injunction to serve the purposes of an appeal or *certiorari*, and it is directly in the teeth of the statute to use this or any other methods of having the judgment set aside which the statute intends shall be final.

The judgment of the court below will be reversed, and the cause dismissed.

McCONNELL v. WALL.

(*Supreme Court of Texas. February 4, 1887.*)

COUNTIES—BONDS—JAIL—COMMISSIONERS' COURT—COUNTY JUDGE ACTING.

County commissioners, in order to raise money to build a court-house and jail, issued bonds of the county, and instructed the county judge to sell some of them to a bank, the bank paying nothing in cash, but agreeing to pay the price of the bonds when the money should be needed for the buildings. Rev. St. Tex. arts. 995, 1200, authorizing the county treasurer to bring suit in the name of the county for all debts due the county, the treasurer accordingly sued the county judge, seeking to charge him for the price of the bonds, as if he had actually received the money in cash from the bank; it appearing that the bank had realized upon the bonds by selling them as soon as they were delivered. *Held*, the action could not be maintained, as the county commissioners' court has control of the financial affairs of the county; and, if it makes a contract by which money does not become due so soon as it ought, the county treasurer cannot correct their mistake or bad management by holding the county judge liable, when he did only what he was directed to do.

Appeal from Houston county.

Nunn & Denny, for appellant. *Maacy & Maacy* and *W. B. Wall*, for appellee.

STAYTON, J. This action was brought by the appellant, as county treasurer of Houston county, against W. B. Wall, county judge of that county, to recover money which he alleged belonged to the county, and was by the defendant unlawfully detained. It appears that Houston county found it necessary to issue and sell bonds to raise money to erect a court-house and jail in place of like buildings destroyed by fire. The county sold \$20,000 of bonds for this purpose, but the bonds were not delivered at the time some of the parties contracted for them, and the money was not paid until the bonds were delivered, though they were made to bear interest before the date of the delivery. The proceeds of all the bonds, except some amounting to some \$2,500 were paid to the appellant before the institution of this suit. Bonds for \$5,000 were sold to the Houston county bank, under an agreement between the bank and the commissioners' court that they should be paid for as the money was needed in the erection of the court-house and jail. These bonds were sold at par, and one-half of their proceeds was paid to the appellant before this suit was instituted, but the residue was afterwards paid.

The county commissioners' court has control of the financial affairs of a county, and, if it makes contracts through which money does not become due to it so soon as it ought, the county treasurer cannot correct its mistakes or bad management, by an action against a county judge, to whom the commissioners' court has confided the duty of consummating an authorized contract, to compel such an official to pay over to him money not received, and which under the contract the county was not then entitled to receive. The appellee was acting under the instructions of the county commissioners' court in selling the bonds to the bank, and paid to the treasurer, before this action was instituted, all the money received under the contract, or which, under the contract, the county was entitled to receive before that time. It is made the duty of county treasurers "to direct prosecutions according to law for the recovery of all debts that may be due his county, and superintend the collection thereof,"

(Rev. St. art. 995;) but it would seem that all such suits should be brought in the name of the county, (Rev. St. art. 1200.) The evidence does not tend to show that the appellee withheld from the appellant, at the time this action was brought, any money which the latter was entitled to hold, and the court correctly instructed a verdict for the defendant. The sale of the bonds to the Houston County Bank seems not to have been made by written contract, though some memorandum or receipts for the bonds seems to have been executed by the bank. Under this state of facts, there was no error in admitting the evidence introduced to show the terms of the sale.

There is no error in the judgment, and it will be affirmed.

TUFTS v. CLEVELAND.

(*Supreme Court of Texas. February 4, 1887.*)

CONDITIONAL SALE—RIGHT OF VENDEE'S CREDITORS.

A contract for the purchase of personal property, providing that the purchaser shall have the possession of the property, but the title is to remain with the vendor until all of the purchase money is paid, constitutes an executory contract, and the property is not subject to be seized in the hands of the purchaser, under process to satisfy his creditors, until they have paid or tendered to the original seller the amount due on such property. The rule is otherwise, however, under the Texas act of March 31, 1885, requiring the registration of such contracts.¹

Appeal from Washington county.

Bassett, Muse & Muse, for plaintiff and appellant.

WILLIE, C. J. The only question relied on by the appellant for a reversal of the judgment rendered in this cause was fully settled by the decision of this court in *City Nat. Bank v. Tufts*, 63 Tex. 113. That case, like this, was a suit to try the right of property to a soda-fount levied on under a writ of attachment sued out by a creditor of the party in possession of the property; and in that case, as in this, the property was claimed by Tufts under instruments similar to those under which he claims the soda-fount in this suit. These instruments constitute a contract for the purchase of personal property, under which its possession passes to the purchaser, but by the terms of the contract the title remains with the seller until deferred payments of purchase money are made. In that case it was held that this constitutes an executory contract, and the property is not subject to be seized under process to satisfy the creditors of the purchaser until they have paid or tendered to the original seller the amount due on such property. The opinion in that case is decisive of this, as there was no tender of the purchase money made by the appellee, and the soda-fount, therefore, remained the property of the appellant, and was not subject to the debt for which it was seized under attachment. The judgment of the court below holding to the contrary must be reversed, and judgment rendered here in behalf of the appellant, and it is so ordered.

It is to be remarked that the rights of the appellant, under the agreement contained in the notes given to him by Chase, accrued before the passage of the act of March 31, 1885, by which the law in respect to such reservations of title was changed by the legislature.

¹As to the validity of conditional sales reserving the title to the property in the seller, and the application of registration laws to such sales, see *Redewill v. Gillen*, (N. M.) 12 Pac. Rep. 872, and note.

See, also, *Manning v. Cunningham*, (Neb.) 31 N. W. Rep. 983; *Kirby v. Tompkins*, (Ark.) *post*, —.

MAASS, EX'X, v. SOLINSKY.

*(Supreme Court of Texas. February 1, 1887.)***APPEAL—JUSTICE OF THE PEACE—RECORD—CAUSE OF ACTION.**

Rev. St. Tex. art. 1573, providing that, in a suit in a justice's court, a brief statement of the pleadings shall be noted on the docket, and article 1640 further providing that, when an appeal is taken from a justice's court to the district court, the justice shall make out a true copy of all the entries on his docket in the cause, and certify the same, with the original papers in the case, to the clerk of the district court, *held*, in a cause originating in a justice's court, the cause of action must appear from the entries made on the justice's docket, from the pleadings filed in the case, if any, or from an agreed case, as the district court can pass on no other case than the one tried in the justice's court; nor can the supreme court review the action of the district court unless the issues appear from the transcript in some of these methods.

Appeal from Jefferson county.

Tom J. Russell, for appellant.

STAYTON, J. This cause originated in a justice's court, and on appeal was tried in the district court, but from the transcript before us we are unable to ascertain what the cause of action asserted was. The transcript consists of the caption, statement of facts, judgment, appeal-bond, and assignments of error. The pleadings in a cause in justice's court may be oral, except when otherwise required by statute, but the law requires that "a brief statement thereof shall be noted on the docket." Rev. St. 1573. The statute provides, further, that, "whenever an appeal has been granted from a justice's court to the county court, it shall be the duty of the justice who made the order immediately to make out a true and correct copy of all the entries made on his docket in the cause, and certify thereto officially, and to transmit the same, together with the certified copy of the bill of costs taken from his fee-book, and the original papers in the cause, to the clerk of the county court of his county." Rev. St. 1640. The same requirement exists when the appeal is taken to the district court for the reasons which authorize such appeal. It is from the transcript and papers thus sent up that the county or district court ascertains what the cause of action presented and tried in the justice's court was, and of this it must be informed; for on appeal it can pass on no case other than the one tried in the justice's court. The cause of action asserted in the justice's court is the only one that can be asserted in the district court on appeal. When an appeal is taken from any judgment of a district court to this court, it must be informed as to what the cause of action was, either through the pleadings made a part of the transcript, or by an agreed case made as the statute permits. In a case originating in a justice's court, this must be shown to this court by the entries made on the justice's docket, by pleadings filed in the case, if any, or by an agreed case; and, if it does not appear what the cause of action was, through a transcript which shows it in some of these methods, this court cannot revise the action of the district court; for unless it knows what was tried, it cannot know whether there was error or not. The statement of facts, as presented, is almost unintelligible, but we might infer from it that one of three causes of action was tried in the district court. We are not called upon or authorized to draw inferences of this kind, and to adjudicate cases upon them. The presumption is that the judgment of the district court is correct, and, in the absence of a transcript showing to the contrary, its judgment will be affirmed.

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HANLON v. SILK.

(Supreme Court of Texas. February 8, 1887.)

APPEAL—BOND—ADMINISTRATOR—APPEAL BY DECEDENT.

A., having appealed from a judgment rendered against him, died before the expiration of the 20 days allowed for executing an appeal-bond, without having executed the bond. Held, his administrator, who was not appointed until after the expiration of the 20 days, could not pursue the appeal by thereafter executing the bond, notwithstanding Rev. St. Tex. art. 1408, allows an administrator to prosecute an appeal without giving bond. That article applies only to appeals taken by the administrator after his appointment.

Appeal from Galveston county.

On motion to dismiss appeal.

Howard Finley, for appellant.

WILLIE, C. J. On January 15, 1886, Thomas E. Silk recovered a judgment against John Hanlon in the district court of Galveston county. The term of the court at which this judgment was rendered adjourned January 29, 1886. Notice of appeal was duly given by Hanlon, but he died February 1, 1886, without perfecting the appeal by giving bond. On fifteenth February, 1886, John G. Duffield and James Carroll, as sureties, filed a bond conditioned that John Hanlon, or his legal representatives, should prosecute his appeal with effect, and perform the sentence, judgment, or decree of the supreme court, in case the judgment of the said supreme court should be against the appellant. It seems that an original administration was had upon the estate of Hanlon, but at what time the record does not show. Letters of administration *de bonis non* were granted to James Carroll on January 17, 1887, and in these letters it is recited that the former administrator had died, and Carroll was appointed to succeed him in the trust. The appellee moves to dismiss the appeal because the bond does not bind the sureties to pay all such damages as this court may award against the appellant.

In *Reid v. Fernandez*, 52 Tex. 379, it was held that the want of this condition in a *supersedeas* bond would vitiate it, and this ruling has been followed in verbal decisions since made upon the same question.

But it is claimed that, on account of the death of Hanlon, his administrator has the right to prosecute this appeal without giving bond at all. The statute reads: "Executors, administrators, and guardians, appointed by the courts of this state, shall not be required to give bond on any appeal or writ of error taken by them in their fiduciary capacity." Rev. St. art. 1408. Had this been a writ of error sued out by the present or former administrator after his appointment as such, his right to prosecute it in this court without bond would have been beyond doubt. Had administration been taken out previous to the expiration of 20 days from the adjournment of the term at which the judgment was rendered, the question would not have been free from difficulty. But, for aught that appears from the record, the estate of Hanlon was vacant and without a representative till after the 20 days allowed for giving the appeal-bond had expired. During the whole period of time elapsing from the notice of the appeal till the expiration of the time allowed to perfect it, there was no way in which it could be perfected so as to give this court jurisdiction, except by filing the bond required by statute. This Hanlon did not do previous to his death, and, after that happened, there was no one authorized to give the appeal-bond for him. The parties whose names appear to the bond found in the record as sureties were not parties to the suit in the district court. They had, therefore, no right to appeal from the judgment there rendered. They could not have appealed for Hanlon in his lifetime, and bound him by their action, without his consent and approval; and they could not, of course, thus bind his estate after his death. When the 20

days expired without perfecting the appeal, there was no means left by which it could thereafter be perfected so as to give the court jurisdiction. The statute allows an administrator to appeal without bond, but he cannot do so after his decedent has lost the right to give bond. Had Hanlon lived more than 20 days after the adjournment of the term at which the judgment was rendered without giving bond, his right of appeal would have been lost, and it could not, therefore, have been prosecuted by his administrator. The same result must follow when the right has been forfeited for any other reason, and we have seen that it had been forfeited in this case by the failure of Hanlon to give bond up to the date of his death, and the fact that there was no one who had the authority after his death to take the appeal for the estate, either with or without bond.

We think the motion must prevail, and the appeal be dismissed, and it is accordingly so ordered.

SCOTT and others v. MCDANIEL.

(*Supreme Court of Texas.* February 4, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHT TO PREFER CREDITOR.

In the absence of legislation forbidding it, a debtor, even though insolvent at the time, may convey his property so as to give one creditor a preference over another.¹

2. SAME—RIGHTS OF UNPREFERRED CREDITOR.

A conveyance of property in trust, to sell and pay off certain enumerated debts, is, in effect, a mortgage, with power of sale, and not an assignment; and any residue that might remain after payment of the preferred or enumerated debts would be subject to the claims of creditors generally, although not specially so provided in the conveyance, and might be reached by any appropriate process; but, until it has been determined by the payment of the enumerated debts that there is a residue, the trustee under the deed is entitled to the possession of the property, and it cannot be taken from him by the levy of an attachment or other writ.

Appeal from Grimes county.

H. H. Boone, for appellee. *Robert G. Street*, for appellants.

STAYTON, J. Wheat & Thompson conveyed to the appellee property in trust to sell and pay off debts enumerated in the instrument by which the conveyance was made. That the debts were just, and the entire transaction in good faith, is not questioned. It is claimed that it was in contravention of the statutes in relation to fraudulent conveyances. There is nothing on the face of the instrument from which it can be so held, nor do the facts indicate that it was executed for a purpose that would invalidate it under the statute. It was executed by persons unable to pay their debts, and gave preference to creditors named; but the right of even an insolvent debtor to do this has always been recognized, in the absence of legislation forbidding it. The property conveyed was evidently not of sufficient value to pay the debts which it undertook to provide for, and there is not the slightest evidence tending to show any agreement or understanding that the debtors were to receive any benefit under it other than such as results from the payment of their debts. It is urged that the conveyance was in contravention of the statutes regulating assignments. The instrument is, in effect, a mortgage, with power of sale, and not an assignment; and any interest that might by any possibility remain after the payment of the enumerated debts would be subject to the claims of other creditors, and might be reached by them through any appropriate process. In such an instrument a clause of defeasance is not necessary, but would be implied from the character of the instrument itself.

The only ground on which it could be claimed, with any degree of plausibility, that such instruments are forbidden by the act regulating assignments

¹See *Smith v. Whitfield*, (Tex.) 2 S. W. Rep. 822, and note.

by insolvent debtors, is that this act declares preferences void. That provision of the statute was considered in *La Belle, etc., Works v. Tidball*, 59 Tex. 292, in which it was held that the eighteenth section of that act had reference only to assignments made under it; and, further, that preferences given through instruments other than such assignments as the act contemplates are valid, unless in contravention of the act concerning fraudulent conveyances. The questions presented in this case have been considered in several cases recently. *Stiles v. Hill*, 62 Tex. 430; *Jackson v. Harby*, 65 Tex. 713; *National Bank v. Lovenberg*, 63 Tex. 506; *Waterman v. Silberberg*, 2 S. W. Rep. 578, (decided at last Tyler term.)

The appellee was entitled to the possession of the property which the appellants seized, or caused to be seized, and sold, and for the violation of that right was entitled to recover. In case of an assignment under the statute, no creditor has the right, through any kind of process, to seize the assigned estate, and take it out of the hands of an assignee, but must take under it, or be content to reach any estate that may not be properly paid to creditors, through a writ of garnishment, or in some method recognized as proper, shall any funds belonging to the estate be paid into court at the close of the assignee's administration. In case, however, of a conveyance, in the nature of a mortgage, to a trustee with power to sell, whatever residuary interest the debtor may have is subject to the claims of creditors not protected by it, and this they may reach by any lawful process; but when, by the terms of the instrument, the trustee is entitled to possession, it cannot be taken from him upon the levy of an attachment or other writ. Rev. St. arts. 167, 2292, 2296.

There is no error in the judgment, and it will be affirmed.

BROWN and others v. REESE.

(*Supreme Court of Texas.* February 4, 1887.)

EVIDENCE—JUDGMENT ALLOWING SCHOOL VOUCHER.

In an application for a *mandamus* to compel the commissioners' court of a county to issue a warrant for the payment of a school voucher, it being alleged that the claim had been audited and allowed by the commissioners' court, but the only evidence of the allowance being an indorsement on the warrant that "the court finds a certain sum (naming it) due on this claim," signed by the county judge, *held*, under Rev. St. Tex. art. 1527, providing that the proceedings of the commissioners' court shall be recorded by the clerk in a suitable book kept for the purpose, and shall be signed by the county judge at the end of each term, and be attested by the clerk, the best evidence of a judgment of that court is either the record itself, or a certified copy, as provided for by the statute, under the seal of the clerk; and there being no authority for this indorsement by the judge, it is not evidence for any purpose, in a proceeding of this character, and should not have been admitted.

Appeal from Leon county.

B. D. Doshied and Kiroen, Gardner & Etheridge, for appellants. *Geo. P. Finlay and Forster Rose*, for appellee.

GAINES, J. This suit was originally instituted in the district court of Leon county, by a petition for a *mandamus*, to compel appellants, as members of the commissioners' court of that county, to cause a warrant to issue in favor of appellee for the payment of a school voucher issued to him, in 1874, by the superintendent of public schools of the county. It was alleged that the claim was audited and allowed by the commissioners' court of Leon county on the thirteenth day of August, 1883, by virtue of the act of April 2, 1883, (Laws 18th Leg. 41.) Judgment was rendered in the court below awarding the writ of *mandamus* as prayed for, and defendants have appealed, and assigned the following error, in substance: That the judgment is unsupported by the evidence, because the voucher and the indorsement thereon are no proof that the commissioners' court allowed the claim as alleged. There is no evidence in

the record of any entry upon the minutes of the commissioners' court in reference to this voucher. The warrant is signed by the school superintendent, and appears to be in regular form. It is indorsed as follows: "AUGUST 13, 1883. The court find \$291.31 cts. due on this claim. [Signed] JAMES BROWN, Co. Judge."

The Revised Statutes provide that the proceedings of the commissioners' court shall be recorded by the clerk in a suitable book kept for the purpose, and shall be read over and signed by the county judge, or the member of the court presiding, at the end of each term, and attested by the clerk. Rev. St. art. 1527. The best evidence of a judgment of that court, therefore, is either the record itself or a certified copy, as provided for by the statute, under the hand and seal of the clerk. The statement of facts shows that neither was produced on the trial in the court below. It also appears that no evidence of the allowance of the claim was offered, except the indorsement upon it which has been hereinbefore set out. Now, the question arises, is this proof of the fact that the court audited and allowed the claim? We think not. We have found nothing in the statute providing for any indorsement upon a voucher of this character by any officer. It is quite clear that the county judge could not have given a certified copy of the record if one had been made, nor could the clerk, who is the custodian of the records, give any certificate, as to the action of the court, which could be used as evidence, except to an exact copy. There being no authority for this indorsement by the judge, it is not evidence for any purpose in a proceeding of this character, and should not have been considered by the judge in the court below. If the commissioners' court had made an order for the payment of this claim, and the order was not entered, it might probably be used in evidence in a proceeding to have an entry made *nunc pro tunc*.

But, should it be conceded that this was evidence tending to prove that the voucher had been audited and allowed, it cannot be held sufficient to warrant a proceeding to compel the commissioners to make an order for its payment. The writ of *mandamus* only lies to enforce the performance of a plain and imperative duty. If the officers have a discretion, they cannot be compelled. If a voucher so indorsed would call for any action at all on their part, it would seem it would be their duty to consider it, in connection with other evidence, and to decide, in their discretion, according to the truth of the fact as they should find it. Can the clerk of a court be forced to issue execution upon a judgment properly rendered, but not entered upon the minutes, although it may fully appear by the entry upon the judge's docket? Clearly not. Can he be compelled to issue upon a judgment, the record of which has been destroyed? On the contrary, it is held that an execution in such case may be enjoined. *Cyrus v. Hicks*, 20 Tex. 483. We think, therefore, that, in order to sustain the judgment in this case, there should have been shown that conclusive proof of the allowance of appellee's claim which is only afforded by an order duly entered on the minutes of the tribunal charged with the duty of auditing it.

We are of opinion that the judgment of the court below is without evidence to support it. It is therefore reversed, and the cause remanded.

BOEHM and others v. CALISCH.

(Supreme Court of Texas. February 4, 1887.)

1. ATTACHMENT—FRAUDULENT CONVEYANCE—EVIDENCE OF OTHER FRAUDULENT TRANSACTIONS.

In an action between an attaching creditor and one claiming property as a *bona fide* purchaser from the debtor, the issue between them being as to whether the sale was made in good faith, evidence of collusion between the debtor and another

creditor, by which an attachment was fraudulently obtained, is inadmissible, it not appearing that there was any connection between that transaction and the transaction which formed the basis of this suit.

2. SAME—CLAIMANT'S BOND—RIGHTS OF SURETIES.

In an action between an attaching creditor and one claiming property as a *bona fide* purchaser from the debtor, the issue being as to whether the transfer was made in good faith, although the claimant abandons the issue, the sureties on his claim-bond may intervene and defend his rights, and judgment may in such case be rendered in behalf of the sureties, although it inures to the benefit of the claimant, who had not presented his claim.

3. PARTNERSHIP—ACTION—PARTIES—DORMANT PARTNER.

A dormant partner is not a necessary party to a suit concerning the partnership property.

4. ERROR—ASSIGNMENT OF—EVIDENCE—JUDGMENT.

An assignment of error that, upon the evidence adduced on the trial, judgment should have been for plaintiff, is too general to be considered on appeal.

Appeal from Washington county.

Garrett, Searcy & Bryan, for appellants. *Bassett, Muse & Muse*, for appellees.

WILLIE, C. J. This was a trial of the right of property to certain goods attached by Boehm & Co. in a suit brought by them against Charles Wenar & Co., and claimed by H. Calisch. Boehm & Co. tendered issues to the effect that the goods had been transferred by Wenar & Co. in fraud of his creditors. Calisch did not join issues, but abandoned the case; but his sureties on the claim-bond were allowed to intervene, and defend his right to the property. The cause was submitted to the judge without the intervention of a jury, and judgment was rendered for the sureties, and the plaintiffs have appealed to this court.

On the trial, Charles Wenar, of the firm of Wenar & Co., was introduced as a witness on behalf of the defendants, and, after having been examined in chief by the defendants, the plaintiffs, upon cross-examination, propounded to the witness the following questions: "(1) Who met Isaac Heidenheimer at the railroad depot on the night of December 1, 1884, the day before the attachment of Charles Wenar & Co. by the said I. Heidenheimer, on his arrival from Galveston? (2) Where did Isaac Heidenheimer stay on the night of December 1, 1884, the day before the attachment of Charles Wenar & Co. by him, after the arrival of the night train from Galveston? (3) Didn't you meet Isaac Heidenheimer at the train on December 1, 1884, the day before the attachment of Charles Wenar & Co. by him, on his arrival from Galveston? (4) Did not Isaac Heidenheimer spend the remainder of the night of December 1, 1884, the day before his attachment of Charles Wenar & Co., after his arrival from Galveston, with you, or with David Rosenthal?"

These questions were objected to, among other reasons, because the answers to them would have been irrelevant to the issue. The bill of exceptions does not inform us what answers to these questions were expected from the witness. Admitting, however, that he would have stated that he met Heidenheimer at the depot, and that Heidenheimer spent the night with him, we cannot see what relevancy these answers could have had to the issue in this case. That issue was as to the *bona fide* or fraudulent character of the transfer of the goods in controversy by Wenar & Co. to the claimant. The facts sought to be drawn from the witness related to a transaction between himself and Heidenheimer, which is not shown to have any connection whatever with the transfer. On the second of December, 1884, Heidenheimer sued out an attachment against Wenar & Co., and had it levied on their stock of goods, and such goods as were levied on were sold by the sheriff, and enough was realized therefrom to pay Heidenheimer's debt. Heidenheimer arrived at Brenham the night before the attachment was sued out. If Wenar was informed of his coming, and of the nature of his business at Brenham,

before he arrived, and met him at the depot, and took him to his house, and he remained there that night, these facts might have furnished evidence upon the question of collusion between Wenar and Heidenheimer in suing out the attachment. It might have tended to show that in the matter of Heidenheimer's attachment Wenar had committed a fraud. But fraud in one transaction cannot be proved to establish fraud in another wholly disconnected with it. The evidence might have tended to show that Wenar was capable of committing a fraud, but not that he had committed one in the matter before the court for adjudication in this case. It might have prejudiced the jury against him; but this was improper, when it would have prevented the appellees from having their cause tried upon the facts pertinent to the issue between them and the plaintiffs. The appellants' brief has shown no connection between the answers sought to be elicited from the witness and that issue, and we are unable to discern the connection. We think the questions were properly excluded by the court.

The following question was also propounded by the appellants to Wenar upon cross-examination: "Don't you know, from information received, that the credit of about \$5,200 to the account of Charles Wenar & Co. with Bassett & Bassett, of March 24, 1885, was a part of the proceeds of the sale of Charles Wenar & Co.'s stock of goods received from Isaac Heidenheimer from his attachment of Charles Wenar & Co., in cause 6,172, *Isaac Heidenheimer v. Charles Wenar & Co.*, in the district court of Washington county?" This question, upon objection by the appellees for irrelevancy, and for being intended to elicit hearsay evidence, was ruled out by the court. The bill of exceptions to the ruling of the court does not state what answer the appellants expected to this question. But, if the answer had been affirmative, it would not have been admissible, as it would have been a statement of the witness made upon the information of others, and would not have fallen within any of the exceptions to the general rule excluding such testimony. But it was also clearly irrelevant. If we understand the object of the question, it was to trace a portion of the money realized by Heidenheimer from his attachment suit against Wenar & Co. into a deposit of \$5,200 to the credit of Wenar & Co. in the bank of Bassett & Bassett. Suppose it admitted that this was the case, it tended to prove nothing pertinent to the issue in the present case. As we have already said, no fraud of Wenar in another transaction, disconnected with that which formed the basis of this suit, had any bearing upon this case. The evidence does not connect the two transactions, or show what Wenar's conduct with Heidenheimer had to do with his transfer of goods to Calisch. He might have colluded in December, 1884, with Heidenheimer, to have his goods seized under attachment, and might in March, 1885, have received the reward of his fraudulent conduct, yet in November, 1884, and even later, he might have made *bona fide* sales of goods to Calisch, and the collusion with Heidenheimer had no connection whatever, so far as the testimony shows, with the different sales made to Calisch by Wenar & Co. We should have to resort to conjecture to connect the two transactions. The relevancy of the evidence not appearing, we hold the ruling of the court rejecting it to be correct. If, in the judgment of the court below, the goods seized by Boehm & Co. were not subject to their attachment, there was no impropriety in rendering judgment to that effect in behalf of the sureties, although the judgment inured to the benefit of Calisch, who had not presented his claim. This was the only judgment that could be rendered, if the sureties established Calisch's right to the property; and, if it was not, the plaintiffs should have objected to its entry in the court below, and not awaited to make such objection till the case reached this court on appeal.

There was no necessity for Cohn to join with Calisch in making the claim to the property levied on, as the former was merely a dormant partner in the firm of which Calisch was the only ostensible member. That a dormant part-

ner is not a necessary party to a suit concerning the partnership property is settled by the decisions of this court. *Tynberg v. Cohen*, 2 S. W. Rep. 794, (lately decided,) and authorities cited.

The only remaining assignment of error is as follows: "Upon the evidence adduced on the trial of this case, and on the weight of the testimony, judgment should have been rendered in favor of the plaintiff." This assignment is too general to demand consideration, so it will not be necessary for us to go into an analysis of the evidence to ascertain whether the finding of the court was supported by the proof as against the great preponderance of the testimony.

There is no error in the judgment, and it is affirmed.

COHEN and others v. CONTINENTAL FIRE INS. CO.

(*Supreme Court of Texas. February 4, 1887.*)

1. FIRE INSURANCE—AGENT—RENEWAL OF POLICY BY PAROL.

An insurance company, through its authorized agent, may contract by parol for the renewal of a fire insurance policy, although it may be stipulated on the face of the existing policy that it shall not be renewed in that manner.

2. SAME—DEFAULT ON PREMIUM—DEMAND OF PAYMENT—WAIVER.

Where a policy of insurance provided that the company should not be liable for any loss or damage under the policy if default should be made in the payment of any premium, and that the policy should be void if the assured should neglect to pay the premium, *held*, the fact that an agent of the company made demand for the premium after default by the insured, and threatened to sue for it if it were not paid by a certain day, did not constitute a waiver of the forfeiture, so as to make the company liable for a subsequent loss; especially as it appeared that the agent who acted in the matter had authority to receive applications and to collect premiums only, and not to make contracts of insurance.

3. SAME—FORFEITURE—WAIVER.

Where a policy of insurance provides for a forfeiture upon failure to pay premiums which are to fall due, but does not stipulate that upon such failure the overdue premium shall be considered as earned, a demand and payment of such premium constitutes a waiver of the forfeiture. But such is not the case when the policy provides that, upon default in any installment, the insurance shall cease, and the installment be considered as earned; for then the insurer has the right to the premium although the insurance is forfeited, and hence demand and payment of the premium is held no waiver.

Appeal from district court, Leon county.

Action on fire insurance policy. Judgment for defendant. Plaintiffs appeal.

Kiroen, Gardner & Etheridge, for appellants. *Hutcheson, Carrington & Sears*, for appellee.

GAINES, J. Plaintiffs' application for insurance contained the following clause: "It is also covenanted and agreed that, if default is made in payment at maturity of any one of the installments of premium to be paid as stipulated in premium note given herewith, the whole amount of all the installments remaining unpaid on said policy shall become immediately due and payable, and the policy of insurance issued hereon shall cease to insure, and said Continental Insurance Company shall not be liable for any loss or damage which may accrue to premises insured thereunder during such default, nor until such policy shall be renewed by written consent of the superintendent of said company's south-western department, or by an officer of said company on payment to him of all amounts due thereon." The policy issued in accordance with this application contained the following provision: "This company shall not be liable for any loss or damage under this policy if default shall have been made in the payment of any installment of premium due by the terms of the installment note." It was also stipulated that the policy should become void if the assured should neglect to pay the premium. The

policy also referred to the application, and to the premium note. It was to continue for five years, and was dated March 12, 1883. A cash premium of \$8 was paid upon delivery of the policy, and a premium note for \$32 executed, payable in installments of \$8 each, on the first day of March of the years 1884, 1885, 1886, and 1887, respectively. The first installment was not paid, and on the ninth of November next after it matured the property insured was destroyed by fire.

In order to avoid the effect of the provision for a forfeiture of the policy, plaintiffs proved that, after the installment fell due, one Bridges, an agent of the company, frequently made demand for the premium upon blanks of the company issued for that purpose; that on one occasion he added, "Unless you pay now you will be without insurance;" and that about the middle of October he sent another demand and note, that if the premium was not paid by the twenty-fifth of that month it would be collected by an attorney, or through the bank. Plaintiffs were ready and willing to pay the note, had it been presented by a bank or an attorney. Bridges was agent of the company to solicit applications, and to receive and transmit premiums; but Dargan & Trezevant were the company's superintendents for the south-western department, and as such issued policies applied for as they saw fit.

There can be no doubt that an insurance company, through its authorized agent, may contract by parol for the renewal of a policy, although it may be stipulated on the face of the instrument itself that this shall not be done. There is no peculiar sanctity attached to such provision in contracts of this character, which makes them an exception to the general rule that parties to an agreement may, by mutual concurrence, change its terms at any time after its execution, so as to meet their pleasure or interests. A contract of insurance may be by parol, and its terms may be changed by parol, by mutual assent. It has accordingly been held, in numerous decisions, that though a policy be forfeited by the failure to pay the premiums according to its conditions, yet an agent duly authorized may waive the forfeiture, and thereby reinstate the obligation. The cases even go further, and decide that the authority of the agent may be implied from a previous waiver of a former forfeiture of the same policy, or from a general custom of such agent to exercise such power over the contracts of the company. *Insurance Co. v. Norton*, 96 U. S. 234; *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410; *Helme v. Philadelphia Life Ins. Co.*, 61 Pa. St. 107; *Bowman v. Insurance Co.*, 59 N. Y. 521; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Trustees, etc., v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305.

It may also be considered as settled law that, where a policy provides for a forfeiture upon failure to pay premiums which are to fall due, but does not stipulate that, upon such failure, the overdue premium shall be considered as earned, a demand and payment of such premium constitute a waiver of the forfeiture. *Joliffe v. Madison Mut. Ins. Co.*, 39 Wis. 111. This is upon the principle that, in such case, the insurance and the premium are obligations which depend each upon the other, and hence that a receipt of the latter necessarily implies that the insurer recognizes or renews the original contract, and thereby assumes the continuance of the risk. It is manifestly just that, if he takes payment of the premium, which is but the consideration of a contract of insurance on his part, he should be held responsible for the loss, if any occurs. Such is not the case, however, when the contract is that, upon default in any installment, the insurance shall cease, and the installment shall be considered as earned. Then the insurer has the right to the premium although the insurance is forfeited, and hence a demand and payment of the premium is not held a waiver. *Gorton v. Dodge Co., etc., Ins. Co.*, 39 Wis. 121. We have found no case which goes to the extent of holding that merely a demand of the payment of the overdue premium, without its payment, is sufficient to reinstate a policy which is forfeited. Such is, however, the

contention of appellants in the case before us. We will briefly notice some of the cases which have been cited in support of that position.

Insurance Co. v. Norton, 96 U. S. 234, was a suit by appellee upon a life insurance policy on the life of her husband. There was a default on the last premium which fell due before the death of the assured, but her case was that after it had matured, and before the death, an agreement had been entered into between the agent of the company and the assured that the time of payment should be extended, and that, before the extension had expired, the premium had been tendered. It was proved on behalf of appellee that the agent who made the transaction had been accustomed to take notes, and extend the time of payment, and that the company had ratified his acts. The majority of the court held that these facts were sufficient to reinstate the policy, and that there was sufficient evidence of them to go to the jury, and to warrant their finding. Three of the judges dissented.

In *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410, the premium fell due June 28th. On the first of that month the company wrote to the insured that he would be entitled to a dividend on the 28th. The premium was not paid on the 28th, and on the 29th he died. On the second of July the company wrote the assured that, if he wished to continue the policy, to remit the amount of the premium by return mail. The balance of the premium, after deducting the dividend, was tendered a few days after. The court held that there was no forfeiture; putting the decision upon the ground that the retention of the dividend, under the circumstances, was to be deemed a part payment of the premium, and that this was a waiver of the forfeiture. Two of the judges who concurred in the decision did not concur in the ground upon which it was placed. They considered the letter as showing an election on the part of the company to continue the policy in force.

Now, it will be seen that, in the former case, there was an express agreement for an extension by a duly-authorized agent, and a tender before the extension expired. In the latter case the five judges who concurred in the opinion held, virtually, that the company received part of the premium, and thereby waived the forfeiture. We have found no case going further than these in support of the position taken by appellants. If appellants in this appeal had paid the premium upon demand, we would have had a very different case;* and if the authority of the agent to receive the payment had been shown, or the company had ratified his act by appropriating the money, or otherwise, we should think them clearly entitled to recover. But here was no payment, or tender of payment, nor any agreement, either before or after default, for an extension of time. Bridges, who was certainly agent for certain purposes, did make demand, and did threaten to put the claim out for collection; and it would seem that he contemplated that the insurance should continue if the money was paid. But it nowhere appears that they ever indicated by any act that they desired to pay the premium, and continue the insurance, or ever in any manner agreed to do so. The fact that they were ready and willing to pay on the twenty-fifth of October, the date at which Bridges threatened to put the note out for collection, we think can make no difference. There is no act of theirs before the loss accrued from which it can be inferred that they had any desire to continue the contract with the company. On the contrary, it is rather to be presumed that they were utterly indifferent whether the policy was continued in force or not. It is said in *May, Ins. § 362*, and in *4 Wait, Act. & Def. 57*, that a demand and even a suit brought for an overdue premium is no waiver of a forfeiture. Both authors cite, in support of this proposition, the case of *Edge v. Duke*, 18 Law J. Ch. 183. This case we have not been able to examine, the volume not being accessible to us. See *Gorton v. Dodge Co. Ins. Co.*, *supra*; *Roehner v. Knickerbocker Ins. Co.*, 63 N. Y. 160; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283.

We think, therefore, that appellants' position that there was a waiver in this case cannot be maintained, even if it had been shown that Bridges had authority to reinstate the contract after forfeiture. This agency, however, was by no means established. The courts, in order to prevent forfeitures in such cases, have frequently held slight circumstances sufficient to warrant them in finding such authority to exist. The evidence in this case is that Bridges was merely the agent to receive applications, and to collect premiums, and that he had no authority to make contracts of insurance. There was no evidence that he had granted any previous extension. The circumstance that he made demand on the company's blanks may tend to show his authority for this purpose. But we cannot say the judge below erred if he held this insufficient. There are no findings of fact in the record, and we have to give every intendment to the judgment; so that, unless it should be held that the judge below found against the weight of the evidence upon the question of Bridges' agency, the judgment should not be reversed. We are therefore of opinion that there is no error in the judgment, and it is affirmed.

CITY BANK OF SHERMAN v. WEISS.

(*Supreme Court of Texas. February 8, 1887.*)

BANKS—DRAFT INDORSED FOR COLLECTION—LIABILITY OF COLLECTING BANK.

Where a bank indorses a draft for collection to another bank, which bank, in turn, indorses it also for collection to a third bank, and that bank collects it, *held*, it cannot apply the proceeds to a debt due it by the second or intermediate bank, that bank having become insolvent, but the proceeds belong to the bank first making the indorsement, the restrictive indorsements giving notice of such ownership to the collecting bank. It is not a question of agency as to which bank the collecting bank is agent of, but the rights of the parties are determined by the fact that the collecting bank knowing, from the indorsements, to which bank it belonged, is liable as a trustee, to such owner, for the proceeds.

Appeal from Jefferson county.

Hal W. Greer and Brown & Gunter, for appellant. *O'Brien & John*, for appellee.

GAINES, J. On December 17, 1885, appellant remitted to the City Bank of Houston for collection a draft drawn by one Kent on the Texas Tram & Lumber Company for \$222.58, having first indorsed it as follows: "For collection, and credit for account of the City Bank of Sherman. C. C. JONES, Cashier." On the eighteenth day of the same month the City Bank of Houston indorsed the draft as follows, and sent it to appellee: "Pay V. Weiss, or order, for collection, for account of City Bank of Houston. B. F. WEEMS, Cashier." On the last-named day appellant remitted another draft for \$201.60, drawn by the same drawer upon the same drawee, which also reached appellee through the same channel, with like indorsements upon it. The City Bank of Houston failed. Appellee collected the money upon both drafts,—upon the first before, and upon the second after, he was apprised of the failure. The Houston bank was indebted to both appellant and appellee; and appellee credited the proceeds of the collections to the account of the latter bank, and refused to pay appellant. Appellant brought suit, and the cause was submitted to a jury, who returned a verdict for appellee. The court rendered judgment accordingly, and overruled appellant's motion for a new trial.

The assignments of error relied upon in the brief all relate to the action of the court in giving and refusing instructions. It is complained that the general charge was misleading, in this: that it made the liability of the appellee to depend upon the question whether he was the agent of appellant in collecting the draft or the agent of the City Bank of Houston, and did not instruct the jury as to the legal effect of the restrictive indorsements upon the drafts.

It is also assigned that the court erred in refusing charges asked by appellant to the effect that these indorsements were notice to appellee of appellant's ownership of the paper, and that, if the former collected them, he was responsible to appellant for the amount so collected.

When one places negotiable paper with a bank for collection, and that bank sends it to another for the same purpose, whether the second bank is to be deemed the agent of the owner, or merely the agent of the second bank, is a vexed question. Important legal consequences flow from its determination, and upon it the authorities are conflicting. If the second bank be held agent of the owner, then it would be responsible to him for any negligence which resulted in a loss of the debt. So, also, if the collecting bank failed after recovering the money, being in good credit at the time the paper was transmitted for collection, the bank which had sent it would not be liable to the owner for the amount collected. But if, as many authorities hold, the second indorsee is to be considered merely the agent of his immediate indorser, and not of the first indorser, these consequences do not follow; and, in case of negligence or default, the first indorsee is liable to the owner of the bill, and not the second.

These principles are well illustrated by the authorities which have been cited by counsel for appellee. In *Allen v. Merchants' Bank of New York*, 22 Wend. 215, the defendant bank had received the draft for collection, and had transmitted to a bank in Philadelphia, through whose negligence it had been lost. Defendant was held liable for the loss. In the case of *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459, the decision was to the same effect; and it was also there held that the bank to which the bill had been sent in the second instance was not liable to the owner for its own default. Virtually the same doctrine was held in *Reeves v. State Bank of Ohio*, 8 Ohio St. 466. In *Kent v. Dawson Bank*, 13 Blatchf. 237, a draft was sent for collection to the defendant bank upon a party in Washington, North Carolina. Defendant sent it to bankers in that place then in good standing, who collected it, and, becoming insolvent, failed to pay over the money. The defendant was held responsible. In Pennsylvania the same principle was applied to a company of mercantile agents, and they were held liable to the owner of a claim given them for collection, by the failure of an attorney to whom they had sent it, who collected and retained the money. *Bradstreet v. Everson*, 72 Pa. St. 124. All these cases are based upon the principle that the last collector to whom the paper is sent is the agent of the bank or agency who sends it, and not of the owner, and they therefore hold that the first indorsee who receives the bill for collection is the owner's agent, and takes the bill under the implied contract to be responsible, notwithstanding the negligence or default of the agent whom he may employ. The case of *Hoover v. Wise*, 91 U. S. 308, follows the Pennsylvania case above cited, and holds that the attorney to whom a collection agency has sent for collection a claim belonging to another, is not the agent of the owner. The opinion, however, admits a great conflict of authority even upon that proposition.

It will be seen that the case before us presents quite a different question. It is whether a banker who has received from his correspondent a draft indorsed for collection, which is indorsed in like manner to his correspondent, can collect the paper, and appropriate the proceeds to the latter's debt to him, and refuse to pay the owner. It is not necessary to decide that he is the owner's agent in order to determine that he cannot do this. He has received the owner's money, knowing, by the indorsements upon the draft, that it is his, and will not be permitted to withhold it from him. The authorities in support of this proposition are overwhelming. The following cases from courts of high authority are directly in point: *Sweeney v. Easter*, 1 Wall. 166; *Cecil Bank v. Farmers' Bank of Maryland*, 22 Md. 148; *Sigourney v. Lloyd*, 8 Barn. & C. 622, 5 Bing. 525; *Treuttel v. Barandon*, 8 Taunt. 100;

Blaine v. Bourne, 11 R. I. 119. See, also, *White v. National Bank*, 102 U. S. 658; *Hook v. Pratt*, 78 N. Y. 371; 1 Daniel, Neg. Inst. §§ 336, 698, *et seq.*; Story, Prom. Notes, § 143.

The only case holding the contrary doctrine is *Hyde v. First Nat. Bank*, 7 Biss. 156. The court seemed to consider that it was constrained to its decision by the principle decided in *Hoover v. Wise*, *supra*, and claimed that that opinion was in conflict with the former decisions of the same court in *Sweeney v. Easter*, before cited. An examination of the two cases will show that there is no conflict between them, and the opinion in *Hoover v. Wise* recognizes none; and, although it contains an elaborate discussion of the authorities, it does not name the case of *Sweeney v. Easter*, for the obvious reason, as we think, that the two decisions are dependent upon wholly different principles.

The question before us is not one of agency. A party may be held liable as a trustee of another, or for the conversion of his money, though not an agent. The proposition which determines the rights of the parties here is that appellant collected appellee's money knowing it to be such, and must be held to have received it for appellee's use and benefit. Because the court below charged the jury to this effect, the judgment is reversed, and the cause remanded.

BITNER v. NEW YORK & TEXAS LAND CO., Limited.

(Supreme Court of Texas. February 8, 1887.)

1. STATUTES—CONSTRUCTION—VESTED RIGHTS—REPEALING ACT—IMPROVEMENTS—COMPENSATION—USE AND OCCUPATION AS A SET-OFF.

The Texas act of February 5, 1840, (Pasch. Dig. art. 5300,) provided that, where one has improved the land of another being in possession *bona fide*, he shall be entitled to compensation for the improvements, and Rev. St. art. 4814, established a different rule, exempting the tenant in possession from liability for the use and occupation of the improvements; but section 5, p. 718, of the final title of the Revised Statutes, provided that the repeal of any statute shall not impair any vested right. *Held*, in suit brought after the passage of the Revised Statutes, where the improvements had been made under the act of 1840, and the tenant claimed compensation therefor, his claim may be set off by the owner's claim for the use and occupation of the improvements during the time the old statute was in force, and also during the time after the new statute took effect.

2. DEED—DESCRIPTION BY STATE CERTIFICATES.

Where a deed conveys all the lands located by virtue of certificates issued to a certain railroad, and gives the numbers of the certificates, but does not give the field-notes of the surveys, *held*, as the land could be definitely located by reference to the records of the surveyor's office and general land-office, the description is sufficient. The rule that that is certain which can be made certain applies.

Appeal from Houston county.

Cooper & Moore, for appellant. *Nunn & Denny*, for appellee.

GAINES, J. The appellee was plaintiff in the court below, suing in an action of trespass to try title for the recovery of a tract of land patented to the International & Great Northern Railroad Company by virtue of certificate No. 3,552 issued to that company on the twenty-fourth of May, 1875, by the commissioner of the general land-office. Appellant set up claim to 160 acres of the land sued for by virtue of a pre-emption survey.

The first assignment of error which we shall consider is to the effect that the court erred in admitting in evidence, over defendant's objection, the deed from the railroad company to John S. Kennedy and others, and also two other deeds in plaintiff's chain of title. The ground of objection was that there was no sufficient description of the land. The deeds convey all the lands located by virtue of the certificates issued to the International & Great Northern Railroad Company, and give the numbers of the certificates, among which is No. 3,552, by virtue of which this land was patented, but do not give the

field-notes of the surveys. The land in controversy was then located. By reference to the records of the surveyor's office and of the general land-office, the land conveyed could be definitely ascertained, and hence the description is sufficient. The rule that that is certain which can be made certain applies to this description.

We need not consider the other assignments in detail. They raise the question of the right of appellee to have the value of the use and occupation of the land occupied by appellant set off against his improvements. It is contended by appellant that if he was a possessor in good faith, and made all the improvements upon the land, he was not chargeable with any rents. It seems that the proper construction of article 4814 of the Revised Statutes is that one who has improved the land of another, being in possession *bona fide*, upon setting up claim for the value of his improvements, cannot be made to account for so much of the value of the use and occupation as has accrued from the improvements so made. But appellant's own testimony shows that most of the improvements on the land claimed by him were made in the years 1876 and 1877. If any were made before the Revised Statutes went into effect, the evidence does not disclose it. The act of February 5, 1840, (Pasch. Dig. art. 5300,) was then in force, which established a different rule, and required the value of the use and occupation to be assessed both upon the land and the improvements. The question therefore is, which law applies to the case? The precise point seems not to have been determined by this court. In the case of *Mitchell v. Balderas*, decided at the Tyler term, 1885, but not reported, this court held that, in suits instituted under the old law, that law applied, although the Revised Statutes were in operation at the time of the trial. This case was cited with approval in *Steed v. Petty*, 65 Tex. 490, which involved a similar question. But in the latter case, also, the proceeding was originally instituted while the old law was still in force.

We quote from section 5, of the final title of the Revised Statutes, (page 718:) "The repeal of any statute, or any portion thereof, by the preceding section, shall not affect or impair any act done, or right vested or accrued, or any proceeding, suit, or prosecution had or commenced in any cause before such repeal shall take effect; but every such act done, or right vested or accrued, or proceeding, suit, or prosecution had or commenced, shall remain in full force and effect, to all intents and purposes, as if such statute, or part thereof, so repealed, had remained in force," etc. It will be observed that this provision applies in express terms to all suits commenced before the new laws went into operation; and that, therefore, the cases cited are not decisive of the question now before us. Here the possession was taken, and the improvements were made, while the act of 1840 was in force, but the proceeding was not commenced until after the Revised Statutes went into effect. By the law then existing, when appellant took possession of the land and made the improvements, he had the right to have the value of his improvements allowed him if made in good faith. On the other hand, appellee had a corresponding right to the value of the use and occupation of the premises, including that of the improvements, as an offset to his claim. It is clear there can be no question as to the rent which accrued before the Revised Statutes. That had become a vested right, which is expressly reserved by the section which has been quoted. We think, also, that the section must be held to apply as well to the use and occupation for the time after the new statutes went into operation. The privilege which the old act gave of setting off, against the claim for improvements, the value of the use, as well of the improvements as of the land, accrued when the improvements were made, and was a matter of substantial right, and not a mere matter of remedy.

In *Hall v. Wootters*, 54 Tex. 231, in deciding that the appellant was entitled to bring a second suit of trespass to try title, the court say: "When the first action was commenced, the plaintiff had a right to a second action, and may

have relied on that right in suing and going to trial. To take away that right, and thereby make the judgment conclusive, would materially affect his suit, operate to his prejudice, and be inconsistent with what we think is implied or assumed in article 4811. To the extent necessary to prevent vested or accrued rights, or a suit commenced, from being affected or impaired, the section last quoted (section 5) continues in force statutes otherwise repealed."

Now, if the privilege of bringing a second action, allowed by the former law, became a vested right as to all suits instituted before its repeal, we think, for a stronger reason, the right of a party to the value of the use and occupation of his land, including improvements put upon it in good faith, must be held to be preserved by the section of the Revised Statutes under consideration. Appellee showed a clear title to the land, and the jury found for it under the instructions of the court, and also found that the value of the use and occupation of the land, including the improvements, was equal to the value of the improvements. Appellee had judgment for the land simply, and for costs. The verdict of the jury is well sustained by the evidence. Indeed, they could not have found otherwise under the testimony, unless they had found a verdict more favorable to appellee.

Under this state of case, it is unnecessary to consider the other assignments of error. If there be error, it did not prejudice the appellant's case, and it is immaterial, and not a ground for reversal. The judgment is therefore affirmed.

RABB, Minor, by another, Guardian, v. ROGERS and others.

(*Supreme Court of Texas. February 8, 1887.*)

1. WRIT AND PROCESS—AMENDED PLEADINGS.

Where a suit is filed in the name of a minor by his guardian, and, a demurrer to the petition being sustained, an amended petition is filed substituting the guardian as plaintiff for the minor, held no service of process is necessary on the amended petition, and it is error in the lower court to dismiss the action on plaintiff's refusing to issue such process; especially as the defendants were in court, and were not demanding the process, and the dismissal was made by the court of its own motion.

2. PLEADING—AMENDMENT—NOTICE OF FILING.

Where a party has pleaded or demurred in an action, the only notice to him of the filing of an amendment by the opposite party that is necessary is the order of court granting leave to file the amendment.

3. APPEARANCE—MOTION TO QUASH PROCESS.

Where a party moves to quash process, and the motion is sustained, this is equivalent to an entry of appearance by such party.

Appeal from Nueces county.

Stanley Welch, for appellant. *McCampbell & Givens*, for appellees.

WILLIE, C. J. This suit was originally brought by Frank Rabb, a minor, by and through his guardian, G. A. Rabb, against M. A. Rogers, as surviving widow in community of John Rabb, deceased, and bonded as such, and also against her upon her bond as guardian of the person and estate of said minor. Allegations of mismanagement and misappropriation of said community property by Mrs. Rogers, as also a waste and conversion of her said ward's property, were made in the petition. The plaintiff asked that she be compelled to account as to these estates, as also the estate of his deceased brother, which he alleged had also been wasted and misapplied by said defendant. Collins, Gussett, C. M. Rogers, and C. C. Heath were made defendants as sureties upon the respective bonds of Mrs. Rogers. C. M. Rogers was also charged as her husband, with whom she had intermarried while in charge of the community property of herself and John Rabb. The pleadings of all the defendants except N. Gussett were general, and special demurrers and general denials. Gussett moved to quash the original citation, but made

no other defense so far as the record shows. All the citations were quashed, and the cause was continued to the next term. At that term, the record recites, the general demurrer of the defendants came on to be heard and was sustained, and the plaintiff was allowed to amend his pleadings, which was accordingly done, and the allegations of the original were changed in the following respects: (1) G. A. Rabb was made a party defendant as surety on bond. (2) Allegations of change of residence of M. A. and C. M. Rogers were made. (3) Allegations were made that, since the marriage of defendant M. A. Rogers with C. M. Rogers, March, 1879, no administration has been had on the estate of John Rabb, but that, in violation of law, said defendant Martha A. Rogers, joined by and with the defendant C. M. Rogers, had disposed of a large and valuable portion of said estate, invested the moneys thereof, without authority of law, in property out of Nueces county, had collected and appropriated large sums from pasturage on the lands of said estate, sold and disposed of cattle and stock, and failed and refused to account for the portion of the same, and account and exhibit make of any of the same, of the interest of said minor, Frank Rabb, and openly avowed their intention to appropriate all of said estate, and the portion of said minor to which he is justly entitled. (4) It was averred that said M. A. Rogers exhibited to the probate court a pretended final exhibit, upon which she obtained a discharge; and on twenty-second of November, 1882, plaintiff was appointed guardian, etc., and received from said M. A. Rogers \$5,002.63, as shown by final exhibit; that petitioner, as guardian, etc., caused the pretended final exhibit to be reviewed and reconsidered in said probate court, and because the same was false, and failed to account for large sums of money due said Frank Rabb's estate, and was unaccompanied with vouchers, the same was set aside, and defendant M. A. Rogers ordered to make a proper final exhibit of said estate. (5) It was averred that C. M. Rogers had received money for pasturage due the estate, and had failed to account for the minor's portion. This amended petition purports to be the petition of G. A. Rabb, guardian of the estate and person of Frank Rabb, and the recovery sought is for the benefit of said minor.

A few days after this amendment was filed, the district judge, of his own motion, and without any objection having been made by the defendants to its being filed and considered by the court, entered the following order: "It appearing to the court that, on a former day of this term, a general demurrer to plaintiff's petition was sustained, and plaintiff given leave to amend; and it further appearing to the court that, under said leave, plaintiff has filed among the papers of this case an instrument indorsed, 'Plaintiff's first amended original petition,' which upon examination is considered by the court not such an amendment as can be filed herein, but instead is considered by the court as the institution of an entirely new and distinct suit, entitling defendants to full service of citation, as in other cases,—wherefore, the plaintiff declining to further amend, and failing to ask for service upon said defendants under his said amendment, it is therefore considered by the court that said original cause, No. 1,600, be, and the same is hereby, dismissed, and that defendants go hence without day, and that said defendants recover of said plaintiff all costs in this behalf expended, for which let execution issue." Whereupon the cause was dismissed, and from this judgment of dismissal the present appeal is taken.

This judgment is sought to be sustained here upon the following proposition, viz.: An amended original petition which makes entirely new and different parties plaintiff, and makes additional defendants, and additional demands which would entitle the appellant to a judgment much more onerous than that which was claimed by the original petition, is such an amendment as should require service as in an original suit. But the amended petition did not make a new party plaintiff. The original suit was the suit of F. A. Rabb, minor, by his guardian, G. A. Rabb; the amended petition made it the suit of

G. A. Rabb, guardian of Frank Rabb, suing for the benefit of his ward. Each petition was filed for the benefit of the minor alone, was based upon rights which belonged to his estate, and was prosecuted by his guardian; and we can see no substantial difference between the parties plaintiff to the respective suits. If there is any difference, it consists in the substitution of the guardian for the ward as plaintiff in a suit, which could or should be prosecuted by the former in behalf of the minor. The recovery, in either case, is for the benefit of the minor, and the defendants cannot object that it was had by the proper party, when they have not, by the change of parties, been deprived of any substantial defense. This court has sanctioned a change of parties from an agent to his principal (*Price v. Wiley*, 19 Tex. 142;) from a party suing for the use of another to the beneficiary of the suit, (*Martel v. Somers*, 26 Tex. 551;) and have held that between a suit by a next friend for the benefit of a minor, and a suit of a minor by his next friend, there is no substantial difference, (*Gulf, C. & S. F. R. Co. v. Styron*, 1 S. W. Rep. 161, Austin term, 1886.) The change in this case was of much less importance than in the cases above cited, as the guardian was in effect the party plaintiff in each petition; and the principle upon which the last case rests would have authorized the suit to proceed, whether it were by the minor by and through his guardian, or by the guardian for the benefit of the minor. In the following cases, too, much more important changes as to the character in which the plaintiff sued than was made in the present case were sanctioned by this court. *Tousey v. Butler*, 9 Tex. 525; *Tryon v. Butler*, Id. 553; *Thompson v. Sycareengin*, 48 Tex. 555; *Pridgen v. McLean*, 12 Tex. 420; *McFadin v. MacGreal*, 25 Tex. 75; *Devine v. Martin*, 15 Tex. 27; *Henderson v. Kessam*, 8 Tex. 46. We think, therefore, that the court might well have overruled any demurrer which took exception to the party plaintiff in the original petition, and should certainly have allowed the guardian to proceed for the benefit of his ward under the amended petition. The new party defendant was a surety upon one of Mrs. Rogers' bonds. It was therefore proper that he should be sued as defendant with the other sureties. His presence in the suit did not prejudice his co-defendants. In fact, he was brought in because they had objected to the suit proceeding without him.

But it is a sufficient answer to the entire proposition of appellees that, at the time the amended petition was filed, they were in court, and had filed demurrers and other defenses to the action. Some of the demurrers had been sustained, and this created a necessity for the amendment. The rule is well established in our state that a defendant who has been cited, but has not answered, must be notified of every amendment which sets up a new cause of action, or requires a more onerous judgment against him; but, if he has pleaded to the action, the only notice to which he is entitled is the order of court granting leave to file the amendment. See authorities in *Sayles & B. Pl. & Pr. § 49*.

The decisions cited by the appellees in support of their proposition are all cases where the defendant had not answered to the original petition, and a judgment by default was sought against him upon the amendment. *De Walt v. Snow*, 25 Tex. 320; *Morrison v. Walker*, 22 Tex. 18; *Hutchinson v. Owen*, 20 Tex. 287. In this case all the defendants had pleaded to the original petition except Gussett, and he had filed a motion to quash the citation. This motion was sustained, and the cause continued to the next term. This was equivalent to an entry of an appearance by him at that term. Rev. St. art. 1243. The judgment then rendered sustained the demurrers of the defendants, and they were then bound to take notice of the pleading which supplied the place of the petition held bad upon their demurrer. Under these circumstances, it was certainly error for the court to dismiss the suit because the plaintiff would not again serve process upon the defendants; and especially without request by defendants, who were in court, and might have preferred

to go on with the case. They could waive notice of the amended petition, if notice was necessary; and had the court allowed them to proceed with the trial, and they had done so, all objection to want of notice would have been waived.

It is attempted to sustain the action of the court upon another ground, not assigned below as a reason for the dismissal. It is said that the amended petition shows that Mrs. Rogers is still guardian of Frank Rabb, administering his estate in the county court, and that, therefore, the district court had no jurisdiction of a suit upon her bond as guardian. The petition alleges that she had resigned the guardianship, and had been discharged by the county court, and that G. A. Rabb was duly appointed guardian in her stead. These averments directly alleged that she was no longer guardian, and are inconsistent with her being such. There cannot be two guardians of the same minor claiming in opposition to each other, both recognized as such by the county court. Her statement that she had since been called to account by the new guardian, and ordered by the county court to make a new exhibit in place of the one upon which she had been discharged, shows that the county court recognized G. A. Rabb to be the guardian; otherwise, the order would not have been entered at his request. If the order was a proper one, it could not have the effect to discharge Rabb, and reinstate Mrs. Rogers; for the statute does not allow guardians to be made and unmade in any such manner. If improper, it could have no effect upon the right to bring this suit, as it did not change the *status* of the parties to the proceeding, but the one still remained guardian, and the other discharged from the trust.

It is too clear to require further discussion that the judgment below is erroneous, and it is accordingly reversed, and the cause remanded.

STAYTON, J., not sitting.

McFADDIN v. PRATER.

(*Supreme Court of Texas. February 1, 1887.*)

1. RAILROAD COMPANIES—CONDEMNING LAND—OWNER BOUND TO KNOW BOUNDARIES—STATUTE OF LIMITATIONS.

In an action by one to recover a portion of a sum of money received by another from a railroad as compensation for the railroad's right of way over a certain tract of land, part of which plaintiff claims to own, defendant relied on the two-years statute of limitations as a bar to the action. *Held*, he is not estopped to plead the statute by the fact that he had previously misrepresented to plaintiff (innocently and without fraudulent intent) the true division line between their tracts, so that plaintiff was induced to believe that the right of way did not touch any part of his land, and did not discover otherwise until after two years from the date of payment of the money to defendant. Plaintiff was as much bound as was defendant to know the true location of the division line between them, and the fact that he resided at a greater distance from it than did defendant did not excuse his want of knowledge about it.

2. APPEAL—EXCEPTION TO EVIDENCE.

Exception to the ruling of the lower court in excluding or admitting evidence cannot be made for the first time on appeal.

Appeal from Jefferson county.

This action was brought by appellant, William McFaddin, against appellee, Edwin Prater, to recover a portion of a sum of money received by appellee of a railroad company as compensation for a right of way over a certain tract of land, part of which land appellant claimed belonged to him. Appellee pleaded the two-years statute of limitations. Appellant, in his reply, set out that appellee had misrepresented the true boundary lines between their tracts, which adjoined each other, so that appellant was induced to believe that the railroad's right of way did not touch his (appellant's) land, and that appellant did not learn that such was not the case until two years after the date of

payment by the railroad, and appellant claimed that, on account of such misrepresentations, appellee was estopped to rely on the statute. The lower court adjudged for the appellee, Prater, and appellant, McFaddin, appeals.

Tom J. Russell, for appellant, plaintiff in error. *R. H. Leonard*, for appellee.

WILLIE, C. J. There was no error in sustaining defendant's exceptions to plaintiff's original and amended supplemental petition. Each of these petitions showed on its face that the claim for money received from the railroad company for the right of way was barred by limitation. The excuses for not bringing the suit within the time prescribed by statute were insufficient. They do not show that the plaintiff was prevented from so doing by any fraud or misconduct on the part of the defendant. The plaintiff was as much bound as was the defendant to know the true location of the division line between them. The fact that he resided at a greater distance from it than did the defendant did not excuse his want of knowledge upon this subject. *Rowe v. Horton*, 65 Tex. 29.

The representation made by defendant as to the locality of the line was not fraudulent, or intended to prevent the plaintiff from bringing the suit for the money realized from the right of way. It was made in an honest belief of the truth of the representation, as is shown by the fact that the defendant has insisted in this suit that such was its true location; and not only so, but has successfully maintained his assertion. It was nothing more than a claim that the division line was at the place stated, as a reason why the defendant exercised ownership up to that place. It was not a fraudulent concealment of the plaintiff's rights, but a statement of what the defendant claimed in opposition to them. *Munson v. Hollowell*, 26 Tex. 475.

As to the point made upon the admission of the judgment in evidence, we cannot consider it for want of a proper bill of exceptions. There was no separate bill taken to the rejection of the evidence; nor does the statement of facts, nor any other portion of the record, show that any objection was taken to this action of the court. It is said in the statement of facts that the defendant objected to the admission of the judgment in evidence. The judge's conclusions show that it was ruled out. It should somewhere be shown that the plaintiff excepted to the court's ruling on the subject. But this is not shown, and exceptions cannot be taken to such a ruling for the first time in this court.

The fourth and sixth assignments of error are not in compliance with the rules of this court, as has been frequently held, and they will not be considered.

There is no error in the judgment, and it is affirmed.

HARRIS and others v. SEINSHEIMER.

(Supreme Court of Texas. February 11, 1887.)

1. WITNESS—TRANSACTIONS OF DECEDENT.

In an action by a creditor to subject land inherited by the debtor from his deceased father, evidence of the debtor that he knew of his own knowledge that his father had purchased the land with his wife's means, *held*, the evidence was not incompetent under Rev. St. Tex. § 2243, providing that, "in actions by or against executors in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statement by the decedent, unless called to testify by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transactions with such decedent." This section does not apply, as this action is not by or against an ex-

ecutor, nor does it arise out of any transaction with the decedent. The testimony offered was not as to a declaration of the deceased father, but as to a fact within witness' own knowledge, that the separate means of his mother paid for the land.¹

2. HUSBAND AND WIFE—HEIRS—COMMUNITY PROPERTY—LIABILITY TO DEBTS OF HEIRS.
The half interest of the husband in community property passes to his heirs on his death, and is subject to sale for the debts of the heirs, but a purchaser of their interest acquires no right to the possession of any part of the property until the death of the wife.

Appeal from Brazos county.

J. D. Thomas, for appellant. *Henderson & Butler*, for appellees.

STAYTON, J. The appellee brought this action against W. E. Harris and wife and C. A. Harris and wife, to recover two lots in the city of Bryan. He claims under a purchase made at a sale under execution against W. E. and C. A. Harris. The judgment under which he claims was recorded in Brazos county, May 11, 1885, and he bought July 6, 1886. The two lots were bought by A. A. Harris in May, 1871, he then being, and continuing to be, a married man, until his death, which occurred in 1874. There was nothing in the deed to show that the lots were paid for with the separate means of his wife, but on the trial the defendants proposed to prove that this was true, by the evidence of C. A. Harris, who proposed to state that within his own knowledge this was so; but his evidence was excluded on the ground that, being a party to the action, he could not testify to any transactions with or declarations by his father or mother. The widow of A. A. Harris continued to live on the lots until her death, which occurred January 25, 1886, though she was absent from the property for a short time before that event. On December 10, 1885, the widow of A. A. Harris conveyed the north half of the lots to C. A. Harris, who, having married before that time, occupied the part of the lots so conveyed to him as his homestead continuously from some time in September of that year. When the widow died, she left a will by which she bequeathed the south half of the lots to the wife of W. E. Harris, who, as soon as they could get possession of it after the death of the testatrix, moved upon it, and have since occupied it as their homestead. C. A. and W. E. Harris gave notice of their claim at the sheriff's sale, as did the wife of W. E. Harris.

If the lots were paid for with the separate property of the wife of A. A. Harris, she was the equitable owner, and the notice given at the sheriff's sale of the claim of the several parties was sufficient to put the purchaser on inquiry, and to defeat any right he would have acquired had he purchased without notice. If the lots were the separate property of the widow of A. A. Harris, it is evident that the purchaser at sheriff's sale took nothing; for at the time the conveyance of the north half of the lots to C. A. Harris was made, he had a family, and was occupying as a homestead that part of the lots, and the judgment lien never attached; and title to the south half of the lots passed to the wife of W. E. Harris by the will of his mother. It, then, was important to show whether the property was bought with the separate means of the wife of A. A. Harris. The bill of exceptions does not show that C. A. Harris proposed to testify to any transaction with or declaration by his father or mother, but as to the fact, within his own knowledge, that the separate means of his mother paid for the lots. This was admissible if article 2248, Rev. St., has application. We are of opinion, however, that the statute has no application in this case. The plaintiff in this case claims the lots on the ground that they were the property of C. A. and W. E. Harris at the time he bought. The statute does not render any person incompetent to testify, as to any mat-

¹ As to the admissibility of testimony concerning transactions with deceased persons, see *Park v. Locke*, (Ark.) 2 S. W. Rep. 696, and note; *Roberts v. Briscoe*, (Ohio,) 10 N. E. Rep. 61; *Hill v. Helton*, (Ala.) 1 South. Rep. 340; *Gilder v. City of Brenham*, (Tex.) post. 309.

ter to which any witness may testify under the rules governing the admission of evidence, because he is a party to the action, or interested in the issue to be tried. It does declare that "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent, arising out of any transaction with such decedent." Rev. St. 2248. This is not an action by or against an executor, administrator, or guardian; nor is it an *action* against or by heirs or legal representatives of a decedent, *arising out of any transaction with* such decedent. If the plaintiff were asserting against the defendants, as heirs of A. A. Harris or his wife, some claim arising out of a transaction had between himself, or some one under whom he claims, and the father or mother of C. A. Harris, then the witness could not testify as to any transaction between them, or statement by his deceased parent. Neither the letter nor the spirit of the statute set out above have any application in this case, and the witness ought to have been permitted to give evidence as to any fact which would be admissible if coming from any other witness.

The judge who tried the cause found that the lots were community property, but held that the judgment lien would not attach until the death of the widow of A. A. Harris. This, we think, was error, for, if the property was community, W. E. and C. A. Harris inherited one-half of it from their father, and their interest would be subject to sale for their debts, and on this interest the judgment lien would attach from the date of the recording of the judgment against them, if their situation was not such as to exempt their interests from sale for the payment of debts. A purchaser of their interests, however, would acquire no right to possession of any part of the lots so long as their mother lived, or desired to occupy them. What effect her conveyance to C. A. Harris would have upon her homestead right in so much of the property as she conveyed, it is unnecessary now to inquire. C. A. Harris had no family until June 24, 1885, and, intervening that date and the record of the judgment, could claim no exemption, so far as the record before us shows. Whether W. E. Harris lived on the lots after his marriage, or, with the consent of his mother, so used them as to acquire a homestead right before the judgment lien attached, does not appear.

For the errors noticed, the judgment will be reversed, and the cause remanded.

GILDER, Adm'x, v. CITY OF BRENHAM.

(Supreme Court of Texas. February 11, 1887.)

1. WITNESS—TRANSACTIONS WITH DECEDENT.

Rev. St. Tex. art. 2248, making incompetent the testimony of a party to an action to which the representative of a decedent is either plaintiff or defendant, in so far as the testimony relates to any conversation or transaction with the decedent, does not exclude the testimony of one not a party to the suit, and not bound by the judgment, although such party may be interested in the issue.¹

2. DEDICATION—STREETS—IMPLIED ACCEPTANCE FROM LONG USER BY CITY.

Before a city can set up any right of control over property, it must show that it has accepted the dedication of the property. Such acceptance may be express, or may be implied from long-continued use by the public, though in a state (such as

¹As to the admissibility of testimony concerning transactions with deceased persons, see *Park v. Locke*, (Ark.) 2 S. W. Rep. 696, and note; *Harris v. Seinsheimer*, (Tex.) ante, 307; *Hays v. Hays*, (Tex.) 1 S. W. Rep. 895; *Bates v. Forcht*, (Mo.) Id. 120; *Robertson v. Mowell*, (Md.) 8 Atl. Rep. 273; *Roberts v. Briscoe*, (Ohio,) 10 N. E. Rep. 61; *Rhodes v. Pray*, (Minn.) 31 N. W. Rep. 86; *Hill v. Helton*, (Ala.) 1 South. Rep. 340.

Texas) where much of the land is vacant both in town and country, and where every one feels at liberty to pass at will over any uninclosed premises, the presumption ought not to be generally indulged that a city has adopted a street from the mere fact of its long use as such by the public.¹

8. SAME—WHAT SUFFICIENT TO CONSTITUTE.

Where it appears that a strip of land in a city has never been worked by the city, has not been delineated as a street upon the city map; that it has been passed over by the public by paths crossing it diagonally in different directions; that the city has never exercised any ownership over it except to authorize the mayor to relinquish all claim to it upon plaintiff releasing all claims to another street: *held*, this was not sufficient to constitute an acceptance of the strip as a street.²

Appeal from Washington county.

This action was brought by appellant, M. E. Gilder, as administratrix of A. J. Gilder, deceased, against the appellee, the city of Brenham, to recover the title and possession of a certain lot in the city, and to restrain the city from interfering with her possession thereof, and for damages for her eviction therefrom. Judgment for the city, and plaintiff appealed. The witness Dwyer bought a lot of the decedent, Gilder, in the latter's life-time, which lot bordered on the lot in controversy.

Sayles & Bassett, for appellant. *Beauregard Bryan*, for appellee.

GAINES, J. We do not think the court below erred in admitting the witness Dwyer to testify, over appellant's objection, as to conversations which occurred between him and appellant's intestate in reference to the dedication to the purposes of a street of the premises in controversy. The Revised Statutes, in article 2246, re-enact the first section of the act of May 10, 1871, which removed the restrictions against receiving the testimony of the parties to the suit, and of persons interested in the issue to be tried. The effect of article 2248 is to except from the operation of the former provision the parties to a suit in which the representative of a decedent or a guardian may be either plaintiff or defendant, in so far as the testimony upon either side relates to any conversation or transaction with the decedent or ward. No mention is made of the persons interested in the issue to be tried, and hence they are not excepted from the provisions of the previous article. In the case of *Simpson v. Brotherton*, 62 Tex. 170, the wife of appellee, who was plaintiff in the court below, was held incompetent to testify as to the declarations of appellant's ancestor. There the suit was brought by the husband to recover an interest in land, which interest was claimed as community property of himself and wife. Her testimony was not held inadmissible because of her interest in the proceeding, but upon the ground that, though not named as such, she was in fact a party to the suit, and would be bound by any judgment that might be rendered against her husband. In this case Dwyer was in no sense a party to the proceeding, and will not be concluded by the judgment, whether it be for or against the city.

We are not prepared to say that the evidence was not sufficient to show a dedication by plaintiff's intestate of the land in controversy to the purposes of a street. His declarations to Dwyer at the time he sold to him, and his subsequent declarations, his conveying the land upon both sides up to the disputed strip, leaving just the ordinary width of a street, and other circumstances, tend very strongly to show a dedication. The boundary was well de-

¹Acceptance of a highway by the public is necessary to establish its dedication. *Pavonia Land Ass'n v. Temfer*, (N. J.) 7 Atl. Rep. 423, and note.

²As to what will constitute or prove an acceptance by the public, see *Morse v. Zeize*, (Minn.) 24 N. W. Rep. 287; *Laughlin v. City of Washington*, (Iowa,) 19 N. W. Rep. 819; *Brakken v. Minneapolis & St. L. R. Co.*, (Minn.) 11 N. W. Rep. 124; *Town of Lake View v. Lebahn*, (Ill.) 9 N. E. Rep. 269; *Maywood Co. v. Village of Maywood*, (Ill.) 6 N. E. Rep. 866; *People v. Lohflem*, (N. Y.) 5 N. E. Rep. 784; *Hoadley v. City and County of San Francisco*, (Cal.) 12 Pac. Rep. 125; *State v. Proctor*, (Mo.) 2 S. W. Rep. 472.

fined, and his purpose clearly and unequivocally stated. This makes a dedication so far as he could make it of his own motion. *Oswald v. Grenet*, 22 Tex. 94; *Lamar Co. v. Clements*, 49 Tex. 347.

But the controversy here is not between Gilder's administratrix and those who have bought neighboring or adjacent property upon the faith of his acts and declarations. It is between the administratrix and the city; and we are of opinion that, before the city can set up any right of control over the property, it must show that it has accepted the dedication. The opening and repair of a street subjects a municipal corporation to expense, and may subject it to liability to individuals for damages resulting from any failure to keep it in safe condition. This burden cannot be imposed by "the will of an individual who, from motives of patriotism, convenience, or gain, might lay off his land into town lots or streets, or lay out a highway through his land." *State v. Carver*, 5 Strob. 217. The authorities generally agree that, in order to charge a municipality with the duty of repairs, either an express or implied acceptance of the dedication must be shown, (*State v. Carver, supra*; *Tegarden v. McBean*, 33 Miss. 283; *Town Council v. Lythgoe*, 7 Rich. 495; *Pope v. Union*, 18 N. J. Eq. 282; *State v. Bradbury*, 40 Me. 154; *Niagara Falls Bridge Co. v. Bachman*, 66 N. Y. 261; and it seems to us that, if it has no duty in regard to the street, it should have no control over it, whatever the rights of third persons with respect to the proposed dedication may be. It must be either a public street or not a public street. If a public street, the corporation is responsible for any damage that may result from its neglect to keep it in repair. If not public, then it is not perceived that the charter ordinarily granted to a town or city would invest its council or officers with any authority over it. But it is held that an acceptance may be implied. This is unquestionably so when such acceptance is evidenced by acts clearly indicating that purpose, such as making repairs upon the proposed street, or platting it upon the official maps. And it is also said in many cases that this implication may arise from long-continued use by the public. This seems to be the doctrine in England, but in most of the American decisions which we have examined in which this principle is announced there was evidence of acts on part of the municipal authorities themselves tending to show adoption of the dedication, in addition to the long use by the public of the property in controversy. In many instances the value of the property, and its situation and surrounding, may be such, and the long-continued public use so unequivocal, that, after the ordinary period for the presumption of a grant, both a dedication by the owner and assent of the municipal authorities will be presumed. Cases may arise in our own state to which the English rule should be applied; but, in our opinion, we should not hold it a general principal applicable to every case. In a state in which much of the land is vacant both in town and country, and every one feels at liberty to pass at will over any uninclosed premises, the presumption ought not to prevail that the proper authorities have adopted a street or road from the mere fact of its long use as such by the public.

In the present case there is no evidence tending to show an acceptance of the dedication on part of the city of Brenham. The strip in controversy was never worked or repaired by the city, and was not delineated upon the city map made by its authority. There being no inclosure for a long time on one side of it, it was passed over by the public in part by roads or paths crossing it diagonally in different directions. There is no evidence of any use of the property that might not have been made if no dedication had ever been intended; and it is nowhere disclosed that the city ever claimed or recognized the property as a street until the year 1880, when the city council passed a resolution authorizing the mayor to relinquish any claim upon it, in the event that plaintiff would release all claims upon certain parts of Ant street, into which this disputed street opened at right angles. The charter of the city

confers very enlarged powers upon the city council over its streets, (Sp. Laws 1873, § 6, p. 14,) but it is not necessary for us to consider whether the authority to vacate a street is granted or not. It certainly had the power to refuse a dedication when the agreement was entered into between appellant and the mayor; and there having been no formal acceptance, or act on part of the authorities from which such acceptance could be presumed up to the date of this contract, we think the council was authorized to relinquish under the circumstances, notwithstanding the equivocal use of the premises by the public for a long length of time. To hold otherwise would be to decide that private parties could force the acceptances of streets upon cities with all their burdens, without the assent of the authorities duly authorized to assent to it; for we know of no power in a municipal corporation to prevent the use of any way as a street which the owner may see proper to leave open. Conceding that the dedication here had been complete as to the city, it may still be a question whether the council was not authorized to compromise a dispute with appellant by relinquishment of their claim upon the property in controversy in consideration of an abandonment by her of her claim upon other property in dispute between them. See *Petersburg v. Mapptn*, 14 Ill. 193; 1 Dill. Mun. Corp. § 477. But it is not necessary for us to decide this question.

It follows, from what we had previously said, that the city had no right or control over the premises in controversy; and appellant, being in possession, is entitled to have it restrained from removing his inclosures. We decide nothing in this case as to the right of Dwyer, and others who own lands adjacent to the disputed strip. These rights, if any exist, are distinct from that of the city, and are not concluded by this judgment. We merely hold that appellee cannot now claim the premises as a public street.

The judgment will accordingly be reversed, and here rendered in favor of appellant, and against appellee, restraining it from interfering with appellant's possession and control of the premises in controversy, and for all costs both in this court and the court below.

McCLANAHAN and others v. STEPHENS and others.

(Supreme Court of Texas. February 11, 1887.)

VENDOR AND VENDEE—CUTTING TIMBER—LAND RECOVERED UNDER PARAMOUNT TITLE.

Appellant sold land which he had purchased at a tax sale, but, the title proving defective, the original owner subsequently recovered the land back of the vendee. Held, appellant was not liable to the original owner for the value of timber which the vendee had cut while he was in possession. The proximate cause of the injury to the owner was the act of the vendee, over which appellant had no control.

Appeal from San Jacinto county.

Hill & Corry, for appellants.

STAYTON, J. The appellants sold to Montgomery & Co. a tract of land from which the latter cut timber, and this action was brought, not only to recover the land, but to recover from the appellants, as well as the persons who composed the firm of Montgomery & Co., damages for such cutting. The charge of the court was such as to induce the jury to believe that, in the opinion of the court, there was evidence from which they might find the appellants liable for the value of the timber cut by Montgomery & Co. There was no evidence tending to show that the appellants cut the timber, advised that it should be cut, or in any manner controlled or influenced the conduct of the persons who did cut it. To render the appellants responsible for the injury it must be made to appear that some act of theirs was the efficient cause. The land belonged to the appellees. It was sold for taxes which they had failed to pay; and the mere purchase of it by the appellants was not a violation of any right. The appellants, however, did not acquire title by their

purchase, but it is apparent from all the evidence in the case that they believed they had. They were so advised by persons learned in the law, and, so believing, sold the land to Montgomery & Co. Their sale to the persons who did cut the timber was not the efficient cause of the injury. The proximate cause of the injury was the act of their vendees, over which they had no more control after they sold than had they before.

It was held in *Wall v. Osborn*, 12 Wend. 40, and in *Morgan v. Varick*, 8 Wend. 594, where persons sold personal property belonging to others, and directed or requested their vendees to take possession of it, and remove it, that this made the vendees trespassers. In *Kolb v. Bankhead*, 18 Tex. 232, it was held that one who pointed out and sold to another, timber standing on the land of a third person, which he had no right to sell, was responsible as a trespasser for a cutting by his vendee, which the vendor knew was intended when he sold. In these cases, the sellers, in effect, directed the doing of the illegal act; themselves did it through the agency of other persons.

To render the appellants liable for the acts of their vendees it must be made to appear that they acted in concert in doing the illegal act, or that the injury was the ordinary or natural result of some act which they did. If they knew that their vendees were engaged in the lumber business, and even supposed that they purchased the land for the purpose of using the timber on it in their mills, it cannot be said that the sale of the land made by them, of itself, would ordinarily or naturally bring about the result now complained of. There is no law in force in this state which forbids the sale of land held by doubtful title, or of land adversely possessed by some other person; and such a sale cannot be said to be illegal when considered even in relation to one holding the possession or superior title, for it deprives such person of no right. One cannot be said to be a trespasser by reason of having done some act not illegal in its nature. The charge given was calculated to mislead, and should not have been given.

The judgment will be reversed, and the cause remanded.

SEYMOUR and others v. HILL.

(Supreme Court of Texas. February 15, 1887.)

INJUNCTION—EXECUTION ISSUED AFTER LAPSE OF YEAR.

A judgment having become dormant from the failure of the judgment creditor to issue execution within a year, an injunction will issue against an execution issued after the expiration of the year, because it is presumed, from the delay in taking out execution, that the judgment has been paid. But, it appearing that the judgment had in fact not been paid, the injunction will be dissolved, and any money which had come into the hands of the sheriff under the execution will be applied to the judgment under a proper prayer therefor on the part of the creditor.

Appeal from Fayette county.

Moore, Duncan & Meerscheldt, for appellant.

STAYTON, J. This action was brought by the appellee to restrain the enforcement of a judgment rendered against him in a justice's court in favor of the appellant. He sought relief on the ground that the judgment was obtained by fraud, and upon the further ground that the judgment was dormant. An execution had issued on the judgment, for the first time, more than a year after the judgment was rendered, and under it a bale of cotton had been seized, which by consent of parties was sold, and the proceeds were in the hands of the sheriff. The defendant denied that the judgment was obtained by fraud, and gave a history of the transactions between the parties which led to its rendition. He also asked that the judgment rendered in the justice's court be revived, or that he have judgment against the plaintiff for the sum claimed to be due him on the judgment, which the pleadings of the parties show was

\$75.28, with interest thereon at the rate of 10 per cent. per annum from the twenty-ninth August, 1881. There was a trial without a jury, and the court found that the judgment complained of was not procured by fraud, but that it was dormant when the execution issued. Whereupon the injunction was perpetuated in so far as it restrained proceedings under the execution, and the defendants were directed to deliver the proceeds of the cotton to the plaintiff.

The judgment in favor of Seymour against Hill, having been found by the court to be valid, is conclusive evidence of the indebtedness of the latter to the former. There is no pretense that the judgment has been paid; and the only ground on which the right to enforce it, though the execution issued, is denied, is that the judgment is dormant. In *North v. Swing*, 24 Tex. 194, it was held that an execution issued on a dormant judgment was properly enjoined; but in that case no relief based on the existence of a valid debt was asked, though it is intimated in the opinion that the judgment on which the execution was issued might have been revived in that case.

The judgment rendered by the justice of the peace, on which the execution in favor of Seymour issued, could not have been revived in the district court; but it would seem, under the former decisions of this court, that, having jurisdiction of the matter through the application for an injunction, the court had jurisdiction to determine whether the sum for which the judgment was rendered in the justice's court was still due to Seymour, and, if so, to have rendered a judgment in his favor for it. *Stein v. Freiberg*, 64 Tex. 273; *Hale v. McComas*, 59 Tex. 486; *Willis v. Gordon*, 22 Tex. 241; *Witt v. Kaufman*, 25 Tex. 384; *Chambees v. Story*, 4 Tex. Law Rev. 299. The defendant asked this relief, and it was denied. This we think was error. When an execution has not been issued upon a judgment within one year after its rendition, such inference of payment arises that the law refuses an execution to enforce it until that inference has been removed. This inference may be removed by a proceeding to revive the judgment, if it then appear that it has not been paid, or by an action upon the judgment.

In the case before us it appears that the judgment has not been paid; money has come into the hands of the sheriff to pay it in part, through an execution voidable; and, under this state of facts, ought the officer to be restrained from paying it over in obedience to the writ which was returnable on the day the injunction in this case was granted? The statute provides that "no injunction shall be granted to stay any judgment or proceedings at law, except so much of the recovery or cause of action as the complainant in his petition shall show himself equitably entitled to be relieved against, and so much as will cover costs," (Rev. St. 2874,) and that "the principles, practice, and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with the provisions of this title or other law," (Rev. St. 2898.) The principles recognized in courts of equity deny an injunction in all cases in which it does not clearly appear that injury will result if the writ be not granted; and in many cases it has been said that, to authorize the writ, it must appear that the threatened injury would be irreparable. High, Inj. 22. Can any such injury result if the writ be refused, when it appears that the party seeking it is indebted to another, and the sole purpose of the writ is to prevent or delay the creditor in receiving that which is due to him? We think not. There is a maxim enforced in equity which declares that he who seeks equity must do equity. If it appears that one justly indebted to another in a sum fixed by a judgment, on which, however, an execution ought not to issue because the judgment is dormant, seeks relief by injunction against an execution issued on such a judgment, it seems to us, where it is shown that the judgment has not been paid, that the injunction ought to be dissolved. High, Inj. 130, 138. The sole ground on which an execution on a dormant judgment is denied being the inference of payment, it would seem, when this is rebutted, to perpetuate the injunction would be

to refuse application to a well-settled principle or rule in equity, and to grant the injunction when no legal injury to the applicant can result if it be denied. It is the legal right of the creditor to have his debt, and to have it without delay.

In *Watson v. Newsham*, 17 Tex. 437, and in *North v. Swing*, 24 Tex. 193, injunctions were perpetuated restraining executions issued on dormant judgments, but in neither of the cases was there any inquiry made whether the judgments were unpaid, nor was any relief based on them asked.

The judgment will be reversed, and remanded, with instructions to the district court to dissolve the injunction, and to render a judgment otherwise in accordance with this opinion; but, as the appellant committed at least a technical wrong in suing out the execution, let him be adjudged to pay all the costs incurred in the district court. It is so ordered.

PENNINGTON and another v. McQUEEN.

(Supreme Court of Texas. February 15, 1887.)

APPEAL—REJECTED EVIDENCE.

A party complaining of the rejection of evidence must show what the rejected evidence was, in order that the court may determine upon review whether he was injured by the rejection.

Appeal from Tyler county.

William P. Nicks, for appellants. *Stephen P. West* and *Burnett & Hanscom*, for appellee.

STAYTON, J. This is an action of trespass to try title, instituted by the appellee to recover a lot in the town of Woodville. The defendants, in addition to the ordinary defenses filed in such actions, alleged that the property was their homestead, and that they executed to H. A. Barclay an instrument on which the plaintiff relied, she being a purchaser from Barclay, though on its face an absolute deed, intended only as a mortgage to secure a debt due to Barclay. The deed was absolute on its face, and acknowledged by Pennington and wife as such instruments are required to be to pass title to homestead property. The wife also pleaded that the deed was a forgery, and that, if executed, this was done through duress from her husband; but there was no averment that either Barclay or Mrs. McQueen had any knowledge of any improper means used by the husband to induce his wife to sign the deed. By supplemental petition, Mrs. McQueen alleged that she was an innocent purchaser. There was no evidence whatever introduced upon the question of forgery, and the deed was admitted in evidence without objection. There was no evidence offered to show duress, unless evidence bearing on that question was sought to be elicited under a question asked, the answer to which was excluded, which will be hereafter noticed.

There was some conflict in the evidence as to the purpose for which the deed was executed, but there was no evidence tending to show, if it was intended, as between the parties to it, only as a mortgage, that Mrs. McQueen had any notice of that fact when she bought from Barclay.

On the trial the defendants asked Mrs. McQueen: "What consideration did you pay your son, H. A. Barclay, for the premises in controversy, and how did you pay the same?" Some objection, the bill of exceptions not showing what, was made to this question, and the court refused to permit the answer to be given. It would seem that the answer should have been admitted, as there was a question made whether Mrs. McQueen was a *bona fide* purchaser; but no injury could have resulted from the action of the court, for the witness in her testimony stated "that she paid said Barclay \$600 cash in hand for the property herein in controversy."

It is urged that the plaintiff holds under a quitclaim from Barclay, and that she, for this reason, cannot be deemed an innocent purchaser. The deed from Barclay to Mrs. McQueen is not of that character.

Mrs. Pennington, after having testified fully that the deed was understood between herself, husband, and Barclay to be only intended to secure a debt due from her husband to Barclay, was asked "why and for what purpose she executed the deed of conveyance from defendants herein to H. A. Barclay, and under what circumstances she executed the same." This question was objected to, as shown by the bill of exceptions, "because the same, as they alleged, sought to show duress." The objection was sustained. It is incumbent upon the party who complains of the rejection of evidence to show in some way what the rejected evidence was, that this court may know whether he was injured by the ruling. A question may be proper; but, if the reply to it would have been of no value to the party propounding it, he has suffered no injury. *Mathews v. State*, 44 Tex. 379; *Griffin v. Chadwick*, Id. 407; *Burleson v. Hancock*, 28 Tex. 82; *Styles v. Gray*, 10 Tex. 507; *King v. Gray*, 17 Tex. 71; *McKay v. Overton*, 65 Tex. 85; *Milliken v. Smoot*, 64 Tex. 172.

It is urged that the court, on motion, struck out the testimony tending to show that the deed to Barclay was intended as a security for money. There is nothing in the record, which we can consider, to show that this was done. A bill of exceptions filed after the close of the term tends to show that fact; but, under a well-settled rule, a bill of exceptions so filed cannot be considered. We do not see, however, how such a ruling, if made, could have injured the appellants, in the absence of evidence tending to show that Mrs. McQueen had notice of such fact.

There is no error, and judgment will be affirmed.

HARRIS and another v. SESSLER and another.

(Supreme Court of Texas. February 15, 1887.)

1. PARTNERSHIP—WHAT CONSTITUTES.

Any declarations or conduct on the part of several that would induce others to consider them as partners will render them liable as such.

2. SAME—SECRET AND OSTENSIBLE PARTNERS.

A secret partnership exists where one is really participating in the profits and loss of an enterprise carried on by another, and withholds a knowledge of the fact from the public. An ostensible partnership exists where one who has no actual interest in a firm says he is a partner, or knowingly permits the firm to use his name in any manner in order to obtain credit.

Appeal from Jefferson county.

R. H. Leonard, for appellants. O'Brien & John, for appellees.

GAINES, J. This suit was originally brought by appellants against appellees to recover a certain store account. The petition charged defendants as partners. This was denied under oath, and at the fall term, 1885, of the district court, a judgment was rendered in favor of plaintiff against both defendants. Defendant Crary appealed, and at the last term of this court, at this place, in an opinion not reported, this court held the evidence insufficient to show a partnership, and reversed the judgment, and remanded the cause. The cause was again tried at the spring term 1886 of the district court, and resulted in a judgment in favor of appellants against appellee Sessler, but against them, and in favor of appellee Crary. The assignments of error complain of the action of the court below in charging the jury that, unless they believe that an actual partnership existed between the defendants, they would find for defendant Crary, and in omitting and refusing to charge to the effect that they should find against both defendants should they believe that defendants held themselves out to third persons as partners.

The petition alleged both that defendants were partners, and also that they held themselves out as such; and the charge was clearly erroneous if there was any evidence sufficient to show *prima facie* that there was any declarations or conduct on part of Crary, or on part of Sessler with his knowledge, that should reasonably have induced appellants to consider them as partners in the business which Sessler was prosecuting. The testimony offered by plaintiffs to show an actual partnership was somewhat stronger upon the second than upon the former trial of the case. But the verdict of the jury is against its sufficiency, and we cannot say it is contrary to the evidence upon that issue. But the testimony adduced bearing upon the question of partnership, in so far as it showed anything pertinent to the issue, tended to establish an actual secret partnership. This, as we take it, is the direct opposite of an ostensible partnership. The former exists where one is really participating in the profits and loss of an enterprise carried on by another, and withholds a knowledge of the fact from the public; the latter takes place when one who has no actual interest in a business says he is a partner with another, or knowingly permits such other in any manner to use his name as a member of the firm in order to obtain credit.

The goods and money in the account were originally charged to Sessler alone. No witness ever heard either Sessler or Crary say they were partners, though several seemed to think such was the fact. Sessler's book-keeper testified that the business of Sessler was done in his own name, and that, if Crary ever had any connection with it as a partner, he did not know it. But we may say, in brief, that, if any partnership existed between appellees, it was very carefully concealed. There being no evidence, therefore, that defendants ever held themselves out as partners, the court did not err in refusing to give the instructions asked by appellants.

There being no error in the judgment, it is affirmed.

MOORE v. JORDAN and others.

(Supreme Court of Texas. February 15, 1887.)

JUSTICE OF PEACE—PLEADING—AMENDMENT.

Rev. St. Tex. art. 1573, providing that pleadings in a justice's court may be oral, and that a brief statement thereof shall be noted on the docket, and article 1575, providing for amendments in accordance with the rules governing the district and county courts so far as the same may be applicable, *held*, under these sections, pleadings are essential to the formation of issues to be tried in those courts.

Appeal from Houston county.

Cooper & Moore, for appellant. Nunn & Denny, for appellees.

GAINES, J. This suit was originally brought by appellant against appellees in a justice's court to recover a balance of \$35 alleged to be due on a promissory note, and to enforce the lien of a chattel mortgage executed to secure the debt. A judgment having been rendered against the defendants in the justice's court, an appeal was taken to the county court, and the cause thereupon transferred to the district court by reason of the disqualification of the county judge. The defendants having obtained a judgment in the district court after a trial upon the merits, the plaintiff now appeals. There have been already two appeals to this court from judgments in suits growing out of the original case, but since they in no manner affect the present appeal they need not be noticed.

The original citation from the justice's court and a copy of the note and mortgage appear in the transcript, but the record nowhere discloses any plea on behalf of the defendants. Plaintiff testified to facts showing that defendant David Jordan had paid part of the indebtedness, but that a balance of \$35 and interest was still due. The defendant named testified to the payment of

the note in full; but his testimony was admitted under a suggestion by the court, and an agreement by counsel, that, since the cause was being heard without a jury, the evidence should be introduced, but none but legal testimony should be considered by the court. After its admission, appellant objected to any evidence of payment being considered because defendants had not pleaded that or any other defense. The court, however, considered the evidence, and gave judgment for defendants; and to this action appellant excepted, and now makes his exception the ground of an assignment of error. We do not doubt that pleadings are as essential to make an issue in the justice's court as in a court of record. The statutes provide, however, that they should be oral, (with certain exceptions,) and that a brief statement thereof shall be noted on the docket. Rev. St. art. 1573. It is also declared that they may be amended in accordance with the rules governing amendments of pleadings in the district and county courts so far as the same are applicable. Rev. St. 1575. These citations are sufficient to show that pleadings in the justice's court are made essential to the formation of the issues to be tried, and that they are not to be dispensed with. This was in effect held by this court in the case of *Maass v. Solinsky*, ante, 289, (decided at the present term.) See, also, *First Nat. Bank v. Pritchard*, 2 Willson, Con. Rep. § 132.

The bill of exceptions states, in so many words, that "there was no pleadings made by defendants;" and we therefore think the court below erred in considering the testimony adduced to show a payment of the note. It would seem that the record here would be sufficient to show the pleadings, if there appeared therein the brief statement required by the statute, either from the transcript of the justice's docket or that of the district court, or by entry upon the minutes of the latter court, either independently or in the judgment itself.

This renders it unnecessary to consider the other assignment, that the judgment of the court is contrary to the weight of the evidence.

Because of the error pointed out, the judgment is reversed, and the cause remanded.

WOESSNER v. CRANK.

(Supreme Court of Texas. February 15, 1887.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—TRUST IN ASSIGNEE, ON HIS DEATH, DOES NOT PASS TO WIFE.

The trust conferred upon an assignee under an assignment for the benefit of creditors is personal, and does not, upon his death, pass to his widow as successor to the trust; and so, where a suit is pending at the time of his death between him and a creditor claiming adversely to the deed of assignment, the widow is not entitled to be substituted, and to prosecute the suit as his successor.

Writ of error from Nueces county.

D. McNeill Turner and McCampbell & Gioens, for plaintiff in error. *Stanley Welch*, for defendant in error.

STAYTON, J. Eliza Crank brought an action against George F. Gage for debt, and sued out and caused to be levied a writ of attachment on personal property in the possession of W. E. Gage. Soon after the levy of the attachment, W. E. Gage made an assignment, under the statute, for the benefit of his creditors, appointing John Woessner assignee. John Woessner qualified, and made claim, under the statute, to the property levied upon under the writ of attachment sued out by Mrs. Crank. Before the cause was tried, John Woessner died, and, his death having been suggested, his wife, the plaintiff in error, "as his surviving widow in community, as his legal representative, appeared, and joined issue as his successor in said trust as assignee." With no other representative of the assigned estate before the court, the cause was tried, and a judgment rendered against the plaintiff in error, and the sureties on the claimant's bond executed by her husband, such as is usual when, on trial of

the right to property, it is found subject to the process under which it was seized. The correctness of the judgment is questioned on many grounds, which it will be unnecessary to consider.

That cases may arise in which the surviving wife, who has qualified under the statute to administer the community estate of herself and her deceased husband, may make herself a party plaintiff or defendant to an action pending at the time of her husband's death, and affecting the community estate, is doubtless true. No such case, however, is presented by the record before us. The trust conferred upon John Woessner by the deed of assignment, and his qualification under it, was personal, and his widow, by reason of her relationship to him, would not become his successor in the trust. In case of the death of such an assignee the law provides that the county or district judge shall appoint another in his place. Act March 24, 1879, § 14. The judgment rendered in this cause settles no right, because there was no party before the court who had authority to represent the assigned estate. This error, though not assigned, requires a reversal of the judgment.

The judgment will be reversed, and the cause remanded; plaintiff in error to pay costs of this appeal.

COLEMAN and others v. DUNMAN and others.

(*Supreme Court of Texas. February 15, 1887.*)

SALE—LIEN—PURCHASER—NOTICE.

Appellee having agreed to sell a herd of cattle, reserving a lien on 1,000 head in that and other herds of the purchaser in part payment of the purchase money, the purchaser raised the money which he was to pay in cash by borrowing of appellants, and agreeing to sell him 800 head of the herd bought of appellee, and other herds, at a certain price per head. Appellants had notice, at the time, of the contemplated sale between appellee and the purchaser by which appellee was to retain a lien on 1,000 head, but did not disclose to appellee their contract for the 800 head, but allowed appellee to go ahead and consummate the sale by delivering the cattle subject to the lien on 1,000 of them. *Held*, appellee's lien right under his agreement is superior to the right of appellants to the cattle, though appellee's agreement was not consummated until after appellants' had been carried into effect. It was, at least, gross negligence on the part of appellants not to inform appellee of their claim, and equity will postpone him who is prior in time to him who has been allowed to act in ignorance of an opposing title which it was the duty of the holder of that title to communicate.

Appeal from Goliad county.

Appellants, Coleman, Mathis & Fulton, sued appellee A. M. Dunman in sequestration for certain cattle. R. L. Dunman intervened, claiming that A. M. Dunman had gathered the cattle for him, and that he owned the cattle. It appeared that on the first of December, 1877, R. L. Dunman, the intervenor, made a contract with Coleman & Stockley to sell them certain cattle at the price of \$30,500. To pay for the cattle, Coleman & Stockley were to give Dunman a bill of sale on a certain other herd of cattle, and were to pay a note for \$5,000 due from Dunman to Thomas H. Coleman, and were to give Dunman written authority to gather out of any of their cattle 1,000 head at certain prices. The parties were to meet on the first January, 1878, and consummate the trade by delivering the papers. In the mean time, however, Coleman & Stockley induced appellants, Coleman, Mathis & Fulton, to pay the note of Dunman held by Thomas H. Coleman, agreeing to sell appellants 800 cows at \$10 per head, to be gathered out of any cattle of Coleman & Stockley, including those purchased from Dunman; the price of the 800 cows to be applied first to reimburse appellants for paying the Coleman note, and the balance to be applied to other indebtedness of Coleman & Stockley to appellants. At the time of making this agreement appellants had notice of the terms of appellee Dunman's contract with Coleman & Stockley, by which he was to have the right to gather 1,000 cattle from any owned by Coleman &

Stockley. Dunman, however, was not told of their contract, and he and Coleman & Stockley met and consummated their agreement by a mutual delivery of a bill of sale and of all the papers relating to their trade; appellee being still in ignorance of appellants' right to the 800 cows under their contract with Coleman & Stockley. In June, 1878, A. M. Dunman having gathered about 365 head of the cattle, appellants brought this suit against him; and R. L. Dunman, intervening, alleged that A. M. Dunman was gathering for him, and that he was entitled to the cattle under his contract with Coleman & Stockley, which gave him a right to 1,000 head. The lower court held that the intervenor had a lien on the cattle to the extent of 1,000 head; that the appellants had notice of this lien; and that they, having received 1,000 head, were responsible to appellee for the value of 635 head, the balance of the 1,000 after deducting the 365 head appellee had received. Coleman, Mathis & Fulton appeal.

Glass & Callender, for appellants.

WILLIE, C. J. This case was before us on a former occasion, and is reported in 59 Tex. 199. We then held that the agreement that Dunman should gather 1,000 head of cattle out of the stock of Coleman & Stockley, in part payment of the purchase money of the stock of cattle sold by him to them, subjected the former stock to a lien or charge to the extent of the value of the 1,000 head to be gathered from it. The cause was remanded for a new trial; and, when again heard, the court below gave effect to the agreement in accordance with the decision of this court. The district judge held, further, that the lien of the agreement took precedence over any claim upon the same stock of cattle held by the appellants, and this ruling presents the only question for decision upon this appeal.

The agreement between appellants and Coleman & Stockley, by which the former assumed payment of Dunman's note to Thomas Coleman, took place between the time when the contract of sale was agreed upon between Dunman and Coleman & Stockley and the time when it was consummated by a delivery of the bill of sale. It was found by the judge that Dunman had no notice of this agreement till after the bill of sale was delivered, and this is not disputed. Dunman's lien was contracted for when the trade between him and Coleman & Stockley was agreed upon. It certainly took effect when the trade was consummated. It was further found by the judge that Mathis, of the firm of Coleman, Mathis & Fulton, knew, at the time that firm agreed to pay the note held by Thomas Coleman, that Dunman was to have a lien upon the 1,000 head of cattle owned by Coleman & Stockley, including those sold to them by Dunman. There was some conflict of testimony upon this point, but the finding is supported by sufficient testimony, and is not excepted to, and must therefore be treated as correct.

It is a well-known principle of equity that one acquiring an interest, even for a valuable consideration, with notice of any existing equitable claim or right in the same subject-matter held by a third person, is liable in equity to the same extent, and in the same manner, as the person from whom he made the purchase. 2 Pom. Eq. § 688. This court has already held that the contract between Dunman and Coleman & Stockley gave to the former a lien upon the stock of cattle, which, of course, is such an equity as would be protected against persons subsequently acquiring an interest in the same stock with the knowledge of its existence. Appellants had knowledge of Dunman's claim before they contracted for their own; and, had the trade between Dunman and Coleman & Stockley been consummated at any time before the appellants obtained their lien, it is clear, under the principle stated, that their rights would have been postponed to those already acquired by Dunman. It would have been a fraud upon Dunman for his vendors, without his consent, to give another person priority of lien as against him; and appellants, having

notice of his rights, could not in good conscience accept and enforce such priority in their own favor. While Dunman's contract with Coleman & Stockley was not carried into immediate effect, yet when consummated it was without change as to the agreement about gathering the 1,000 cattle from the stock of Coleman & Stockley. Appellants had knowledge of this agreement from a date prior to their own agreement as to the 800 cows, down to the time when the trade was finally executed, and Dunman's cattle transferred by bill of sale to Coleman & Stockley. Yet they failed to inform Dunman as to the contract they had made for a right to the 800 head of cattle, and permitted him to part with his stock under the impression that he had the only claim there was for gathering cattle from Coleman & Stockley's stock in satisfaction of any lien or debt whatever. They knew of Dunman's intention to part with his property for a lien upon the stock on which they had secured a claim, and yet permitted him to do so in ignorance of their claim. They delivered to Coleman & Stockley the note which Dunman was to receive in part payment for his stock, and thus furnished that firm with the means of obtaining Dunman's cattle, and yet said nothing to him as to the terms upon which Coleman & Stockley had acquired the note. Knowing their own right, and Dunman's intention to perfect his lien, it was, to say the least, gross negligence on their part not to inform him of the nature of their claim. In such cases equity postpones him who is prior in time to him who has been induced to purchase from want of knowledge as to the opposing title, which it was the duty of the holder of that title to communicate. Pom. Eq. § 687. It matters not what was the nature of the appellants' lien, or that it was acquired by an advancement towards the purchase money of the cattle bought by Dunman. One character of lien has no superiority over another on the question of notice, when brought in conflict with a *bona fide* purchaser for valuable consideration. Even the vendor's lien upon land yields to a purchaser without notice who has paid value for the land. If a lien which in any case springs from the nature of a contract itself, when not waived, can be thus postponed, there is no reason why one which would not have existed but for an express contract between the parties should not meet a like fate.

The other questions raised by the record become unimportant in view of the principles upon which this decision is based. Dunman, having gathered only 365 head out of the 1,000 sold him by Coleman & Stockley, was still entitled to 635 head, to make up the 1,000 head which he was to receive out of the stock of the parties with whom he had traded. The value of that number of cattle was what the judgment below gave him.

There is no error in the judgment, and it is affirmed.

STAYTON, J., not sitting.

WALLIS and others v. TAYLOR and others.

(Supreme Court of Texas. February 25, 1887.)

CHattel Mortgage—Assent of Creditors—Attachment.

An instrument executed by a debtor, without knowledge or assent of his creditors, as follows: "Know all men by these presents that I * * * bargain, sell, and convey the merchandise in my two houses, situated in * * * to the undersigned parties, to satisfy a part or all of certain claims held by them against me for the following amounts,"—setting out the names of his creditors, with the claims over against each name, and signed by the debtor alone, and delivered by him to the county clerk,—is not a valid mortgage which will avail against an attachment, nor does the assent of the creditors thereto subsequent to the attachment make it so available.

Appeal from Grimes county.

Action to foreclose chattel mortgage, brought by Wallis, Landes & Co., appellants, against W. H. Taylor and others, respondents.

T. C. Buffington and Davis, Davidson & Miner, for appellants. *Hutcherson, Carrington & Lears*, for appellees.

STAYTON, J. W. H. Taylor signed and filed for record the following instrument:

"The State of Texas, County of Grimes.

"ANDERSON, November 18, 1884.

"Know all men by these presents that for and in consideration of value received I, W. H. Taylor, bargain, sell, and convey the merchandise in my two houses, situated in Anderson, Grimes county, Texas, to the undersigned parties to satisfy a part or all of certain claims held by them against me for the following amounts: Block, Oppenheimer & Co., \$1,400; Wallis, Landes & Co., \$2,000; Wm. D. Cleveland, \$575; I. L. Lyons, \$425; Kauffman & Runge, \$200; M. D. Conklin, \$30; Leo, Zander & Henderson, \$69.63; Browne Bros., \$450; Derby & Dey, \$305; T. Ratto & Co., \$39.25; Karl, Kliberg, Kline & Co., \$125; Jacob Bernstein & Co., \$247.

W. H. TAYLOR."

The persons named were creditors of Taylor, but there was no agreement or understanding between him and any of them that the instrument should be made, and none of them consented to take under it, or, so far as the record shows, knew that it had been signed and filed with the clerk, until after the creditors Block, Oppenheimer & Co. had brought suit on their claim, and caused the merchandise to be attached. When Taylor signed and filed the instrument, he closed up the houses, and delivered the keys to an attorney with intent and instructions to him to hold for the creditors named; but the attorney had no authority whatever to represent the creditors, so far as the record shows. The goods were sold under an order issued in the action brought by Block, Oppenheimer & Co., and they were bought by Calhoun, who subsequently sold them to the defendants Bradley and Levy. After the levy of the attachment, Wallis, Landes & Co. consented to take under the instrument, and brought this action against W. H. Taylor to recover the sum due to them from him, and against Bradley and Levy to foreclose the mortgage which they claimed to have under the instrument above copied, or for the value of the property. It was proved that Bradley and Levy had notice of the facts before stated when they bought from Calhoun. The cause was tried without a jury, and judgment rendered in favor of plaintiffs against Taylor for the sum due, but in favor of the defendants Bradley and Levy.

The only assignment of error questions the correctness of the judgment on the facts, claiming that the instrument constituted a valid mortgage. Waiving all question of the right of appellants without joining the other parties named in the instrument to maintain this action, did the instrument constitute a valid mortgage? We are of the opinion there is no error in the judgment. A mortgage, like any other contract, requires the consent of the mortgagor and mortgagee, and it must be consummated by delivery. In the case made the assent of the creditors was not given. There was no prior understanding or agreement that any mortgage should or would be given until after the attachment had been levied, and we know of no rule by which this subsequent assent could fix a lien on the attached property that would override the lien acquired by the attachment. *Foster v. Perkins*, 42 Me. 168; *Osnard v. Blake*, 45 Me. 602; *Day v. Griffith*, 15 Iowa, 104; *Welch v. Sackett*, 12 Wis. 270; *Miller v. Blinbury*, 21 Wis. 684; *Jewett v. Preston*, 27 Me. 400; *Maynard v. Maynard*, 10 Mass. 456; *Dole v. Bodman*, 3 Metc. 142. Had there been an understanding between Taylor and his creditors that a mortgage on the merchandise should be executed for their security, the delivery of the instrument to the clerk, under the great weight of authority, would have been a sufficient delivery; for, under such circumstances, the act of the maker would as fully evidence his intention to consummate the prior agreement as

would the delivery of the instrument to the creditors; but until the contract had the assent of the parties delivery to a person in no way thererepresentative of the creditors could not give validity to it. It has been held in many cases that, in the absence of evidence, the assent of creditors to a general assignment for their benefit, or to a trust deed made and delivered to a trustee, might be presumed; but we know of no case in which an instrument, signed and delivered, as was the instrument relied on in this case, has been held to be a valid mortgage.

The cases cited by counsel have been examined, and do not sustain the proposition relied on for a reversal in the case before us.

There is no error in the judgment, and it will be affirmed.

WOODHOUSE v. RIO GRANDE R. CO.

(Supreme Court of Texas. February 25, 1887.)

1. RAILROAD COMPANY—STATUTORY PENALTY FOR DISCRIMINATION IN FREIGHTS.

Under Rev. St. Tex. arts. 4257, 4258, and the acts of April 19, 1879, and April 10, 1883, amendatory thereof, limiting freight rates to be charged by railroads to 50 cents per 100 pounds per 100 miles, and giving the right to recover a penalty of \$500 from railroad companies for willful discrimination in freight charges after refusal for 20 days, upon notice, to refund the overcharge, a notice and refusal to refund are only required where a charge exceeding the 50-cent rate is made.

2. SAME—BONDHOLDERS IN POSSESSION—SERVICE OF NOTICE ON.

Where a railroad has passed into the control and management of the bondholders, they and their agents represent the railroad company for the purpose of being served with notices directed by law to be served on the railroad company.

Appeal from Cameron county.

Action brought by W. E. Woodhouse, appellant, against the Rio Grande Railroad Company, to recover a statutory penalty.

Stanley Welch and McCampbell & Givens, for appellant. Wells & Hick and Waul & Walker, for appellee.

STAYTON, J. This action was brought by appellant to recover the penalty imposed by the act of April 10, 1883, on any railroad company for unjust discrimination in freight charges, and to recover the sum alleged to have been demanded and paid in excess of that demanded of and paid by other persons. The statute provides that, "if any railroad company shall charge one person more for transporting freight of the same class, in equal or less quantities, over its road, for the same or a less distance, than it charges another for the same or greater distance, all such discriminating rates, charges, or collections, whether made directly or by means of any rebate or other shift or evasion, shall be considered and taken as *prima facie* evidence of extortion and unjust discrimination, which is hereby prohibited, and declared unlawful; and any railroad company or companies, for such violation of law, shall forfeit and pay to the person or persons injured thereby the sum of five hundred dollars, to be recovered before any court having jurisdiction of the amount, in any county through or into which the freight may have been transported." The several affreightments on which discrimination is alleged to have been made are fully stated. The petition alleges that notice of the several discriminating charges was given to the railroad company more than 20 days before the action was brought, and that it had failed to repay the sums claimed to be in excess of those charged and collected from other persons for like services. It is alleged, however, that this notice was given to named trustees for bondholders, who had the entire control and management of the railroad at the time the discriminations were made. Demurrers, general and special, were filed, and upon hearing sustained. The special demurrers questioned the sufficiency of the notice, in that it was not given to "the railroad company, or to the agent demanding or receiving the same." The statute provides "that

the penalties prescribed by law for any overcharge shall not be recoverable unless the party aggrieved shall give notice thereof in writing to the railroad company, or to the agent demanding or receiving the same, and said company shall fail within twenty days thereafter to refund to such aggrieved party the amount of such overcharge." The act of April 19, 1879, provides that "railroad companies may charge not exceeding the rate of fifty cents per hundred pounds per hundred miles over their roads." This, with other matters, is contained in an amendment to Rev. St. art. 4257, which, before the amendment, contained the same provision. The succeeding article, for a violation of this law, gives to the injured person the right to recover a penalty of \$500. Rev. St. art. 4258.

The statute which we have quoted above makes notice to the railroad company, and its refusal for 20 days to refund, necessary before a recovery can be had "for any overcharge." If we give to the word "overcharge" its ordinary signification, it means a charge of more than is permitted by law; and it is only when such a charge is made that notice and refusal to refund are required before an action to recover the penalty can be maintained. It is not claimed, in this case, that a rate higher than 50 cents per hundred pounds per hundred miles was charged and received, but that a forbidden discrimination was made. There may be an overcharge without discrimination, and there may be an unlawful discrimination without an overcharge, *i. e.*, without a charge higher than the maximum fixed by law. The laws giving penalties for receiving more than the maximum rates for transportation of passengers and freights in force prior to the passage of the act of April 10, 1883, did not make the willfulness of the charge a fact on which the right to recover depended, and thus operated harshly. The proviso to the tenth section of the latter act, which requires notice to the railroad company, and a refusal by it to refund the sum overcharged, was doubtless inserted for the purpose of relieving the former law of its severity. The penalty was never given for mere discrimination in charges. Under article 4257, the amendment thereto of April 19, 1879, as well as under the act of April 10, 1883, it is only in case of unjust discrimination that the penalty was given. Under the act last mentioned, the discrimination must not only be one unjust, but one *willfully* made, in order to subject a railroad company to the penalty. Thus protected from liability for inadvertent discrimination, or for discrimination not unjust, there was no necessity for further protection, such as is given by the proviso to the tenth section of the act of April 10, 1883.

The word "willfully" carries the idea, when used in connection with an act forbidden by law, that the act must be done knowingly or intentionally; that, with knowledge, the will consented to, designed, and directed the act. When intention, design, or knowledge, at the time an act is done, is an element essential to liability for the act, to require notice subsequently to be given would be but to require the doing of a useless thing. That the law intends such a notice can never be presumed in the absence of language clearly so declaring. There is nothing in the language of the statute under consideration requiring notice to be given in cases of unjust discrimination in freight charges, and we are of opinion that the proviso to the tenth section of the act of April 10, 1883, has application only in cases in which charges for freight or passage in excess of the maximum rates fixed by law have been made.

If, however, this were not true, we are of the opinion, in the absence of some law permitting railway companies to place their roads in the hands and under the exclusive management and control of other persons, that whosoever is voluntarily permitted to manage and control a railroad in this state must be deemed in law the agent of the railroad company, upon whom notice may be served. The pleadings in this case sufficiently show that the person on whom notice was served was an agent of the appellee, on whom it might

be properly served. It cannot be ascertained from the record on what particular ground the demurrers were sustained; but if the court was of the opinion that, because the railroad was in the hands of persons representing bondholders, the company was relieved from responsibility for their acts in the management of the business of the company, then we are of the opinion that this was error. Railway companies voluntarily assume duties to the state and to the public, which they cannot free themselves from by voluntarily surrendering the management and control of their roads to other persons, in the absence of some law which permits them to do so. We know of no such law in this state.

The theory of the defense in this case is that, while railway companies are subject to all the laws of this state made for the purpose of compelling them to discharge their duties to the public faithfully and impartially, so long as they manage and control their own property, they have the power to relieve themselves from liability arising under these laws, by placing their roads under the management and control of other persons. No such theory has foundation in the laws of this state. How far, if at all, a railway company can voluntarily surrender the management and control of its road to other persons need not be considered in this case; for, be that as it may, every railroad company in this state is liable for the acts of all persons to whom it confides the control and management of its road, as fully as though operated under the immediate control of the agencies provided by its charter.

The judgment of the district court will be reversed, and the cause remanded.

KUNDE v. STATE.¹

(Court of Appeals of Texas. October 27, 1886.)

1. EVIDENCE—MOTIVE—INDICTMENT.

It is now well settled that an indictment against a defendant for an offense different from that for which he is on trial may be introduced in evidence against him if such indictment, in any degree, tends to show a motive on the part of the defendant to commit the offense for which he is on trial.

2. SAME—CASE STATED.

It is objected that the indictments introduced in evidence in this case were not admissible for any purpose, because they were presented subsequent to the murder for which the defendant was on trial. But *held*, that the objection is not good in this case, because the said indictments were connected by other testimony with transactions which occurred before the murder, and which tended to show a motive on the part of defendant to commit the murder. The reproduced testimony of a deceased justice of the peace disclosed prosecutions against the defendant and others for offenses against the property of the deceased shortly before the murder, in which prosecutions deceased was an important and indispensable witness. *Held* that, though meager and indefinite, the reproduced testimony of the defunct justice of the peace was admissible to establish motive, and qualified the indictments as evidence to explain that the defendant was one of the parties charged with the offense against the property of the deceased.

3. SAME—LETTERS.

Article 751 of the Code of Criminal Procedure reads as follows: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; as when a letter is read, all other letters on the same subject between the same parties may be given. And when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." That portion of the written testimony of the deceased witness, M., read by the state in this case, related solely to the prosecution of the defendant and his co-defendants. That part proposed to be read by the defense related solely to a prosecution against the deceased. *Held*, that that portion of the testimony offered to be read by the defense had no re-

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

lation whatever to that portion read by the state, was not necessary to explain the portion read, was clearly inadmissible under the provisions of the said article of the Code of Criminal Procedure, and was properly excluded.

4. **MURDER—EVIDENCE—CASES OVERRULED.**

The evidence in this case disclosed that Taylor Kunde, one of the parties jointly indicted with this defendant, was near the place of the murder at the time it occurred, and had equal opportunity with the defendant to commit it; that, on the night of the murder, the said Taylor Kunde furnished two Mexicans with a double-barreled shotgun each; that the said Mexicans left the said Taylor Kunde's house that night, before the murder was committed, taking the guns with them; and that, when they returned with the guns on the next morning, one barrel of each gun appeared to have been recently discharged. The murder was perpetrated by the use of fire-arms. Under this state of proof, the state proposed to reproduce the testimony of a deceased witness to show certain acts and declarations of the said Taylor Kunde shortly prior to the murder, which acts and declarations tended strongly to show malice on the part of Taylor Kunde towards the deceased, and a motive on his part to commit the murder. *Held*, the exclusion of this evidence was error. The ruling as made by the trial court upon this question is supported by early decisions of this court, (*Bowen's Case*, 3 Tex. App. 817; *Boothe's Case*, 4 Tex. App. 202; *Walker's Case*, 6 Tex. App. 576; and *Holt's Case*, 9 Tex. App. 571;) but, as the same has been modified by later decisions, those authorities are overruled. The rule now established is that "investigation with reference to other parties than the accused should not be permitted in cases either positive or circumstantial, unless the inculpatory facts are such as are proximately connected with the transaction. In other words, to show remote acts or threats would not be admissible unless there were other facts also in proof proximately and pertinently connecting such third party with the homicide at the time of its commission." Note the approval on the question of *McInturf's Case*, 20 Tex. App. 335, and authorities cited.

5. **SAME—IDENTIFYING PAPERS.**

See the statement of the case for evidence held sufficient to establish the identity of certain papers, and thus qualify them as evidence in the case.

6. **SAME—EXAMINING PAPERS IN SEPARATE ROOM.**

The trial court did not err in permitting and directing a state's witness to retire from the court-room into a room by himself so that he could examine certain papers for the purpose of identifying and explaining them in his evidence.

7. **SAME—CASE STATED.**

The state sought, in this case, to throw discredit upon certain defense witnesses who testified to certain facts connected with the presence of Mexicans near the scene of the murder when it was perpetrated, by proving that the said witnesses, when examined upon the *habeas corpus* trial of the defendant, said nothing about the Mexicans. The defense proposed to explain the silence of the said witnesses as to the Mexicans on that occasion by proving by one R. that he was the attorney for the defendant in that proceeding; that he did not interrogate the said witnesses about the said Mexicans; and that, because of the prejudice existing against the defendant at the time, he did not expect to obtain bail for him, and did not undertake to develop the evidence in his behalf. *Held*, that such proof was competent for the purpose for which it was offered, and should have been admitted.

8. **SAME—CONVICTION SUSTAINED.**

See the statement of the case for evidence held insufficient to support a conviction for murder of the first degree.

Appeal from district court, Guadalupe county.

The indictment in this case was joint against the appellant Taylor Kunde, Albert Kunde, Ludwig Kunde, and Frederick Kunde, and charged them with the murder of Jabez Drennon, in Guadalupe county, Texas, on the twenty-sixth day of October, 1874. The appellant, being alone upon trial, was convicted of murder in the first degree, his punishment being assessed at a life-term in the state penitentiary.

The statement of facts in this case, covering upwards of a hundred pages in the record, is too voluminous even for a connected synopsis, but enough of the evidence is given in *resume* below to elucidate the rulings of the court.

The deceased was assassinated at night, on the public highway. He was *en route* to his rural home from church when the fatal shots were fired from ambush. The ambush was established inside of and near the corner of the Kunde field, which field inclosed the residences of the defendant and his co-defendants. The defendant then lived in the house of his father, Ludwig

Kunde, which was about a half a mile distant from the house of Frederick Kunde. The Kundes, father and sons, were arrested for the murder. This appellant was alone upon trial in this case. In stating the facts upon which the rulings of the court are based, reference will be had to the head-notes in the order in which they are reported.

(1) Over the objection of the defendant the state was permitted to read in evidence certain indictments charging the appellant and his co-defendants with the theft of hogs, the property of the deceased, and for perjury. The name of the deceased was indorsed upon each of those indictments as a witness for the state.

(2) The said indictments were presented by the grand jury subsequent to the assassination of the deceased. The predicate upon which the said indictments were admitted was the testimony of the witness Moore. He testified that he was the justice of the peace before whom was had the examining trials of appellant and his co-defendants upon complaints charging them with the offenses for which they were subsequently indicted. Those examining trials were had a few days before the assassination, and on those trials the deceased, who was the main and indispensable witness against them; testified for the state.

(3) Moore having testified to the examining trial of appellant and his co-defendants upon complaints charging them with the offenses subsequently charged against them in the indictments admitted in evidence, the state proposed to prove by him that the deceased, at the same time, was charged in his court with the violation of the pistol law. The exclusion of this evidence is the subject-matter of the third head-note.

(4) The excluded evidence referred to in the fourth head-note was the proffered testimony of a witness to the effect that, in the August preceding the assassination, the appellant's co-defendant, Taylor Kunde, obtained from the witness a shotgun and ammunition, and when he obtained them, threatened deceased with violence.

(5) The witness Zorn testified for the state that, at the inquest on the body of the deceased, the state's witness Morrison handed him the fragment of a German newspaper, and a piece of writing paper from an old copy-book, which he claimed he found on the ground of the shooting, the same having been used as gun-wadding. Witness subsequently went to old man Kunde's house and found a dilapidated German newspaper, into which the fragment given him by Morrison (who testified that he found it on the ground of the killing, and that it had been used as gun-wadding) fitted perfectly; the paper, with the fragment inserted, constructing a full and complete grammatical account of an incident in Arkansas. At this point, witness was handed a bundle of papers found among the rubbish of the court-house garret indorsed: "Papers found by Zorn at Kunde's." Witness recognized the indorsement as being in his handwriting. Stating that it would require much time and patience to fit the fragments together so that he could pass intelligently upon their identity, the court ordered the witness to retire with the papers into an anteroom. See head-note 6. On his return, Zorn stated that he found one of the smaller to fit into a larger fragment, and that the two constructed the grammatical account of the Arkansas incident, exactly as he remembered to have read it from the first-named fragments, and he was confident the papers were the same.

(7) Several defense witnesses testified that two Mexicans left old man Kunde's house about dusk on the evening of the murder, and went towards the place where deceased was afterwards shot; that those Mexicans claimed that deceased refused to pay them for work they had done for him; that they took a gun each, which they borrowed from Taylor Kunde; that they did not return until early next morning, when they brought the guns back, each with one barrel empty, drew the wages due them by old man Kunde, and left. To discredit these witnesses the state asked them why they did not testify about the

Mexicans on the *habeas corpus* trial of appellant a few days after his arrest. The head-note No. 7 discloses the explanation attempted by the defense, and excluded by the court.

(8) The evidence throughout the general issue was circumstantial. In addition to the facts stated, the state proved that, before the trouble about the hogs, the appellant and deceased were good friends. A few days before the complaint charging the Kundes with theft of hogs was filed in justice's court by deceased, he and appellant met on the highway. Appellant asked deceased if he thought he (appellant) took his hogs. Deceased replied that he did not know that, but knew that his brothers did. Appellant then asked deceased what he was going to do about it. Deceased replied that that was his business. Appellant put his hand on deceased's shoulder, and said: "They will be dear hogs to you." The state further proved that the tracks of two men led from the ambush in the direction of, and near to, old man Kunde's house. One of those tracks was made by a No. 6 boot with a metal-tipped, and peculiarly stamped heel. Such a boot was worn by one of the Kunde boys at the *habeas corpus* trial, but the witnesses for the state not only could not state positively that the appellant was the party who wore them, but they varied in their recollection upon that point; one-half, if not more, of the witnesses believing that the said boots were worn on that trial by Taylor Kunde. The state proved also the finding of a piece of German newspaper in old man Kunde's house, and a gun-wad made of German newspaper, on the ground of the killing, which gun-wad, when spread out, fitted with nicety into the paper found in Kunde's house, etc. It proved, also, the escape of the Kunde's from jail pending trial, and their flight. The defense proved that the *habeas corpus* trial which was had a few days after the killing was attended by a large concourse of armed citizens, who proclaimed their intention of hanging appellant and his co-defendants, and that they desisted only by reason of the personal appeal of the district judge who presided. By members of his family not indicted, the appellant proved a complete *alibi*. He proved, also, that his brothers, Taylor, Albert, and Frederick Kunde, all wore number six boots or shoes, and that he was wearing shoes at the time of the killing, and of the *habeas corpus* trial.

W. M. Rust, and Waelder & Upson, for appellant.

For the purpose of showing a motive on the part of the defendant to kill the deceased, an indictment against the defendant, found prior to the killing, at the instance of the deceased, or in the finding of which he was an important witness, might be admissible in evidence; but an indictment found after the killing of deceased is not admissible in evidence for any purpose. *Robinson v. State*, 16 Tex. App. 354; *Taylor v. State*, 14 Tex. App. 346; *Hart v. State*, 15 Tex. App. 227; *Rucker v. State*, 7 Tex. App. 549; *Somerville v. State*, 6 Tex. App. 433; *Traverse v. State*, 20 N. W. Rep. 724.

The court erred in permitting the state to read in evidence the portion of the written testimony of A. B. Moore, taken on the *habeas corpus* trial, October 28, 1874, before Judge JOHN P. WHITE, and in not permitting the defendant to read in evidence the balance of said Moore's testimony, for the reasons stated in the bill of exceptions, because—*First*, the introduction of evidence tending to show that "some members" of the family to which defendant belonged had been prosecuted for crime at some indefinite period, without in any way connecting the defendant with such prosecution, seems so clearly erroneous as to need no authority to support the proposition of its inadmissibility; *second*, a statement that an officer produced the records of his court in certain prosecutions is not the best evidence of the contents of such records, and is no proof of the same; *third*, when part of an act, declaration, or writing is given in evidence by one party, the whole may be given in by the other. Code Crim. Proc. art. 751; *Ryan v. State*, 8 Tex. App. 254; *Pharr v. State*, 9 Tex. App. 129.

In a case where the evidence is wholly circumstantial, the defendant is entitled to any and all evidence calculated to throw light upon the transaction, and especially to any fact or circumstance which might tend to show that some other person did the killing. *Cooper v. State*, 19 Tex. 449; *Means v. State*, 10 Tex. App. 16; *Dubose v. State*, Id. 280; *Hart v. State*, 15 Tex. App. 202; *Barnes v. State*, 41 Tex. 342; *Naftsing v. State*, 7 Tex. App. 301; *Shultz v. State*, 13 Tex. 401; *McInturf v. State*, 20 Tex. App. 335.

The court erred in not permitting defendant's witness William M. Rust to testify to the testimony of the deceased witness E. T. Rhodes, given on said *habeas corpus* trial.

The court erred in not permitting the defendant's witness Mrs. Emma Kunde to testify to the attempt of deceased, Drennon, to kill Albert Kunde, one of the defendants charged with his murder.

The court erred in admitting in evidence the bundle, consisting of gun-wadding, pieces and scraps of paper, cartridges, and buckshot.

Where discredit is sought to be cast upon the credibility of a witness for stating certain important facts on one trial, which facts such witness omitted to state on a former trial, evidence giving any reasonable explanation for such omission should be permitted in vindication of the credibility of the witness.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. 1. Defendant's first and second bills of exception will be considered together. It is well settled that an indictment against the defendant, charging him with a separate offense from the one for which he is on trial, may be introduced in evidence against him when such indictment tends, even in a remote degree, to show a motive on the part of the defendant to commit the crime for which he is on trial. *Rucker v. State*, 7 Tex. App. 549; *Taylor v. State*, 14 Tex. App. 346; *Hart v. State*, 15 Tex. App. 227; *Robinson v. State*, 16 Tex. App. 347. It is, however, contended by counsel for defendant that the indictments read in evidence in this case were not admissible for any purpose, because they were not presented against defendant until subsequent to the date of the murder of Drennon. This would be an insuperable objection if the said indictments were not connected by other testimony with transactions which occurred before the murder, and which tended to show motive on the part of defendant to commit the murder. It was shown by the reproduced testimony of the deceased witness, Moore, who was a justice of the peace, that, shortly prior to the murder of Drennon, some of the Kunde family were prosecuted before him in relation to hogs belonging to Drennon, and that there was also a prosecution before him against two of the Kunde family for perjury, in which said Drennon was an important and indispensable witness. This evidence shows that some of the Kunde family were charged with some offense relating to Drennon's hogs shortly before Drennon was murdered. It is presumptively shown by the indictment read in evidence that one of the members of the Kunde family who was thus accused was the defendant Julius Kunde, and that he was charged with willfully and maliciously killing hogs belonging to said Drennon, and the offenses are charged in the indictment to have been committed at a date prior to the murder of Drennon. We are of the opinion that the testimony of Moore was admissible to prove motive, although such testimony is very meager and indefinite, and that this testimony rendered admissible the indictment in order to explain that defendant was one of the Kunde family, who had been charged before the murder with an offense in relation to deceased's hogs. We think the objections made to this evidence reach only to its weight, and not to its admissibility.

Another question presented by the second bill of exception is the correctness of the ruling of the court refusing to permit defendant to read in evi-

dence the balance of the reproduced testimony of the witness Moore, the state having read in evidence only a part of said testimony, which testimony was in writing, being the testimony delivered by said witness on the trial of this cause upon *habeas corpus*. Counsel for defendant contend that, as a part of said testimony had been read in evidence, defendant was entitled to have the entire testimony read in evidence, under the provisions of article 751 of the Code of Criminal Procedure. That article reads: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; as, when a letter is read, all other letters on the same subject between the same parties may be given. And when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." That portion of the testimony of Moore which was read in evidence by the state related to prosecutions against some of the Kunde family. That portion of said testimony which defendant proposed to read related to prosecutions against the deceased, Drennon. It is obvious that the portion of said testimony offered to be read by defendant had no relation whatever to that portion read by the state,—was not necessary to make the portion read fully understood, nor did it in any way explain the same. It was clearly inadmissible by virtue of the article of the Code quoted, and it was not admissible under any rule of evidence.

2. It was error to refuse to permit the defendant to reproduce the testimony of the deceased witness, E. T. Rhodes. By this testimony defendant proposed to show acts and declarations, on the part of his co-defendant Taylor Kunde, occurring shortly prior to the murder, which said acts and declarations tended strongly to show malice on the part of Taylor Kunde towards Drennon, and a motive on his part to commit the murder. It was shown by other evidence in the case that Taylor Kunde was near the place of the murder at the time it occurred, and had equal opportunity with defendant to commit the murder; also, that on the night of the homicide said Taylor Kunde furnished two Mexicans with a double-barreled shotgun each; that said Mexicans left said Kunde's house that night, before the murder, carrying said guns with them, and that they did not return with said guns until the next morning; and that one barrel of each of said guns then appeared to have been recently discharged.

We presume that the learned trial judge rejected the proposed testimony upon the authority of *Bowen v. State*, 8 Tex. App. 617; *Boothe v. State*, 4 Tex. App. 202; *Walker v. State*, 6 Tex. App. 576; *Holt v. State*, 9 Tex. App. 571; and perhaps some other early decisions made by this court. The doctrine of these cases, in the broad terms therein announced, while perhaps sustained by the weight of authority at the time the decisions were made, is no longer the doctrine recognized by this court, and by what we consider the weight of authority of the present day; that is, the rule announced in those cases has been qualified and very much modified by recent decisions, and is not the rule which now obtains. *Dubose v. State*, 10 Tex. App. 230; *Hart v. State*, 15 Tex. App. 202. In *McInturf v. State*, 20 Tex. App. 335, it is said: "The rule now established is that investigation with reference to other parties than the accused should not be permitted in cases either positive or circumstantial, unless the inculpatory facts are such as are proximately connected with the transaction; in other words, to show remote acts or threats would not be admissible unless there were other facts also in proof proximately and pertinently connecting such third party with the homicide, at the time of its commission;" citing *Means v. State*, 10 Tex. App. 16; *Aiken v. State*, Id. 610; *Hart v. State*, 15 Tex. App. 202; *Banks v. State*, 72 Ala. 522. See, also, *Sawyers v. State*, 15 Lea, 694, a case in point.

The proposed testimony of the witness Rhodes, under the rule above stated,

was clearly admissible. The inculpatory facts against Taylor Kunde, disclosed by this testimony, are proximately connected with the murder of Drennon. There are also other facts in evidence which proximately and pertinently connect Taylor Kunde with said murder, and which render the theory that he committed said murder, or had it committed, fully as probable as that defendant committed or was concerned in its commission. Manifestly, to our minds, the proposed evidence was relevant, admissible, and material, and its rejection is error for which the conviction must be set aside.

3. For the reasons stated in discussing the admissibility of the testimony of Rhodes, the testimony of Mrs. Emma Kunde, as to a difficulty between deceased and Albert Kunde a short time previous to the murder, was also admissible, and the court erred in rejecting it.

4. The bundle of papers admitted in evidence were sufficiently identified, and it was not error to admit them in evidence; nor was it error to permit and direct the witness Zorn to retire from the court-room into a room by himself for the purpose of thoroughly examining said papers, with a view to identifying and explaining them in his evidence.

5. It was error to refuse to permit the witness Rust to testify as to the cause why some of the defendant's witnesses were not asked, on the *habeas corpus* trial, as to the two Mexicans who were at Kunde's house on the evening of the murder. It was sought by the state to cast discredit upon the testimony of some of defendant's witnesses who testified about the Mexicans, by showing that, when these same witnesses testified on the *habeas corpus* trial, they did not state anything about the two Mexicans. Defendant sought to show by the testimony of Rust that said witnesses on the *habeas corpus* trial were not interrogated as to the Mexicans; that he was counsel for the prisoners on that trial, and that he did not undertake to develop the evidence in behalf of them, because, owing to the great prejudice then existing against said prisoners in the minds of the people, he did not expect to obtain bail for them. This testimony would have afforded a reasonable explanation of the silence of the witnesses in regard to the Mexicans when said witnesses testified on the *habeas corpus* trial, and would have tended to remove any unfavorable impression as to the credibility of said witnesses which might have been created upon the minds of the jury by said silence. *Wilson v. State*, 17 Tex. App. 525; *Phillips v. State*, 19 Tex. App. 158.

6. A number of objections are urged to the charge of the court. No exceptions to the charge were made at the time of the trial. After a careful study of the charge, we fail to perceive any material error in it. No additional charges were requested by the defendant.

7. The twenty-second assignment of error calls in question the sufficiency of the evidence to support the conviction. Circumstantial evidence alone is relied upon by the state to sustain the conviction. After very careful and repeated examination of the evidence as presented in the statement of facts, we unhesitatingly say that to our minds it is wholly insufficient to warrant the conviction. There are but few circumstances which tend even remotely to prove this defendant's connection with the murder, and none of these inculpatory circumstances are at all inconsistent with his innocence, nor are any of them incapable of explanation upon any other hypothesis but that of his guilt. Taken altogether, the circumstances are far from being of a conclusive nature. They do not lead the mind to a satisfactory conclusion, and do not produce a reasonable and moral certainty of the defendant's guilt; in other words, the evidence, being wholly circumstantial, is not of that force, certainty, and conclusiveness demanded by the law in support of a conviction for felony. *Pogue v. State*, 12 Tex. App. 283; *Lovelady v. State*, 14 Tex. App. 545; *Rye v. State*, 8 Tex. App. 153; *Hunt v. State*, 7 Tex. App. 235; *Robertson v. State*, 10 Tex. App. 602; *Black v. State*, 1 Tex. App. 369; *Barnes v. State*, 41 Tex. 842.

Other errors are assigned, but they are of a character not likely to occur on another trial, and we pass them without discussing or deciding them. Because of the errors in the rulings of the court in relation to evidence which we have pointed out, and because the court erred in not granting defendant a new trial because of the insufficiency of the evidence, the judgment is reversed, and the cause remanded.

*Ex parte KUNDE.*¹

(Court of Appeals of Texas. November 27, 1886.)

BAIL—MURDER—HABEAS CORPUS.

See the statement of the case in *Kunde v. State*, ante, 325, for evidence held insufficient as "proof evident" of murder in the first degree, and therefore insufficient to authorize the refusal of bail.

Habeas corpus. On appeal from district court, Guadalupe county. The transaction involved in this proceeding is the same charged in the indictment upon which the relator was tried and convicted, and the conviction set aside at a former day of the present term of this court. The indictment charged the appellant with the murder of Jabez Drennon, in Guadalupe county, Texas, on the twenty-sixth day of October, 1874. This writ of *habeas corpus* was sued out subsequent to the issuance of the mandate of this court upon the previous appeal, and at the hearing of the same, upon substantially the same evidence adduced upon the former trial, which will be found set out in substance *ante*, 325, bail was refused the applicant, and he was remanded to the custody of the sheriff of Guadalupe county. Upon this appeal, the applicant is awarded bail in the sum of \$4,000.

C. Upson and *W. M. Rust*, for relator. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. Our conclusion, upon an examination of the evidence, is that the proof is not evident that the applicant is guilty of murder in the first degree, and that he is entitled to bail, and that the sum of \$4,000 is a reasonable amount of bail to require of him. Wherefore the judgment of the court below denying applicant bail is reversed, and he is now granted bail in the sum of \$4,000, and the sheriff of Guadalupe county, or other officer having applicant in custody, will release him upon his giving good and sufficient bail in said amount, in accordance with the provisions of the law governing in such cases. Ordered accordingly.

*GOFORTH v. STATE.*¹

(Court of Appeals of Texas. November 24, 1886.)

1. CRIMINAL PRACTICE—FORMER ACQUITTAL—EXHIBITING GAMING TABLE.

Former acquittal of a co-defendant, jointly indicted with this defendant for exhibiting a gaming table, the two being indicted as individuals, cannot operate as a bar to the subsequent prosecution of this defendant for the same offense, even though it were true that both parties indicted were partners. The trial court properly instructed the jury to disregard the special plea. It should have been excepted to and stricken out.

2. SAME—JURY LAW.

A jury in the county court is composed of six men, and is formed by drawing from the box the names of twelve jurors, "or so many as there may be," etc. In this case there were but six regular jurors, and the defendant was required to pass upon them before others were summoned and placed in the box. *Held* correct, and that the court could not be required to have the panel filled to twelve unless there

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

were twelve regular jurors, nor could it be required to fill the panel to twelve before passing on the six in the box. Moreover, if the formation of the jury was irregular, it is not made to appear that prejudice resulted to the appellant.

3. SAME—EXCEPTION—EVIDENCE.

Bill of exception failing to show the objections made to the evidence rejected, or even that it was rejected by the trial court, cannot be considered on appeal.

4. SAME—CHARGE OF THE COURT.

See the statement of the case for special instructions which were correctly refused as being predicated upon no evidence in the case.

Appeal from county court, Rusk county.

Appellant was convicted of exhibiting a gaming table, under an indictment which charged him jointly with one Jeff Wheelis. A fine of \$25 was the punishment assessed against him.

The state proved, by its main witness, in substance, that defendant was a member of a firm doing a saloon business in the year 1884. In connection with his saloon, defendant kept a pool-table, open and accessible to the public, on which the game called 15-ball pool was generally played. Witness often played that game on the table; the rule of the game being understood by the players to be that the loser was to pay for a drink, a cigar, or a check which was good at defendant's bar for a drink or cigar, for each of the players. Witness had seen defendant provide the checks, drinks, and cigars, but could not swear that defendant actually knew that the articles named were "up" on the game. He had never seen any manner of betting on the games played on the table.

The special charge refused by the trial court, and which is the subject-matter of the fourth head-note of this report, reads as follows: "You are instructed in this case that if the defendant kept the table alleged to have been kept for gaming purposes,—that is, if he allowed parties to play on the same, charged no fees, but required the players, either tacitly or openly, to purchase drinks at the defendant's bar, or the loser to pay for the drinks for the players at the defendant's bar,—you will find the defendant guilty; but if the defendant simply kept the pool-table, and charged no fees, drinks, or other thing of value on the same, and had no understanding with the players that the party losing should pay for drinks for the other players, and had charged no compensation for the use of said table, and no custom requiring the persons playing on the table to treat, but that the same was absolutely free to the world, without money and without price, you will find the defendant not guilty. Defendant asks the court to charge the jury that if they believe from the evidence that the table kept by defendant, which fact was admitted by him, was kept only for the amusement and recreation of his customers and patrons, and not for the purpose of gaming or of obtaining betters, and defendant received no table fees or anything of value for the use of said table, and that defendant neither participated in nor encouraged said games, and had no interest in said games, and received no benefit from said games, you will, under the circumstances, find the defendant not guilty."

W. C. Buford, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. 1. Defendant's special plea of former acquittal presents no legal defense whatever in bar of this prosecution. That his co-defendant, Wheelis, indicted jointly with him, had been tried and acquitted, could not operate as an acquittal of this defendant. Conceding that Wheelis and defendant were partners in keeping the gaming table, each was amenable individually and separately, and the acquittal or conviction of one would not bar the prosecution against the other. They were not indicted as a firm, but individually. The court did not err in instructing the jury to disregard said special plea. Said plea should have been excepted to, and should have been stricken out.

2. There was no error in the organization of the jury. A jury in the county court is composed of six men. Code Crim. Proc. art. 595. It is formed by drawing from the box the names of twelve jurors, "*or so many as there may be*," etc. Code Crim. Proc. art. 646. In this instance there were but *six* regular jurors, and the defendant was required to pass upon these before others were summoned and put in the box. This was correct practice. It was not required of the court to have the panel filled to twelve unless there were that many regular jurors, nor was it required that the panel should be filled to twelve before passing upon the six already in the box. Code Crim. Proc. arts. 644, 647. Besides, if there was any irregularity in the formation of the jury, it is not made apparent that defendant was injured thereby.

3. Defendant's bill of exceptions to the rejection of the testimony of Wheelis fails to show the objections made to said testimony, and does not even show that it was rejected by the court. Such being the character of the bill, it cannot be considered.

4. In view of the evidence, the charge of the court is sufficient and correct. It is conclusively shown that the table was kept for gaming purposes, and there was no evidence warranting the special instructions requested by defendant.

We find no error in the conviction, and it is affirmed.

COOPER v. STATE.¹

(Court of Appeals of Texas. November 27, 1885.)

1. RAPE—INDICTMENT.

Indictment is sufficient to charge rape if it alleges, in general terms, that the rape was accomplished by force or by threats or by fraud, or by all those means together; and it is not essential that it should allege the character of the force, or specify the threats used.

2. CRIMINAL PRACTICE—EXCEPTIONS.

Bill of exceptions failing to set out sufficiently the facts alleged in an application for a continuance, and the record bringing up no such application, the action of the trial court cannot be revised by this court; presumption always obtaining in favor of the correctness of the ruling of the trial court in the absence of a sufficient showing to the contrary.

3. RAPE—CHARGE OF THE COURT.

"The law of the case," as those terms are used in article 677 of the Code of Criminal Procedure, requiring the court to give a written charge to the jury, means the case as made by the evidence. The evidence, as disclosed in this case, disclosed a rape accomplished by threats alone, and the charge of the court confining the jury to a rape by threats was correct.

4. SAME—EVIDENCE.

See the statement of the case for evidence held sufficient to support a capital conviction for a rape perpetrated by a father upon his own daughter.

Appeal from district court, Erath county.

The death penalty was assessed against the appellant upon his conviction for the rape of his own daughter, S. L. Cooper, in Erath county, Texas, on the fifteenth day of July, 1885.

The evidence of the prosecutrix, sufficiently corroborated, states the case of the state. She testified that the defendant and his wife, the witness' step-mother, the witness, and her infant brother arrived in the town of Stephenville on the evening of July 15, 1885. They took up their quarters in an old unoccupied log-house of three rooms, and retired early on that night, defendant and his wife sleeping on one pallet on the floor of the room, and witness and her brother upon another pallet spread in the same room. During the night the witness was awakened by the defendant, who compelled her to sub-

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

mit to his carnal passion. Witness wept, and pleaded with the defendant to desist, but by main force he exposed her person, and penetrated her sexual organ with his male member, threatening to kill witness if she cried out, resisted, or subsequently reported the outrage to any one. Physicians testified for the state that an examination of the person of the alleged injured party, made several days after the alleged rape, disclosed that her sexual organ had been penetrated by the private organ of a man. The testimony for the defense went to show that the injured party, for some time prior to the alleged rape, traveled over the country in the sole care of her step-mother, soliciting alms under fraudulent pretenses of various kinds, and had ample opportunity of lewdly associating with men, and by such lewd association to receive the injuries in her parts testified to for the state.

J. P. Groome and M. V. La Baume, for appellant, maintaining the converse to the rulings of this court. *The Assistant Attorney General*, for the State.

WILLSON, J. 1. The indictment charges rape accomplished by force and threats, and is in the usual form. Willson, Crim. Forms, No. 374, p. 167, and cases there cited. It has never been held necessary that an indictment for this offense should allege the character of the force, or specify the threats used. It is sufficient to allege, in general terms, that the rape was accomplished by force or by threats or by fraud, or by all these means together.

2. There is in the record a bill of exception to the action of the court overruling an application made by defendant for a continuance. There is not, however, any such application in the record, and, not having the application before us, we are unable to revise this action of the court, as the bill of exceptions to the ruling upon the same does not disclose sufficient facts to enable us to fully understand and determine the question presented by the bill. As was said by this court in *Swift v. State*, 8 Tex. App. 614: "The legal presumptions are all in favor of the correctness of the ruling of the court; and we find no error in the ruling as the matter is here presented, assuming that the facts were as stated in the body of the bill of exceptions and in the explanation of the judge."

3. We are unable to perceive any error in the charge of the court. It limits the jury to a consideration of a rape by means of *threats*, omitting to instruct in regard to a rape by means of *force*. This, we think, was correct, in view of the facts of the case. Evidently the rape was accomplished by *threats*. But even if it had been accomplished by *force*, or by both force and threats, the charge was favorable to the defendant, because it limited the finding of the jury to threats alone. The court is required to give the law applicable to the evidence, and nothing more. *Teague v. State*, 4 Tex. App. 147. The words, "the law applicable to the case," as used in article 677 of the Code of Criminal Procedure, requiring the court to give a written charge to the jury, mean *the case as made by the evidence*. In the case before us, the case as made by the evidence was a rape accomplished by means of *threats*, and the court properly restricted the jury to a consideration of that means alone. If the court had charged in regard to a rape committed by means of *force*, the defendant would have had good ground of complaint, because the evidence did not warrant such a charge, there being no such force used as would constitute the force defined by the statute. Pen. Code, art. 529. In regard to threats, the charge of the court is in the exact language of the law, (Pen. Code, art. 530,) and is sufficient.

4. As to the sufficiency of the evidence to support this conviction, we must hold that it meets and satisfies the requirements of the law. It is legally sufficient. The positive testimony of the injured female fixes the guilt of the horrid crime upon the defendant, her own father. Her testimony is not contradicted in any essential particular, and is corroborated sufficiently to war-

rant a conviction upon it. Her credibility was a question for the jury to determine. They believed her credible, or they would not have found the defendant guilty. It is not the province of this court to pass upon the credibility of witnesses. Whatever uncontradicted and unimpeached testimony a jury has pronounced *credible* we must regard as credible. While, as jurors, we might not have been satisfied as to the credibility of the prosecuting witness, and might not have been willing to convict upon her testimony alone, as a court we have no right to consider and determine but the one question, is the evidence legally sufficient to support the conviction? We must regard the evidence before us as true. The jury have said by their verdict it is true, and we must not, in this respect, question the correctness of the verdict. Being true, it is legally sufficient, and, there being no error in the conviction, the judgment must be and is affirmed. If, as found by the jury, the defendant committed the unnatural, inhuman crime of rape upon his own daughter, a mere child at the time, he certainly deserves to suffer the extreme penalty of the law, and the punishment of death assessed against him cannot be said to be excessive.

The judgment is affirmed.

WOOD v. STATE.¹

(Court of Appeals of Texas. December 17, 1886.)

MURDER—EVIDENCE.

If, when a party is examined as a witness in proceedings before a magistrate's court or a coroner's inquest, he is charged or suspected of the crime then under investigation, and is then aware that he is so charged or suspected, his testimony before the said investigation cannot be received against him upon his trial for the same offense. See the opinion *in extenso* for circumstances under which it is held that the defendant was in such duress, when testifying before the coroner's inquest, that his testimony before that tribunal was incompetent against him on this trial. The mere fact, however, that defendant was a witness at the inquest, and was placed under the "rule," would not bring his then testimony within this rule.

Appeal from district court, Callahan county.

The indictment in this case was presented in the district court of Nolan county, Texas. It charges the appellant with the murder of Ben Warren, in said Nolan county, on the tenth day of February, 1885. Changes of venue, upon the motion of the court in each case, were had, respectively, from Nolan to Mitchell county, and from Mitchell to Callahan county, in which latter county the trial was had, resulting in the defendant's conviction of murder in the first degree, his punishment being assessed at a life-term in the penitentiary. So much of the evidence as is involved in the question disposed of on this appeal is stated in the opinion of the court.

B. G. Johnson, for appellant, maintaining the principle announced in the opinion. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. This is a conviction for murder of the first degree, with a life sentence in the penitentiary, for the homicide of Ben Warren. Quite a number of errors are assigned, but we desire to discuss but one, holding those not referred to to be not well taken.

From a bill of exceptions it appears that, on the morning after the homicide, this defendant, Wood, and several other witnesses, were sworn, and placed under the rule in charge of the sheriff, and that they were so held during the entire day and a portion of the night. About 12 o'clock of that day the sheriff was informed, either by Germany, the county judge, or Scarborough, the county attorney, that suspicion was pointing very strongly to Mr. Boyett

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

and defendant, Wood, as the guilty parties. About sundown of that day, the sheriff was further informed, either by the county judge or county attorney, or Steele, the justice who was holding the inquest, that the developments before the inquest were such as would saddle the guilt upon Boyett and Wood, this defendant, and that, after they were examined as witnesses, he had better separate them from the other witnesses, and not permit them to talk to anybody; that, some time after dark of that day, the sheriff inquired of Mr. Eidson if he could take charge of Boyett, Wood, and one Hylton, and hold them for him, and keep them from talking to any one, and, at the same time, asked Eidson if he had his gun. Eidson replied that he would, on his return from his supper. Boyett, Wood, and Hylton were taken from the room in which all the witnesses were kept, before the coroner's jury, one at a time, and, after testifying, each was taken and placed in Eidson's charge. The recollection of the sheriff, who was a witness, was that they were not placed in charge of Eidson until after testifying before the jury of inquest. Wood was not informed by the sheriff of the suspicion against him before he testified at the inquest. The above is substantially the testimony of the sheriff bearing on the question presented in the bill of exceptions.

Mr. Scarborough, county attorney, states that he had a number of witnesses, including defendant and Boyett, placed under the rule early in the morning, and before the jury began their investigations, for the *double purpose* of holding them as witnesses, preventing them from conversing with their friends, and preventing the escape of the parties if the facts developed should authorize their arrest; these purposes were not made known to any of the parties confined; that he told the sheriff, before Boyett, Wood, or Hylton testified, that after they testified to take them to another room, and keep them separated from the other witnesses; that the defendant was not released from the time he was placed under the rule until his arrest.

Eidson states that about sundown the sheriff requested him to take charge of Wood, Boyett, and Hylton; that he agreed to do so on his return from supper; that, on his way home, Germany, county judge, told him that Boyett and Wood were the guilty parties, and would, as such, be sent to jail; that, when he returned, the sheriff brought Boyett, Wood, and Hylton, and placed them in his charge in the court-house, in witness' office, and placed him between the door and said parties, and instructed him to hold them. Some time after this the sheriff came, and got said parties, one at a time, and carried them away; that he did not know where they were taken, but thought they were taken before the jury of inquest, which was in session in a room in the court-house not far from his office; that the parties were placed in his charge about 8 o'clock at night, and within about 15 or 20 minutes afterwards Wood appeared to be very anxious, and asked him if he knew how matters stood. Eidson told Wood that he would have to go to jail that night; that this was a voluntary statement, not having been made to Wood by instructions from the sheriff or any one else. Eidson is an attorney, and upon the trial of this cause appeared for appellant. All of this was said and done between 8 and 9 o'clock that night. Eidson was positive it was not later than 9 o'clock. This occurred before the sheriff took either of the parties out of his office, as hereinbefore stated.

Mr. Scarborough further testified that Wood gave his evidence before the jury of inquest between 10 and 11 o'clock that night. His best judgment was that it was about 11 o'clock, and that Wood was not notified that he would be charged with the murder, nor that his evidence would be used against him.

Appellant, Wood, testified before the jury of inquest, and his evidence was reduced to writing and properly authenticated. Upon the trial, the state, over the objections of appellant, introduced in evidence his testimony taken before the inquest. Appellant objected upon the grounds that he was under arrest at the time the evidence was given, and was not cautioned as the law

requires, and because the testimony was not voluntary. These objections were overruled, the evidence admitted, and appellant excepted, and reserved the point by proper bill of exceptions.

This question will be treated independently of our statute upon the subject. A most admirable opinion upon this subject will be found in the case of *People v. McMahon*, 15 N. Y. 384. In that case the authorities are collated, and from them the following rule is deduced: "When a party is examined as a witness before a magistrate or coroner's inquest, and is afterwards prosecuted for the same offense under investigation, his testimony, so taken, will not be received against him if, at the time of his examination, he was charged or suspected of the crime, and that he was informed of the charge or suspicion against him." This we believe to be the correct rule; that which is supported by the weight of authority. It will be seen that the fact of arrest or no arrest does not figure in this proposition. Whether the party be under arrest, either by warrant or without warrant, or is not under arrest, if he is charged or suspected of the crime, and knows himself to be charged or suspected, his testimony taken before the magistrate or coroner's inquest is not admissible against him.

Now, let us apply this rule to the case in hand. Appellant was informed by Eidson, who had him in charge, that he would be sent to jail that night. He had been, with a number of other witnesses, under the rule in another room; was taken by the sheriff from among them, and placed in charge of Eidson. He saw the sheriff when he placed Eidson between him and the door, and heard the sheriff tell Eidson to "hold them." From these facts it is evident to us that appellant was thoroughly informed that he was suspected of the murder of Ben Warren. This being the case, his testimony taken before the coroner's inquest was not admissible as evidence against him; was not "voluntary" under the construction given that word in the *McMahon Case* and authorities therein cited.

We have been considering the competency of this evidence under common-law rules, without regard to our statute. How stands the question when viewed in the light of our statute? If in arrest or custody, not being cautioned as the statute requires, his testimony is evidently not competent. Was appellant in arrest when he gave his evidence before the inquest? For the party to be in arrest it is not necessary that the officer should say to him, "I arrest you," or, "You are my prisoner," or to use any certain words in making the arrest. The arrest may very clearly be proved by the surrounding facts. *Nolen v. State*, 9 Tex. App. 419. Looking, then, to the facts which surround this matter, there can be no question but that appellant was in arrest, and, not being cautioned as the Code requires, his testimony, taken before the inquest, was not competent evidence against him. We must not be understood as indicating that, because appellant was sworn and placed under the rule, and testified as a witness, therefore he was under arrest or in custody within the meaning of articles 749 and 750, Code Crim. Proc.

For the error in admitting the testimony of appellant taken before the jury of inquest, the judgment is reversed, and the cause remanded.

HALL v. STATE.¹

(Court of Appeals of Texas. January 8, 1887.)

LARCENY—VARIANCE.

An indictment for the larceny of a horse alleged both the ownership and possession of the animal to have been in the same person at the time it was stolen. The evi-

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

dence sustained the ownership as alleged, but proved that the animal was stolen from the possession of a different person, who was holding the same for the owner. Held a fatal variance between the allegation and the proof of the possession.

Appeal from district court, Bee county.

The opinion discloses the case. Five years in the penitentiary was the penalty assessed.

No appearance for the appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. The indictment alleges that J. G. Dohl was the owner of the stolen horse, and that said horse was taken from the possession of said J. G. Dohl. The evidence shows that J. G. Dohl was the owner of said horse, but was not in possession thereof at the time the same was stolen. Said horse, at the time of the theft thereof, was in the possession of H. Dohl, who was holding the same for the said J. G. Dohl, the owner. There is therefore a fatal variance between the allegation and the proof with respect to the possession of the animal at the time of the theft. In view of the facts of the case, the indictment should have alleged both the ownership and possession of the horse in H. Dohl, or it should have alleged the ownership in J. G. Dohl, the general owner, and that it was taken from the possession of H. Dohl, who was holding possession thereof for said J. G. Dohl. *Bailey v. State*, 18 Tex. App. 426; *Frazier v. State*, Id. 434; *Briggs v. State*, 20 Tex. App. 106; *Littleton v. State*, Id. 168; *Bailey v. State*, Id. 68.

Because the allegation as to the possession of the animal at the time it was stolen is not supported, but is contradicted, by the evidence, the judgment is reversed, and the cause is remanded.

SARA v. STATE.¹

(Court of Appeals of Texas. January 8, 1887.)

1. CRIMINAL PRACTICE—STATEMENT OF FACTS.

The failure of the trial judge to sign the statement of facts agreed upon by both parties to the case, or to sign and file with the clerk a statement of the facts compiled by himself, deprives the appellant of a statement of facts without fault on his part, and is reversible error.

2. DISORDERLY HOUSE—EVIDENCE.

The character of a house as a disorderly house may be established by common reputation, but the proof must directly implicate the person charged with keeping it, in order to convict. See the opinion for the substance of evidence held insufficient to support a conviction for keeping a disorderly house.

Appeal from county court, Victoria county.

This conviction was for keeping a disorderly house, and the penalty assessed was a fine of \$100.

J. L. Hill, for appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. Among other grounds it is assigned as error that the trial judge neither signed the statement of facts agreed to by counsel for both parties, nor made up such statement, and filed it in the record, as required by article 1378 of the Revised Statutes. Under previous holdings of this court, (*Johnson v. State*, 16 Tex. App. 372, and cases cited,) the judgment must be reversed, the omission of the judge being without fault on the part of the appellant.

Taking the agreed statement of facts made up by counsel as a fair summary of the evidence adduced on the trial, this court feels constrained to say that the allegations of the indictment are not met by the proof. The appellant is charged with keeping a disorderly house, and the reputation of the place is relied on to sustain the charge. Common reputation is a legitimate source

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

from which to draw proof to fix the character of the house, but the evidence must directly connect the person charged with the offense committed. The testimony in this case goes to show that the reputation of the house was established by another proprietor and at an anterior time.

Because of the errors indicated, the judgment is reversed, and the cause is remanded.

LORAINÉ v. STATE.¹

(Court of Appeals of Texas. January 8, 1887.)

1. DISORDERLY HOUSE—INDICTMENT.

Indictment which alleged that the accused, "on the tenth day of March, 1886, in Victoria county, Texas, did keep a disorderly house, said house being then and there kept for the purpose of public prostitution," sufficiently charged the keeping of a disorderly house.

2. SAME—EVIDENCE.

See the statement of the case for evidence held insufficient to support a conviction for keeping a disorderly house.

Appeal from county court, Victoria county.

The conviction was for keeping a disorderly house, and the penalty assessed was a fine of \$100.

While the testimony both for the state and the defendant shows that the house at which the defendant lived was commonly reputed to be a disorderly house, there was no witness introduced upon the stand who testified that the defendant was known or regarded as the *keeper* of the house. One witness testified that, at times, it appeared to him that the house was under the management of the defendant, while at others it was under the management of another party.

Stayton & Kleberg and *J. L. Hill*, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. We are of opinion that the indictment in this case sufficiently charges the appellant with keeping a disorderly house. Pen. Code, art. 339; Willson, Crim. Forms, No. 218. But we are most clearly of the opinion that, as presented in the record, the evidence wholly fails to sustain the charge in the indictment, or the judgment of conviction which has been rendered in the court below. *McElhanev v. State*, 12 Tex. App. 231; *Sara v. State*, ante, 339, (present term.)

The judgment is reversed, and the cause remanded.

Ex parte O'CONNER and others.¹

(Court of Appeals of Texas. January 12, 1887.)

BAIL—MURDER—HABEAS CORPUS.

See the statement of the case for evidence in a *habeas corpus* proceeding for bail, under an indictment for murder, held insufficient to authorize the refusal of bail.

Habeas corpus. On appeal from district court, Bexar county.

The appellants in this case, J. T. O'Conner, Abbie M. O'Conner, and Mattie Collins, were held under a *capias* issued from the justice's court on a charge against them of the murder of the infant of the said Mattie Collins. They sought relief under the writ of *habeas corpus*, and, bail being refused by the district judge, this appeal has been prosecuted to this court, and bail is awarded to each of the relators in the sum of \$250.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

It was proved, on behalf of the state, that the relator Mattie Collins came to the house of J. T. O'Conner and his wife, Abbie M. O'Conner, some time prior to October, 1886. Her name was given out as Mrs. Smith. She was pregnant when she came to O'Conner's house, and, late in October, gave birth to a full-period, well-developed, and matured female child. Mattie Collins was in appearance a strong, healthy woman, with large, well-developed breasts, and apparently well able to give her infant its natural nourishment. The infant, however, was put "to the bottle" at once, and for some time was nourished on goat's milk. It declined rapidly in flesh, and presented the appearance either of starving, or being nourished on impure food. Some time in November, J. T. and Abbie O'Conner applied to the orphans' home in San Antonio for the child's admission as a destitute orphan. When admitted, the child showed every indication of disease or starvation, the symptoms of starvation predominating. Within a week the home authorities ascertained that the child's mother was neither dead nor in destitute circumstances, and compelled the O'Connors to take the child from the home. Two or three nights subsequently the O'Connors took the child, in a deplorable state of physical emaciation, to a negress living in an exposed tenement on the outskirts of town, and placed it in the hands of the negress to be taken care of. Money to provide cow's milk, and a sufficiency of apparel, was left with the negress. On the second day thereafter the child died. Its death was reported to the authorities, and an inquest was held. Physicians on the inquest testified that, judging from the appearance of the body, the infant died from starvation, though it was possible that its death may have resulted from disordered bowels, superinduced by unwholesome nourishment. While the witnesses for the state expressed belief that starvation was the immediate cause of death, no one of them would swear positively to that fact. It was proved that, before the birth of the child, the relator O'Conner, explaining the presence of a pregnant woman in his house, said that she was a woman who, having been unfortunately intimate with her brother-in-law, had come to his house to escape her trouble. It was also proved that shortly after the birth of the child, and while it was being nursed on goat's milk from a bottle, Mattie Collins said, smiling as if in jest, that the reason she did not nurse the child was that it was not her offspring. None of the witnesses knew why Mattie did not nourish the child from her breast. The testimony for the defense covered the first few days succeeding the birth of the child. The witnesses testified that Mr. and Mrs. O'Conner and Mattie Collins, *alias* Mrs. Smith, treated the infant with evident care and affection, and that, for some reason unknown to them, the said infant was fed on goat's milk.

J. A. & N. O. Green, T. J. Ponton, and A. S. Chevalier, for relators.

The proof must show that the applicants deliberately and willfully starved the child to death. Otherwise there can be no murder in this case. 4 Amer. Crim. Def. 105; Desty, Amer. Crim. Law, §§ 57*a*, 124*e*; 1 Bish. Crim. Law, § 883; Rosc. Crim. Ev. (3d Amer. Ed.) 721; Tayl. Med. Jur. (8th Amer. Ed.) 646. If it was lawful for Mattie Collins to raise the child upon goat's and cow's milk, at the orphans' home, and under the care of an experienced nurse, so that she might conceal her disgrace and loss of chastity, then the case at most is negligent homicide, and is bailable. Pen. Code, arts. 579, 580.

WHITE, P. J. In this case the judgment of the court below refusing bail to applicants on the *habeas corpus* hearing is reversed, because, as shown by the testimony here exhibited, it is not, in our opinion, "evident" that they are guilty of murder in the first degree, if, indeed, the said evidence establishes, with any degree of certainty, a crime of any kind committed by them. There is an agreement in the record as to their ability to give bail in the sum of \$1,000 each. We will fix the amount of the bond for each at the sum of \$250; and upon the execution of a bond by each of said applicants in said sum, with

approved security conditioned as the law requires, the sheriff of Bexar county will release them from confinement in jail.

The judgment is reversed, and bail is granted appellants in the sum of \$250 each. Ordered accordingly.

KING v. STATE.¹

(Court of Appeals of Texas. January 12, 1887.)

RAPE—FRAUD—MARRIED WOMAN—CHARGE OF THE COURT.

Article 531 of the Penal Code, declaring carnal intercourse with a woman obtained by means of fraud to be rape, was enacted for the protection of married women, provides that the fraud must consist in the use of some stratagem by which the woman is induced to believe that the offender is her husband. Charge of the court, therefore, which announces, in effect, that an attempt to have carnal intercourse with a woman when she is asleep, constitutes fraud within the meaning of the statute was erroneous. Note that the evidence fails to show that the alleged injured party was a married woman.

Appeal from district court, Red River county.

The conviction was for the burglary of the house of Alice Johnson, with intent to rape the said Alice Johnson, and the penalty imposed was a term of two years in the penitentiary.

The state's testimony shows that on the night of October 18, 1886, the defendant opened the window of the room in a certain house occupied by the prosecutrix, entered the room, got into the bed of and with the prosecutrix, and endeavored to obtain carnal knowledge of her person. The prosecutrix did not awaken until the defendant made the actual assault upon her person. She then escaped from the defendant, and he left the premises. There is not a particle of evidence to show whether the prosecutrix was a married or unmarried woman. The defense relied upon was the testimony of several witnesses to the effect that the defendant was of unsound mind, and unable to distinguish right from wrong.

A. J. Taylor, for appellant, assigning the error discussed in the opinion. Asst. Atty. Gen. Burts, for the State.

WILLSON, J. In explaining to the jury the law of rape accomplished or attempted by fraud, the court in its charge uses the following language: "Fraud must consist in the use of some stratagem, as an attempt to have carnal connection with a woman when she is asleep." In this case, if the defendant committed burglary with intent to commit the offense of rape, it is quite clear that he did not intend to accomplish the rape by either force or threats, for neither of these means were used or attempted to be used by him. The evidence is that he assaulted the woman when she was asleep, and, while she was in that condition, attempted to have carnal connection with her, but when she awoke he desisted from any further efforts to gratify his lust upon her. It was the opinion of the learned trial judge, as expressed in his charge to the jury, that an attempt to have carnal knowledge of a woman when she is asleep *per se* constitutes *fraud* within the meaning of the statute upon this subject. In this opinion we think the trial judge erred. The statute declares that "the fraud must consist in the use of some stratagem *by which the woman is induced to believe that the offender is her husband,*" etc. Pen. Code, art. 531. It nowhere declares that it is "fraud" to have, or to attempt to have, carnal knowledge of a woman when she is asleep; and, as the word "fraud" used in this statute is specifically defined therein, we must be limited in ascertaining the meaning of the word, to its statutory definition. If a man should have, or attempt to have, carnal knowledge of a married

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woman while she was asleep, under such circumstances as induced her to believe that he was her husband, it would be such fraud as the statute contemplates. Thus, if he should represent himself as her husband, and induce her to believe that he was her husband, and then while she was asleep, or even while she was awake, have, or attempt to have, carnal knowledge of her, it would be fraud within the meaning of the statute. But the single fact that the woman was asleep when the act of carnal knowledge was committed or attempted, does not constitute fraud. The woman must be married, and the stratagem used to have carnal knowledge of her must be such as induces her to believe that the offender is her husband. This portion of the statute concerning stratagem protects married women only. In the case we are considering there is no evidence that the woman assaulted was a married woman.

We are of the opinion that the charge of the court defining fraud is manifestly and materially erroneous, and that this error produced the conviction of the defendant; wherefore the judgment is reversed, and the cause is remanded.

LACEY v. STATE.¹

(Court of Appeals of Texas. January 12, 1887.)

LARCENY—EVIDENCE—CHARGE OF THE COURT.

See the opinion *in extenso* for evidence held insufficient to support a conviction for felonious larceny; and for circumstances under which, the evidence showing a series of depredations, but not the value of the property taken at any one time, it was the duty of the trial court to charge the jury that, to sustain a conviction for felonious larceny, it devolved upon the state to select a certain transaction, and prove the value of the property involved to have been \$20 or more.

Appeal from district court, Bexar county.

The opinion discloses the case. The penalty assessed by the verdict was a term of three years in the penitentiary.

No appearance for the appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. This is an appeal from a judgment of conviction for theft of property of the value of \$20 or more. It was in evidence that certain lumber was taken from the possession of H. Gray; that the property was found on the premises of the appellant, where it had been converted to different purposes of repair; and that it aggregated the value of \$23.50. The evidence goes to show that the owner of the property was a contractor and builder; that in the month of September, 1886, he was building a house, in the regular prosecution of his business, in the city of San Antonio; and that for that purpose he had placed lumber and materials on the lot, of which said lumber the stolen property was a portion. The appellant lived near by, and across a ditch from the building lot. About the twenty-eighth day of September, appellant was arrested for the theft, in consequence of discoveries made by one Speer, whom the owner of the property had placed as a watch to detect and apprehend the perpetrators of what appears to have been a series of constantly recurring thefts during said month. The record is silent as to the amount and value of lumber taken on any one particular occasion or night. True, the witness Speer, who had been set to watch, testifies to one night upon which he saw appellant and a negro woman make "several trips" to and from the lot, each time bearing away lumber, but his testimony does not fix the amount taken on that night. Lumber had been previously taken, but the amount of it is also unknown. Hence we have no fixed amount of lumber taken on the night testified to by the witness, nor have we an aggregation of the previous

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takings, so that a due subtraction may be made, and a certain amount and value taken on that or any other night fixed.

Upon this state of facts it was the duty of the trial judge to have instructed the jury that, to sustain a conviction for the theft of property of the value of \$20 or over, the prosecution must select a certain transaction, and prove the value of the lumber taken on that occasion to have been \$20 or over. Now, it is not necessary to enter into a discussion of the exceedingly nice question which sometimes arises in cases like this, for it is not even shown that property of the value of \$20 was taken on any particular night. Hence, if we concede that the transactions of a night constituted but one theft, yet to support the conviction there should be proof that the value of the lumber taken on that night was \$20 or more. It appearing from the record that all of the lumber was stolen in the night-time, it will not be denied that each night's theft constituted a distinct and complete offense. For example, lumber of the value of \$10 is taken on one night; on the next night lumber to the value of \$13.50 is taken. Under our statute (Pen. Code, art. 726) these would be separate and distinct offenses, each complete in itself. The state, most assuredly, would not be permitted to construct a felony out of two misdemeanors.

Let us view the subject from another stand-point, for we are dealing with a two-edged sword. Suppose A. steals from the same owner, and from the same place, \$30 worth of property on one night, and on a succeeding night still another. A conviction is had for the second theft, or the first, as the case may be. Upon a trial for the remaining transaction, a plea in bar setting up the first conviction would not be entertained, for evidently the two transactions constitute, each within itself, a distinct offense, resting upon its own facts.

We are therefore of opinion that the verdict and judgment of conviction for felony are not supported by the facts. We are further of opinion that the omission in the charge of the court, before alluded to, was calculated to injure the rights of the appellant. Accordingly the judgment is reversed, and the cause remanded.

ROSALES v. STATE.¹

(Court of Appeals of Texas. January 12, 1887.)

FALSE PRETENSES—SWINDLING—INDICTMENT.

See the opinion *in extenso* for an indictment held insufficient to charge the accused of the offense of swindling if it was the purpose to charge the swindling out of the value of an organ; and insufficient to charge that offense if it was the purpose to charge the swindling out of a chance in the raffle for the organ, because, such a right being one not enforceable at law, it will not support an assignment for swindling.

Appeal from district court, Duval county.

The opinion states the case. The penalty assessed was a term of 30 days in the county jail, and a fine of \$100.

L. P. Bryant and Showalter & Nicholson, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. This conviction was had upon an indictment charging "that Antonio Rosales, on or about the thirty-first day of October, 1885, in Duval county, Texas, of and concerning a certain raffle for a roller organ, did knowingly, falsely, and fraudulently represent and state unto one Loretta A. de Zapata, who then and there owned and had paid for and purchased a certain chance in said raffle for said organ; that the price of the chances therein (to-wit, 50 cents) had been raised to \$1, and that she, the said Zapata, would have to pay said raise of 50 cents, or lose said chance, and that, by means of said false and

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

fraudulent statement, did then and there obtain and acquire from said Loretta A. de Zapata, a transfer of her right in and to her chance aforesaid in said raffle, and, by means of said false and fraudulent statement, did then and there induce said Loretta A. de Zapata to part with her right and title to the chance and number aforesaid; that said chance and number was then and there of the value of the price of said organ, to-wit, the sum of \$12 in lawful money; that said Loretta A. de Zapata relied upon said representation and statement of said Rosales as true; that said representation and statement, so made and above set forth, were false; that said Rosales, at the time and place thereof, well knew that the same was false and untrue; that, in truth and in fact, the price aforesaid of said chances in said raffle for said organ had not been raised to \$1; that in truth and in fact the said Zapata did not have to pay a further 50 cents in order to avoid the loss of her said chance and number; that in truth and in fact said raffle had then and there already taken place, and that said chance of said Zapata had then and there won said organ, as he, the said Rosales, well knew; and that said statements were made with intent to defraud and deprive said Zapata of the value of the said property, and appropriate the same to the use of him, the said Rosales,—against the peace and dignity of the state."

A motion to quash, upon the ground that the indictment charged no offense against the laws of the state, was overruled. On this appeal the only question is the sufficiency of the indictment. In the first place, the indictment charges that defendant, by means of the false pretenses, did acquire and obtain from the owner a transfer of her right in and to her chance in the raffle, and that by the same means he induced her to part with her right and title to her chance and number in the raffle, which was of the value of the price of the organ, \$12. Then, again, we find, in the latter clause of the indictment, the charge that said statements were made with intent to defraud and deprive the owner of the value of said property, (the organ,) and appropriate the same to the use of him, the said Rosales. It is extremely uncertain whether the pleader intended to charge that Zapata was swindled out of her chance in the raffle, or out of the value of the organ. If the charge is that she was swindled out of her chance in the raffle, then we are of opinion it is very questionable if such a charge would support the prosecution. Under the statute, swindling is the acquisition of any personal or movable property, money, or instrument of writing conveying or securing a valuable right, etc. Pen. Code, art. 790. We take it "a valuable right," as mentioned in the statute, is one which could be enforced at law. A chance in a raffle is not such a right. A raffle determined with dice, for a sum under \$500, if played in a place other than a private room or residence, is a violation of law, and punishable as such. *Long v. State*, 2 S. W. Rep. 541, (decided at last Tyler term.) In this case the value of the organ raffled for is inferentially, if not positively, alleged to be \$12. How the chances were to be determined, that is, whether by dice or otherwise, is not stated. The allegations are not sufficient to sustain a charge that defendant swindled Zapata out of the organ. If the raffle had already taken place, and it had been determined that her chance had won, then the organ was her property; and if, by false representations, appellant swindled her out of the property, he would be liable, notwithstanding she might have acquired her title in a manner not sanctioned by law. It would be no valid defense to appellant that her title was obtained through unlawful means, if, indeed, he would be allowed in any manner to call in question the acquisition of her title. *Woodward v. State*, 103 Ind. 127, 2 N. E. Rep. 321, and authorities cited; 5 Amer. Crim. Rep. (Gibbons,) 200; 7 Crim. Law Mag. 244.

We are of opinion the indictment is too uncertain to support the conviction; and, because it does not sufficiently charge any offense against the laws of this state, the judgment will not only be reversed, but the prosecution will be dismissed under said indictment.

WRIGHT and another v. STATE.¹

(Court of Appeals of Texas. January 12, 1887.)

BAIL—SCIRE FACIAS.

Recognizance which recites the principal's obligation to the state in a fixed sum, but does not bind him to appear before the court at a fixed time, and which binds only the surety for the appearance, is *per se* invalid, and is illegal, in that it is more onerous on the surety than the law requires. See the opinion in illustration, and for a definition of recognizance.

Appeal from district court, De Witt county.

This appeal is prosecuted from a judgment final forfeiting the recognizance of Joseph Wright, bailed upon a charge of larceny of a horse. The amount of the recognizance and judgment was \$500.

Fly, Davidson & Davidson, for appellants. *The Assistant Attorney General*, for the State.

WHITE, P. J. This appeal is from a judgment final upon a forfeited recognizance. The recognizance is in these words, viz., (after stating style of case, etc.): "In this cause this day came the defendant, Joe Wright, in his own proper person into court, and acknowledged himself to owe and be indebted to the state of Texas in the full and penal sum of five hundred dollars; and at the same time also came into open court J. L. Hume, in his own proper person, surety for him, the said Joe Wright, and acknowledged himself to owe and be indebted to the state of Texas in the full and penal sum of five hundred dollars, to be levied of his goods and chattels, lands and tenements; to be void, however, upon condition that the said Joe Wright do well and truly make his personal appearance before the district court of De Witt county to be begun and holden at the court-house thereof in the city of Cairo, on the thirteenth Monday after the first Monday in September, 1884, and now in session, and there remain from day to day, and from term to term, and not depart therefrom without leave of the court, then and there to answer an indictment filed in said court on the third day of December, 1884, charging him, the said Wright, with the theft of a horse."

In answer to the *scire facias* served upon him after the forfeiture and judgment *nisi*, the surety, Hume, filed several special exceptions, all the grounds of which are fully and sufficiently disclosed in the fourth exception, which is as follows, viz.: "Said recognizance, as set out in said *scire facias*, while binding Joe Wright to pay the state of Texas the sum of five hundred dollars, does not bind him, the said defendant or principal, Wright, to appear in this court, or to do anything else, but it does bind this defendant to produce the said Wright in court, or pay the sum of \$500, which this defendant says is not a sufficient recognizance to support the judgment *nisi* based thereon, and that the *sci. fa.*, setting out and pleading the said judgment *nisi* and recognizance, is insufficient to maintain this action against defendant." It is, moreover, contended that said recognizance is invalid, because, in so far as the surety is concerned, it was more onerous than the law requires, in that it bound the surety for the appearance of his principal, while there was no obligation upon the principal himself that he should appear in court.

"A recognizance is an undertaking, entered into before a court of record, in session, by the defendant to a criminal action and his sureties, by which they bind themselves, respectively, in a sum fixed by the court, that the defendant will appear for trial before such court upon the accusation preferred against him." Code Crim. Proc. art. 283. It is manifest that the statute intends that the defendant shall obligate himself that he will appear in court

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

to answer the accusation against him. The purpose of the recognizance is to secure the appearance of the defendant at the time for trial. *Carroll v. State*, 6 Tex. App. 463; Willson, Crim. Forms, No. 590; Code Crim. Proc. art. 287. It is a conditional obligation; the condition being dependent upon his appearance or non-appearance at the time and place specified. As set out in the recognizance above, it will be noticed that, in so far as Wright, the principal, is concerned, the undertaking is without condition of any kind, and is an unqualified acknowledgment of an indebtedness to the state of \$500. His obligation, though entered into in court, is not a recognizance at all in statutory contemplation or in effect, any more than if it had been executed out of court. *Jones v. State*, 1 Tex. App. 485. We are of opinion that appellants' exceptions to the sufficiency and validity of the undertaking of Wright as a statutory recognizance were well taken, and should have been sustained.

Appellants' second position is also well taken, because it is clear that, if the statute only requires a surety to obligate himself in case the principal is obligated, in the same manner and to the same extent, and the principal is not so obligated, the surety is not bound; and where the statute requires each to be jointly and severally obligated for the appearance of the principal, and the principal is not so obligated, but the surety is, the obligation of the surety is more onerous than the law requires, and is therefore a nullity. *Barringer v. State*, 27 Tex. 553.

The judgment of the lower court is reversed, and, because the recognizance is wholly insufficient and invalid in law, the prosecution is dismissed.

VIDAURI v. STATE.¹

(Court of Appeals of Texas. January 15, 1887.)

BAIL—SCIRE FACIAS—JUDGMENT NISI—CITATION.

Service of citation on the defendant in the judgment *nisi* must identify him as the defendant in the bail-bond; otherwise the service is insufficient, and will not support a final judgment forfeiting the bail-bond.

Error from district court, Webb county.

The opinion discloses the case. The amount of the bond and judgment was \$300.

McLane & Atlee, for plaintiff in error. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. Atanacio Vidauri became surety upon the bail-bond of one Pedro Valdez. Valdez having failed to appear and answer according to the conditions of the bond, a forfeiture was taken, and a judgment *nisi* rendered, and entered against Valdez as principal, and Atanacio Vidauri as his surety. Citation issued upon said judgment *nisi* for said Atanacio Vidauri, and was returned by the sheriff executed upon *Rafael* Vidauri. Upon this return of service a judgment final was rendered and entered against Atanacio Vidauri, and from this judgment the surviving wife of said Atanacio, he having died subsequent to said final judgment, prosecutes this writ of error, and assigns as error the rendition of said judgment against said Atanacio Vidauri, he not having been cited to appear and answer in the suit.

Manifestly this assignment of error is well grounded, and must be sustained. It is nowhere made to appear in the record that Atanacio Vidauri and Rafael Vidauri are one and the same person. In the absence of such a showing, we must hold that there was no service of citation upon Atanacio Vidauri, and the judgment as to him is void. The state may yet proceed to enforce the judg-

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

ment *nisi* against the estate of the deceased surety, in the manner provided by statute. Code Crim. Proc. art. 448.

The judgment is reversed, and the cause is remanded.

GLEAVES v. DAVIDSON.

(*Supreme Court of Tennessee. 1887.*)

JURY—DEMAND FOR—PLEADINGS—SEDUCTION—TENNESSEE ACT OF 1875.

Under the Tennessee act of 1875, (M. & V. Code, 3602,) providing that "either party desiring a jury must make the demand in his first pleading tendering an issue triable by jury," etc, applies to pleadings alike at common law and under the Code, and requires a party, in terms, to make the demand, if he desires the issue tendered to be tried by a jury.

Error to circuit court, Wilson county.

Williamson & Beard and Stakes & Stakes, for Davidson, defendant in error.

CALDWELL, J. In 1883, Mahalo Davidson brought this action of damages in the circuit court of Wilson county against W. A. Gleaves for seducing, debauching, and begetting her with child, "without her free will and consent." Gleaves filed a plea of not guilty, with the conclusion, "and of this he puts himself upon the country." When the case was reached for trial, the defendant asked for a jury, which was refused by the circuit judge, who proceeded to hear and determine the case without the intervention of a jury. Judgment was for the plaintiff for \$1,500, and Gleaves has appealed in error.

The circuit judge was of opinion that the defendant had not demanded a jury in his plea, and for that reason refused his request, on the trial, for a jury. This action is assigned as error. Counsel for appellant concedes that, since the act of 1875, "either party desiring a jury must make the demand in his first pleading tendering an issue triable by jury," (M. & V. Code, 3602,) but his contention is that the plea of not guilty, filed for his client, makes that demand; that the conclusion, "to the country," meets the requirements of the law. We agree with the trial judge, and dissent from the view of counsel. Though "the resort to a jury, in ancient times, could in general be had only by the mutual consent of each party," and the conclusion "to the country" was then used by the one party to indicate that the issue tendered was to be tried by a jury, and the *similiter* was used by the other party to express his consent to such trial, (Steph. Pl. rule 3, pp. 236, 237; Id. rule 2, p. 229,) we think the ancient origin of such pleading, and the reasons therefor, cannot now be invoked as controlling in the construction of a modern statute.

In this state, prior to the act of 1875, all issues of fact, in the circuit court, were triable by jury, without reference to the mode of pleading,—whether with formal *commencements* and *conclusions* as at common law, or without such formalities and according to the Code. The two modes were then used indiscriminately, and with the same effect, by the profession. Therefore that act must be held to apply alike to both systems of pleading, and to require (whether the one or the other should subsequently be adopted in a given case) that the pleader should go further than formerly, and in terms make the demand, if he desired the issue tendered to be tried by a jury.

The evidence sustains the finding of facts and judgment by the court below, and the judgment is affirmed.

THE GOLD BRICK CASE.

DAVIS *alias* HENNESSY v. STATE.

(*Supreme Court of Tennessee. March 7, 1887.*)

1. CRIMINAL PRACTICE—CONTINUANCE.

Where a defendant, in a criminal action, asks and obtains a continuance of one week to take depositions of six witnesses, and at the expiration of that time admit,

that no steps have been taken to take the depositions, and applies for a further continuance to take depositions of witnesses, five of whom are the same as those in respect of whom time had been previously granted, the continuance is properly refused on the ground of plaintiff's inaction.

2. SAME—GENERAL VERDICT—DIFFERENT COUNTS.

Where an indictment is in two counts charging different offenses, punishable with different penalties, but both of which offenses grow out of the same transaction, the jury may give a general verdict, the effect of which is to convict defendant of the higher offense; and therefore an instruction to the jury as follows: "In case you find defendant guilty it is always safest for a jury to return a general verdict, specifying the offense, and, by fixing the punishment, leaving the court the duty of affixing the count upon which the conviction should be placed,"—though objectionable, is not prejudicial and ground for reversal.

Appeal from criminal court, Davidson county.

Indictment for larceny and false pretenses.

The Attorney General, for the State. *James Quarles* and *Eli Morris*, for appellant.

CALDWELL, J. This is known as the *Gold Brick Case*. There are two counts in the indictment: the *first* for obtaining money under false pretenses, and the *second* for larceny of the money. The prisoner was arraigned four days after the finding of the indictment, and on the day of arraignment the case was set for trial nine days later. On the first day set for trial the defendant asked for further time. One week more was granted, and, upon motion of defendant, an order was entered permitting him to take the deposition of certain persons in New Orleans and in St. Louis. The same order contained a waiver by the attorney general, on behalf of the state, of notice of the time of taking the proposed deposition. When the second day fixed for trial arrived, the defendant was put upon trial; his motion for continuance having first been overruled. The jury returned a general verdict of guilty, assessing the punishment at five years' imprisonment in the penitentiary. Upon this verdict the court pronounced judgment, and, as a result of the judgment, the defendant was adjudged to be "infamous," etc., in accordance with section 6065 of the New Code. The defendant has appealed in error.

It is first insisted, on behalf of the prisoner, that he should have been allowed a continuance. In this we do not agree with counsel. The affidavit for continuance gives the names of the six persons whose evidence defendant says is material to his defense, and which he hopes to have at the next term of the court. *Five* of those persons are the same for the taking of whose depositions he had, one week before, obtained an order of the court. Yet, when his affidavit was presented, and the court asked defendant's counsel "whether any steps had been taken by them to take the depositions," his counsel said "that none had been taken, but that the defendant had written letters." Because of this inaction, as the record shows, the continuance was refused, and we think justifiably, so far as these five proposed witnesses are concerned. True, the time after the order was short, and might not have been the amplest for the procuring of all the depositions. Still an effort should have been promptly made to take them, and, no doubt, would have been made if the defendant had in fact deemed them important to his defense. Had the endeavor been put forth, the proof might have been obtained. Certainly some of it could have been, or some mode of obtaining it might have been inaugurated; and the process made could have been presented to the court as evidence of good faith on the part of the prisoner, and as reasonable ground for further indulgence by the court. The other person mentioned in the affidavit did appear before the motions in arrest and for new trial were overruled, and his statement upon the stand was considered by the court upon those motions. He knew absolutely nothing that could in the remotest degree have benefited the defendant.

The refusal to grant a continuance must fail the prisoner as grounds for reversal, for two reasons: *First*, because the action of the trial judge was

well warranted by the case as it then appeared to him; and, *secondly*, because we can see clearly from the whole record that the prisoner was not prejudiced by that action.

After properly instructing the jury with reference to the first and second counts, respectively, the trial judge said: "In case you find the defendant guilty, it is always safest for a jury to return a general verdict, specifying the offense, and, by fixing the punishment, leaving the court the duty of affixing the count upon which the conviction should be placed." The *second* and main contention of counsel for the prisoner is that this instruction is erroneous, in that it authorized the return of a *general verdict*, when, as they say, such a verdict cannot be received or sustained "because one offense charged is *infamous*, and the other is not," or because a conviction on one count involves greater punishment than on the other. For the same reason it is insisted that the judgment should have been arrested.

The position, though plausible, is unsound, and without the support of authority. That the punishment affixed by law for an offense charged in the one count is greater or less than that for an offense charged in another, affords no reason for not joining the two counts in the same indictment, and argues nothing against the validity of a *general verdict* upon the whole indictment. It is only where the two counts charge *distinct offenses, growing out of different transactions*, that they may not be joined, and that a general verdict is not good. It is well settled that, if the different offenses charged in the different counts grow out of the same transaction, as in the case before us, or if they be but different species of the same offense, the several counts may and should be joined in the same indictment, and a *general verdict* will be good, though the one offense be punishable differently from the others; and the law in such case refers the verdict to the highest offense, or the highest grade of offense, charged. *Ayrs v. State*, 5 Cold. 28; *Kelly v. State*, 7 Baxt. 84, and citations; *Hall v. State*, 3 Lea, 558, 559. In the *Hall Case* the indictment contained two counts, charging arson under two different sections of the Code; and there a *general verdict* of guilty was by this court held to be good, notwithstanding the minimum punishment by imprisonment under one count and section was three years greater than the minimum punishment under the other count and section.

In view of those authorities, resting upon sound reason, as they do, there can be no doubt that a *general verdict* in the case at law would have been wholly unobjectionable if the trial judge had said nothing about a *general verdict* in his charge to the jury; and the law would, in such case, have referred the verdict to the higher offense, and thereby have demanded the declaration of infamy as a part of the judgment. In other words, the result would, in case of a *general verdict* without instruction from the court upon the subject, have been precisely the same that it is with such instruction. Though we do not approve the instruction upon this point, and think it contrary to the better practice, there is no positive error of law in it; and a reversal will not be predicated upon it when we can and do see that the defendant was not prejudiced thereby; the evidence clearly establishing his guilt of the higher offenses.

In *Parham v. State* there were two counts in the indictment, and a *general verdict*. The charge was absolutely erroneous as to one count; and upon that ground, and because the verdict was general, this court was asked to reverse the judgment of conviction. The evidence did not sustain this count, but did sustain the other one, as to which the charge was unexceptionable. The judgment was affirmed; this court saying: "The reason is that the court can see that the defendant could not possibly be prejudiced by what was done." 10 Lea, 503.

Affirmed.

GENTHUR v. FAGAN and Wife.

(Supreme Court of Tennessee. 1887.)

1. MORTGAGE—FORECLOSURE—PLEADING—INVALIDITY OF MORTGAGE—CROSS-BILL.

In a suit to foreclose a mortgage executed by defendants, husband and wife, the wife may aver in her answer that she did not execute the mortgage as charged, and that she never conveyed, nor intended to convey, the land described in the mortgage, and allege fraud and collusion on the part of her husband and complainant to procure her signature and acknowledgment, and she is not required to assert this defense by a cross-bill.

2. SAME—EVIDENCE—HUSBAND AND WIFE.

In a suit to foreclose a mortgage against a husband and wife, in which the wife, by her answer, denies the execution by her of the mortgage as charged, and alleges collusion and fraud by her husband and complainant in obtaining her signature and acknowledgment, testimony of the wife and other witnesses is admissible to prove that complainant admitted to her, in their presence, that she never agreed to give the mortgage sought to be enforced, and such confession, if proved, is conclusive proof that there was no mortgage by her, notwithstanding her signature and acknowledgment.

Appeal from chancery court, Davidson county.

J. P. Helms and *A. S. Marks*, for appellant. *Brien & Son*, for appellees.

TURNER, C. J. The bill was filed to foreclose a mortgage. The wife answers, and says she did not execute the mortgage as charged, and that she never conveyed, nor intended to convey, the lot described and asked to be sold. She gives facts showing a fraudulent collusion on the part of her husband and complainant to procure her signature and acknowledgment. The proof shows that such is the truth of the case; that she charged it upon complainant, and he confessed. The chancellor and commission correctly held the mortgage fraudulent and void as to the wife.

It is insisted that the defense cannot be made by answer, and could only be by cross-bill. We think not. The wife is not an actor in the suit. She is on the defensive, attempting to protect her homestead. She is not seeking active relief, but asks to be let alone in her occupancy. The complainant is assailing that occupancy, by alleging the wife has lawfully parted with the right to it. When she denies, the laboring oar is upon him to make his case. To that end he produces the deed regular in form. At once his case is *prima facie* made. That deed, however, is only a witness, and may be impeached. The impeachment process here was to show that it was obtained by fraud, and under circumstances amounting to moral, if not legal, forgery. The complainant is shown to have confessed to Mrs. Fagan, in the presence and hearing of witnesses not assailed, that he did deceive and induce her to sign a deed to her home when she had agreed only to sign a mortgage to a vacant lot, and positively refused to sign one to the home place. Complainant was endeavoring to induce Mrs. Fagan to sign a second mortgage to the homestead on account of some suggestions some advisor had made to him about the one before us. She said: "I will not. You fooled me once before. You came and brought a paper for me to sign, and you and Fagan made me believe it was a mortgage on my vacant lot, and not on my homestead, and you did not read it to me, but made me sign it at the wash-tub, when I had not *writ* my name for fifteen years, and did not know what I was signing." She then said: "Did I ever agree to give you a mortgage on my home place? Now, Mr. Genthur, I ask you on the word of a gentleman, did I?" He said: "No; you never did." He was asked why the mortgage was not read to her when she signed it. He replied he did not know much about the law. She rejoined: "You knew enough about it to fool me." He responded: "Well, go; show me the vacant lot."

The issue is, was there a mortgage? The confession of complainant shows conclusively there was no mortgage. The burden is upon him to show the

truth of the allegation of his bill. Out of his mouth he is convicted. If he had in court said to the chancellor what he is shown to have said to truthful witnesses, his case would have failed. Then, why not render the proof? If the wife was the mover, certainly she would have to proceed by bill. In that case there would be reason to require it. But what reason can be urged that she shall do so when acting on the defensive? If no substantial reason exists for a rule, there is no law for it. If an action of ejectment is brought, and in the progress of the trial a forged—a fraudulent—deed is offered, with certificate regular in form, good on its face, must the party against whom it is offered stop in the midst of trial, and file his bill to set the deed aside, or may he show the fraud in its execution at the instant? The latter has been the practice, and was pursued in *Cousins v. Stevenson*, (decided by this court in 1875.)

If the trustee or mortgagee had instituted ejectment in the case before us, certainly the respondents would have been permitted to show the fraud, and defeat the recovery at law. The bill to foreclose is nothing more nor less than a suit of ejectment in chancery, and may be defended as at law, with the advantage to complainant that the grounds of defense must be fully stated in the answer, while at law, under the plea of not guilty, the defense of fraud in the execution and the like may be shown. If the technical objection urged was ever the law in this state, it should no longer be so.

Decree affirmed. Report confirmed.

STATE v. CHURCHILL and others.

(*Supreme Court of Arkansas. February 5, 1887.*)

1. EQUITY—JURISDICTION—ACCOUNTS.

The difficulty of properly adjusting accounts is ground for equity jurisdiction, without regard to the singleness or mutuality of the same.

2. STATE OFFICERS—TREASURER—"MUTUAL ACCOUNTS."

Where the treasurer of a state keeps the accounts of the state against himself, and his own, at the same time, against the state, he may, in the sense of the legal expression, be said to have kept "mutual accounts."

3. SAME—SUIT ON BOND—PARTIES—MULTIFARIOUSNESS.

In an action against the treasurer of the state of Arkansas and the sureties in his official bonds for a proper settlement of his accounts, in equity, covering three terms of office, an objection of a misjoinder of parties, and that the complaint is multifarious, cannot be sustained, where both are intimately connected with the subject-matter of jurisdiction.

4. EQUITY—ISSUES—SUBMISSION TO A JURY.

Chancery courts cannot assume jurisdiction of a cause for the purpose of depriving parties of the right of a jury trial; but, once having taken jurisdiction because the case is one properly cognizable in a court of equity, the submission of issues of fact to a jury is a matter within the sound discretion of the chancellor.

5. ALTERATION OF INSTRUMENTS—BOND—ERASURE AFTER SIGNING.

Where a bond or other obligation has been altered materially by the erasure of a name, or the erasure or change of a figure or important word after the same is signed, and before delivery, and the alteration is ordinarily observable, the bond is void as to all the obligors who had no knowledge of it, or did not consent to the alteration, and had not ratified the bond in its altered shape.¹

¹THE MATERIAL ALTERATION of a bond or guaranty, after it is signed and before delivery, will avoid it as to all who did not consent to the alteration, nor ratify it. *State v. Craig*, (Iowa,) 12 N. W. Rep. 301; *Osborne v. Van Houten*, (Mich.) 8 N. W. Rep. 77.

Such alteration will avoid a note, *Hood's Appeal*, (Pa.) 7 Atl. Rep. 137, and note; *Singleton v. McQuerry*, (Ky.) 2 S. W. Rep. 652; or mortgage, *Russell v. Reed*, (Minn.) 31 N. W. Rep. 462, and note; or other instrument, *Few v. Laughlin*, 3 Fed. Rep. 39; *Osgood v. Stevenson*, (Mass.) 9 N. E. Rep. 825; *Crawford v. West Side Bank*, (N. Y.) 2 N. E. Rep. 881; *Coit v. Churchill*, (Iowa,) 16 N. W. Rep. 147.

As to what alterations are material, see *Osgood v. Stevenson*, (Mass.) 9 N. E. Rep. 825; *Singleton v. McQuerry*, (Ky.) 2 S. W. Rep. 652, and note; *Stephens v. Davis*, (Tenn.) Id. 382, and note. As to alterations held immaterial, see *Weaver v. Brouley*, (Mich.) 81 N. W. Rep. 839, and note.

6. SAME—BOND OF ARKANSAS STATE TREASURER—LIABILITY OF GOVERNOR AS A CO-SURETY—DISCHARGE.

Where the bond of the state treasurer of Arkansas, signed by the governor of the state as one of his sureties, was altered materially by the erasure of a name after the same was signed, and, upon presentation to him for approval, he observed the erasure, but his attention was not called to it, and he knew nothing about it, when or before it was made, and he did not afterwards ratify or consent to the alteration, his mere approval of the bond in his official character as governor did not operate as an assent to it in its altered shape in his private character as one of the signers; and in an action upon it he will be released from liability with the other sureties in the bond.

7. ESCROW—BOND—DELIVERY—PLEA.

When the condition of the delivery of a bond to an obligee is suggested by anything appearing on the face of it, or is brought to his knowledge by extraneous evidence, before he accepts it, the plea of conditional execution is good; otherwise not.

8. STATE OFFICERS—TREASURER—SETTLEMENT OF ACCOUNTS—LOUGHBOROUGH BONDS.

C., the state treasurer of Arkansas, disposed of \$165,000 of Loughborough bonds during his first term of office, presumably all for state scrip, and accounted for only \$3,000 of the same, leaving \$159,000 unaccounted for in any way. During his second term he disposed of \$45,000 of the same class of bonds, and accounted for none of them. In December, 1877, after all these bonds had been disposed of, C., as treasurer, having on hand a large amount of state scrip, which he caused to be canceled and destroyed, with the approval of the cancellation committee, appropriated \$145,000 to his Loughborough bond account generally. *Held* (1) that the \$145,000 should be appropriated ratably between the \$159,000 debits of the first term and the \$45,000 debits of the second term; (2) that the item of \$9,589.04, found against C. on a settlement of his accounts, instead of being appropriated as a charge against the third term, should be charged against the second term.

Appeal from chancery court, Pulaski county.

Action on bond of state treasurer. Judgment for defendants. The state appealed.

Dan W. Jones, Atty. Gen., and *J. M. Moore*, for appellant. *U. M. & G. B. Rose*, *F. W. Compton*, *S. W. Williams*, *John McLure*, and *R. C. Newton*, for appellees.

BUNN, Special Judge. The principal defendant in this cause, Thomas J. Churchill, was elected treasurer of the state at the general election held in October, 1874, and executed his official bond with A. H. Garland, R. C. Newton, Gordon N. Peay, John D. Adams, S. W. Williams, Thomas Fletcher, Elisha Baxter, James A. Martin, W. D. Blocher, W. W. Wilshire, B. Hempstead, Will. J. Murphy, Ben S. Johnson, R. A. Little, Thomas Fletcher, Zeb. Ward, Thomas W. Newton, Thomas D. Radcliffe, W. W. Adams, H. L. Fletcher, A. Mills, and R. M. Scruggs as his sureties, and the same was approved by the governor of the state, the said A. H. Garland, on the thirteenth of November, 1874; and he immediately entered upon the discharge of his duties as such, and so continued for and during the period of his first term, which expired on the eleventh day of January, 1877. The said Thomas J. Churchill was re-elected treasurer at the general election held in September, 1876, and executed his official bond with A. H. Garland, H. L. Fletcher, G. F. Baucum, Thomas Fletcher, W. J. Murphy, S. W. Williams, B. F. Danley, W. D. Blocher, B. S. Johnson, John D. Adams, Thomas W. Newton, Richard H. Johnson, S. P. Hughes, W. W. Adams, and Anderson Mills as his sureties, and the same was approved by W. R. Miller, governor of the state, on the first day of January, 1877; and he immediately entered upon the discharge of his duties of his second term, and continued as such treasurer until the expiration thereof, on the fourteenth day of January, 1879. The said Thomas J. Churchill was again re-elected treasurer at the general election held in September, 1878, and executed his official bond with A. H. Sevier, Fred Hanger, S. P. Hughes, John F. Boyle, B. D. Williams, G. F. Baucum, R. H. Johnson, James Cook, W. J. Murphy, A. Thauemmler, A. Mills, John D. Adams, H. L. Fletcher, J. E. Isbell, and H. W. Worthen as his sureties, and the same was approved by W. R. Miller,

governor of the state, on the fourteenth day of January, 1879; and he entered upon the discharge of his duties of his third and last term, and continued to act as such treasurer until the expiration of his said third term, in the month of January, 1881. All of the sureties on said first bond are made defendants herein except Thomas Fletcher, W. D. Blocher, and Gordon N. Peay, and all on the second bond except B. F. Danley and W. D. Blocher, and all on the third bond; and, the following having died since the institution of this suit, their deaths were suggested and admitted, and this cause revived in the name of their legal representatives, respectively, to-wit, W. W. Adams.

On the thirtieth day of May, 1883, this action was instituted against the parties aforesaid by the attorney general in the name and for the benefit of the state, by filing his complaint in the Pulaski chancery court. The complaint states and alleges, in substance and in brief, as follows, to-wit: That the said Thomas J. Churchill, as such treasurer, received from his predecessor in office large amounts of money, United States bonds, state funding bonds of 1869, state scrip, state levee bonds, swamp-land warrants and scrip, county scrip, and certificates of indebtedness issued by the city of Little Rock, naming the amount of each; that a large amount of state scrip was funded during the first term of said Churchill, under the provision of an act of the general assembly of the state to provide means for defraying the expenses of the state government, approved December 23, 1874; that he issued 74 of the bonds issued under said act of the denomination of \$1,000 each, (all issued thereunder being of the same denomination,) to the permanent school fund, and took in exchange therefor an equal amount of 5 per cent. interest-bearing state scrip, and received credit therefor as against said school fund; that during said term he sold 81 of said bonds, of the denomination aforesaid, for the same kind of state scrip at par; that he sold other of said bonds for non-interest-bearing scrip, without authority of law or the direction of the board of finance, said bonds aggregating the amount of \$165,000; that he failed and neglected to verify said scrip, as his duty was, and failed also to burn the same as required by said act, and failed to take certificates of said burning, except as to the sum of \$6,000; that said Churchill failed and neglected to verify or receive certificates for and cause to be burned state scrip received in exchange for 10 of said bonds directed to be sold, for interest-bearing state scrip, by said board of finance, on the ninth March, 1877, and 35 of said bonds, so directed to be disposed of on the fifth of April, 1877, during his second term; that on or about the thirty-first December, 1877, and long after the aforesaid sale of said bonds, the said Churchill, under the provision of "An act to provide for the cancellation of state scrip," approved May 28, 1874, burned, in the presence of the governor, secretary of state, and auditor, \$145,000 of state scrip, which he credited to the account of bonds sold; that during his three terms, by his negligence and mismanagement, he occasioned great additional losses to the state by failing to charge interest on bonds sold, and by taking scrip therefor, including advanced interest, and by failing to account for interest due the state in many other instances; and that the books and accounts of said treasurer were kept in such a confused manner that the exact amount of said delinquencies could not be ascertained by plaintiff, whereupon she asked that an account be taken and stated between herself and said defendant Churchill.

The defendants demurred to the complaint on the grounds of (1) want of jurisdiction; (2) multifariousness; and (3) that it does not state facts sufficient to constitute a cause of action; which being overruled by the chancellor as to each of the three several grounds, the defendants answered over, in substance denying all the material allegations of the complaint severally; and such as are sureties on the first bond denying that the same is their deed, because they say, after they had all signed the same, and before it was delivered or approved, the name of their co-surety Thomas D. Radcliffe was erased,

both from the body thereof, and where signed by him, without their knowledge and consent; and the same plea is made by the defendant sureties on the third bond because of the erasure of the name of their co-surety Fred Hanger; the defendant S. N. Williams, surety on the first and second bonds, alleging in his separate answer that he signed said first bond on condition that Churchill should obtain other signatures thereto than those he did obtain, and that he signed and delivered the same to said Churchill as an escrow, not to be delivered finally until such other names were obtained as well as those who did sign the same.

The cause was thereupon referred to Thomas H. Sim, Esq., as special master, to take and state an account as prayed in the complaint. The report of the special master was made, and excepted to by defendants and by the plaintiff; the exceptions of the latter only being necessary to be stated here, and are, in substance, that the \$59,000 in unaccounted-for state scrip should have been either wholly or ratably apportioned to the accounts of the second term, instead of being wholly appropriated to the account of the first term, as was done by the special master, and that the item of \$9,589.04 should have been charged to the sinking-fund account of the second term, instead of being placed to that account in the third term. The final account of the special master against the defendant Churchill is expressed as follows, to-wit:

	DEBITS.			CREDITS.	
	Currency.	State Scrip.	Swamp-Land Scrip.	State Scrip.	Net Debit Balances.
Summary No. 1, for first term.....	\$ 6,579 35	\$57,730 05	\$.....	\$.....	\$64,309 40
Summary No. 2, for second term.....	3,986 20	.....	110 00	1,087 33	3,008 87
Summary No. 3, for third term.....	13,407 86	.....	.....	204 12	13,203 74
Total balances.....	\$23,973 41	\$57,730 05	\$110 00	\$1,291 45	
Deduct credit balance in state scrip.....	.....	1,291 45	.....	
Net debit balance on the three terms...	\$23,973 41	\$56,438 60	\$110 00		\$80,522 01

—Aggregating for the three terms, \$80,522.01, without interest.

NOTE. From this balance is to be deducted the proceeds of \$2,570.44 in county scrip, held by Treasurer Woodruff, referred to in report of special master.

The court below overruled all of the exceptions to the special master's report, sustained the same in full, and the plea of *non est factum* in favor of all the defendant sureties on the first and third bonds, and the state appealed to this court.

The statement of account by the special master is so full and complete, so accurate in detail, so intelligible in arrangement, and so satisfactory in every respect, that, except where questions of law arise to affect his conclusions, we are quite agreed with the learned chancellor, and shall not interfere with his finding of facts in confirmation of the reports.

At the threshold we are met by the defendants' demurrer in the nature of a plea to the jurisdiction of the court below. Their contention is that it is an unheard-of thing that a suit for breach of an official bond is cognizable otherwise than in a court of law, which, they contend, is competent to afford a plain and adequate remedy to the plaintiff in this controversy. They say, furthermore, that, while equity has jurisdiction in matters of account, such jurisdiction attaches only in cases of "mutual accounts" between parties lit-

igant. They say, also, that, their contention on the last proposition being well founded, the jurisdictional *status* cannot be fixed by a combination of the separate individual and single accounts, as they claim is made in this cause.

In the case of *Smiley v. Bell*, 1 Mart. & Y. 378, the court had under consideration an account in favor of one of the parties, with two payments, in money as credits, in favor of the other party. The court held that such an account was not the proper subject of equity jurisdiction, holding that there was a remedy at law. The syllabus to the case is thus stated: "Jurisdiction of courts of equity in matters of account depends upon whether the accounts are mutual and complicated." The jurisdiction in that case did not turn so much upon the mutuality of accounts as upon their complication, and it is safe to say that, in all cases where "mutuality of accounts" is claimed to be the basis of equity jurisdiction, "mutuality" is only an essential element in this: that it indicates intricacy and complication.

In *Ludlow v. Simond*, 2 Caines, Cas. 1, Justice THOMPSON, in delivering the opinion of the court, said: "The jurisdiction, he [Fon Blaque] again says, exercised by courts of equity, may be considered in some cases as assistant to, in some concurrent with, and in others exclusive of, the jurisdiction of courts of common law. Matters of account form one class of cases, wherein courts of law and equity exercise concurrent jurisdiction. Blackstone lays it down as extending to all matters of account; and it is a subject, I think, over which the jurisdiction of a court of equity ought to receive a liberal construction, because the mode of proceeding is more peculiarly adapted to a deliberate examination and correct settlement." That was a case not materially different from the one at bar, in so far as the mere question of the character of the account is concerned. KENT, C. J., in delivering a separate opinion in the case, said: "The accounts embraced the whole process of the adventure, from its commencement to its conclusion, and consequently consisted of a variety of charges and credits. As then one material part of the cause depended on a settlement of accounts, I think it came properly within the cognizance of the court. Chancery has a concurrent jurisdiction with the courts of law in all matters of account."

It would seem that the difficulty of properly adjusting accounts is that which confers the jurisdiction of accounts upon equity courts, without much regard to the singleness or mutuality of the same. This idea consists with the language of our statutes conferring jurisdiction upon chancery courts and courts exercising chancery jurisdiction. We deem it unnecessary to say more under this particular heading than that the defendant Churchill, as the treasurer of the state, keeping her accounts against himself, and his own at the same time against her, may be said to have kept "mutual accounts," in the sense of the legal expression, because there are upon his books almost innumerable items of debit and credit, many of which, singly and alone, are matters of contention and dispute between himself and the state.

Again, the complaint sets forth that there is such confusion in the books of defendant Churchill, as treasurer, that it is almost impossible, in many instances, to determine which of his three terms should be chargeable with items of his delinquency. From the face of the complaint we readily see that a common-law court would be utterly powerless to do justice between the three sets of bondsmen, and this thought naturally causes the mind to revert back over ground already traversed, and propound the question, "how would three separate trials at law, perhaps by three separate juries, on the three separate bonds, result?" No two of the juries would likely agree as to the appropriation of any item of debit or credit when its appropriate place was at all doubtful.

The question of jurisdiction being decided, the argument that there is a misjoinder of parties as presented in argument, and that the complaint is multifarious, cannot be sustained, since they both are intimately connected with

the subject-matter of jurisdiction. The following authorities, among others, we think sustain us in our conclusions on the subject, viz.: *Witter v. Arnett*, 8 Ark. 57; *Trapnall v. Hill*, 31 Ark. 345; *State v. Brown*, 58 Miss. 835; *Lott v. Mobile Co.*, 23 Cent. Law J. 308; *Gay v. Edwards*, 30 Miss. 218; *Governor v. McEwen*, 5 Humph. 241; *Spottswood v. Dandridge*, 4 Munf. 289; *Gaines v. Chew*, 2 How. 619; *Winter v. Smith*, 45 Ark. 549.

The court below, having overruled defendants' demurrer to its jurisdiction, subsequently refused to sustain a motion made by them to submit certain issues of fact to a jury, and the refusal of the chancellor comes up for review. The motion of defendants was made in assertion of the constitutional right claimed to be enunciated in the seventh section of our "declaration of rights." The language employed in that section is: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy," etc.

In the case of *Williams v. Citizens, etc.*, 40 Ark. 290, this court held that "the constitutional right of trial by jury is confined to cases which, by course of common law, were properly so triable before." Chancery courts are not to assume jurisdiction of a cause for the purpose of depriving parties of the right of a jury trial, but, once having taken jurisdiction because the case is one properly cognizable in a court of equity, the submission of issues of fact to a jury is a matter within the sound discretion of the chancellor. Even when a submission is made, the findings of the jury are to be regarded merely as made in aid of the chancellor. There is no right of trial by jury in causes which would have been cognizable in courts of equity at and before the adoption of our constitution.

On the testimony adduced, the court below sustained the pleas of *non est factum* made by all the defendant sureties on the first bond, and by the defendant sureties on the third bond. The facts are clear and indisputable that the name of Thomas D. Radcliffe, in the body of and as signed to the first bond as one of the sureties, was erased by defendant Churchill after all the defendant sureties had signed it, and before it was delivered or approved, and that this alteration was made without the knowledge and consent of defendant sureties, except that A. H. Garland, one of their number, then governor of the state, observed the erasure when the bond was presented to him for approval. It is also evident that the alteration is and was such as to be readily seen by any one reading the bond. The facts are not so clear as to the erasure of the name of Fred Hanger from the third bond; but while there is some conflict in the testimony on the subject, and some doubt in the mind of the court, it is perhaps more apparent than real, and this court sees no reason sufficient to disturb the decree of the chancellor in relation thereto.

The principal cases on the subject of pleas of *non est factum*, and those most nearly in point, perhaps, are *Smith v. U. S.*, 2 Wall. 219, and *State v. Craig*, 58 Iowa, 238, 12 N. W. Rep. 301. The principle enunciated in these cases may be briefly stated thus: Where a bond or other obligation has been altered materially by the erasure of a name, or the erasure or change of a figure or important word, after the same is signed, and before delivery, and the alteration is ordinarily observable, the bond is void as to all the obligors who had no knowledge of it, or did not consent to the alteration, and have not ratified the bond in its altered shape. The case of *Smith v. U. S.*, above cited, is one very similar to the one at bar. There are these points of difference, however: The district judge, the agent of the obligee, was not in that case as in this a surety on the bond, and therefore possessed no double relation when the bond was presented to him for his approval. On the other hand, in that case, the district judge's attention was called particularly to the alteration of the bond when the same was presented to him for approval, as it had been previously, while in this case Gov. Garland, according to his own testimony, (and it appears nowhere else,) merely observed the erasure at the time the bond was

presented to him, his mind being engrossed with other, and what was thought then to be weightier, matters, and, nothing being said by others about it, it escaped his closer scrutiny, as a matter not important in itself.

It is contended by appellant's counsel that as A. H. Garland was governor of the state at the time, and also one of the sureties on the bond, he occupied a double relation, the one relation being antagonistic to the other, and therefore notice to him of the apparent alteration was no notice to the state; citing in support of their position the case of *Stevenson v. Bay City*, 26 Mich. 44. In that case McCormick, the mayor of Bay City, who was authorized to approve the official bonds of the city officers, as was also the recorder, was also a surety on one of these official bonds. One of his co-sureties, before the bond was delivered for approval, notified him as mayor that he (the co-surety) had signed the bond on certain conditions. The supreme court of Michigan, in a suit on the bond against principal and surety, held that this defense of the co-surety was not good, as a notice of the conditional signing of the bond to the mayor was no notice to the city, since the mayor occupied the double relation. It is nowhere mentioned in the statement or opinion whether the mayor or the recorder approved the bond. The presumption is, however, that it was approved by the recorder, because it is evident the point would have been more strongly pressed had it been approved by the mayor; because it was the duty of the mayor, under the circumstances, to decline to act upon it, leaving it to the recorder, every officer being presumed to have done what duty required; and because the court would hardly have failed to state so important a fact as that the mayor did actually approve the bond, and that it was delivered to him for that purpose. This being the presumption, the reasoning of the court is much strengthened. The recorder had no notice of the condition, otherwise the plea would have been good. It was not the official duty of the mayor to transmit the notice he had received from his co-surety to the recorder before the approval of the bond. The recorder's approval of the bond could not possibly be affected by information locked up in the brain of the mayor, who presumptively had nothing whatever to do with the approval, and, for aught we know, never saw or heard of it after the notice of the condition was given him by his co-surety.

In this case Gov. Garland had no alternative, no choice in the matter, so far as acting or not acting upon the bond is concerned. The law imposes upon him the duty of approving it as soon as presented. He had no double, no substitute to whom he could refer the matter. He could not have disqualified himself to act by any previous act of his own. He simply was compelled to act in the matter. The duty of Churchill, the treasurer elect, was to present to Garland, the governor, and no one else, a good and sufficient bond, and it became the immediate duty of Garland, as governor, to approve it. He might have been under the moral obligation of taking his own name off the bond as one of the sureties. Indeed, it may have been his moral duty never to have signed it; but his legal duty as governor was to act on the bond when presented, whether he had done right or wrong,—whether he had acted prudently or imprudently, previously, in relation thereto, as a private citizen.

Much of the apparent difference of opinion expressed in the adjudicated cases grows out of difference of opinion as to what erasures and alterations are material and what are not; and this difference has seemingly carried some judges to the very verge of relieving the obligee of all responsibility as to alterations appearing upon the face of an obligation, and holding him responsible only when he has been made acquainted extraneously with all the *facts and circumstances* connected with the very act of erasure, or of making the alteration otherwise. Thus in the case of *Russell v. Freer*, 56 N. Y. 67, the name of J. appeared in the body of the bond when H. and F. signed, and they were told at the time by C., principal obligor, that J. would sign the bond. It transpired that the name of J. was subsequently, but before delivery, stricken

out without the knowledge or consent of H. and F., and the bond was then delivered to M., the obligee, *who had no knowledge of the facts*, and who thereupon received it for the purpose for which it was intended, thereby incurring responsibility relying thereon. J. never signed the bond, and therefore there was *no erasure of his name as signed by him*. In that case the court held H. and F. bound. The principle enunciated in that case is this: There being no erasure of the surety as signed by him, the erasure of his name in the body of the bond is not such a material alteration as to create suspicion that the bond is not genuine, and therefore is not such as to put the obligee on notice and inquiry, and that in such case he can only be affected by actual notice. The same rule, defining what erasures appearing upon the face of an obligation are not such as to put the obligee on notice, is laid down in *Cutter v. Whittemore*, 10 Mass. 442.

The rule above stated is in nowise in conflict with the rule applicable to the case now under consideration; that is to say, that where the name of a surety, both in the body of the instrument and as signed by him, is erased, and so appears to the reader, the alteration is such as to put the obligee upon notice. There are no exceptions to this rule among the authorities, so far as our research has extended, and the following are cited to show the argument: *Smith v. U. S.*, 2 Wall. 219, *supra*; *Dair v. U. S.*, 16 Wall. 1; *State v. Craig*, 58 Iowa, 238, 12 N. W. Rep. 301; *Sharp v. U. S.*, 28 Amer. Dec. 676, and notes.

Surety signing bond on express condition that all named in the bond shall sign, is released if one of them does not sign, and his name is erased from the body. *Inhabitants of Readfield v. Shaver*, 50 Me. 36; *Fletcher v. Austin*, 11 Vt. 447. Where the obligee is, otherwise than by an inspection of the obligation, and before the same is accepted by him, informed of the facts and circumstances connected with the alteration, he is, of course, affected with notice, and, if he accepts the obligation, the sureties not assenting to the change, or ratifying the obligation in its new shape, will not be bound. *Martin v. Thomas*, 24 How. 315; *U. S. v. O'Neill*, 19 Fed. Rep. 567.

The name of Radcliffe, one of the sureties on the first of the bonds now in suit, having been erased both in the body of the bond and as signed by him at the end, the alteration was sufficient to put the obligee on notice and inquiry that possibly the bond was not genuine, or had been materially altered so as to increase the liability of the obligors, and it was the obligee's duty to decline to accept it, and thereby protect innocent parties; and, failing to do this, being unable now to account for the alterations otherwise than as rendering the bond void as to the non-assenting sureties, they are, by all the rules known to the law, released. Greenl. Ev. 564; *Miller v. Stewart*, 9 Wheat. 680. There are a few cases in which the sureties are made responsible for the alterations made by their principal while the bond is in his hands for completion as for the acts of an agent, under the rule (good in another class of cases) that, if one of two innocent persons (the surety and obligee) must suffer from another's (the principal's) acts, he ought to be the sufferer who first reposed confidence in the wrong-doer. This is the doctrine enunciated in the case of *Wilmington & W. R. Co. v. Kitchin*, 91 N. C. 39. Besides being unsupported by precedent, the doctrine has not the strength of argument that the more general rule has. A surety is everywhere in law a favored debtor. He is moreover a necessity in many of the most important business transactions of life, both public and private, and the policy of the law is that he should be favored more than other debtors, since he is, or may be to a certain extent, powerless to protect himself. To hold him bound by the acts of the principal in increasing his liability without his knowledge and consent, by altering his contract, might be ruinous to him. There is nothing ordinarily in the situation of the parties to work as a restraint on the principal obligor in regard to the rights of his sureties. The obligee, however, occupies a situation which makes it

easy to impose a commensurate penalty upon him for his failure to protect the rights of the innocent surety. Hence, affected with notice in any of the ways pointed out by the law, he dare not fail to protect the surety; for, if he does, the surety is no longer bound to him. The rule is founded upon reason and justice, and any other conflicting with it must be discarded.

The attitude of A. H. Garland, one of the sureties on the first bond, and also governor of the state, and who approved the same, is such as to make his case a novel one. As the governor, he was the head of the executive department of the state government, and one of the duties imposed upon him as such was to approve the official bond of the treasurer and other state officers, when presented to him for that purpose. In the case of *Marbury v. Madison*, 1 Cranch, 149, the supreme court of the United States, through Chief Justice MARSHALL, said: "By the constitution of the United States the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." Emphasizing this principle, this court, in the case of *Hawkins v. Governor*, 1 Ark. 570, said: "All the departments of the [state] government unquestionably have the right of judging of the constitution, and interpreting it for themselves. But they judge under the responsibilities imposed in that instrument, and are answerable in the manner pointed out by it. The duties of each department are such as belong peculiarly to it, and the boundaries between their respective powers or jurisdiction are explicitly marked out and defined." And, in speaking of the governor, the court says further: "It is no answer to this argument to say that he may exercise his legal and constitutional duties in such a manner that individual injustice may be done without remedy or redress. So may the other departments." "The court can no more interfere with executive discretion than the legislature or executive can with judicial discretion." It is said, furthermore, that the constitution assigned to the governor no merely ministerial duties; neither can the law impose upon him any such.

We are not, then, permitted to judge of A. H. Garland's act in approving or otherwise dealing with the bond in question, as governor of the state. More than this, we are forbidden to do so, either in censure, criticism, or comment. Our task is to separate the official from the private individual whom we find is one of the sureties on a bond from the obligations of which he claims to be released. In other words, we are to deal with him just as we would deal with one of his co-sureties who had, before the delivery of the bond, observed the erasure of the name of Radcliffe therefrom. We take occasion to say, in the outset, that if a surety, affected with that kind of knowledge as to the erasure, is to be released, it is more on the grounds that the court has released some of his co-obligors in response to their pleas than because of the erasure itself. Dealing with him as if he were another individual than the governor of that name, he would be released on the same plea that his co-sureties have been released, except that he occupies a different position as stated. In response to that, he claims that, notwithstanding his after-knowledge of the erasure, he never waived his right to claim his release; he never assented to the alteration, nor ratified the bond as altered; and never did anything in relation by which he is estopped from making this his defense. The evidence does not show that the surety saw the erasure until after it was made, and knew nothing about it when or before it was made. In such case, there can be no assent; for assent, technically speaking, must precede in point of time the thing assented to. The evidence is equally at fault to establish a ratification which in point of time must succeed the thing ratified, because acts or words amounting to ratification must be affirmative in their character, and such as, in fact, would be sufficient to amount to the making of a new contract. There is no better settled principle than that, to hold one bound by any word or act as a waiver, it must be shown

that he so spoke or acted with all the facts and circumstances attending the creation of the right he is alleged to have waived. The rule most usually finds its application in the cases of indorsers of commercial paper, but it is none the less applicable to the case of a surety on a bond or other obligation. *Spurlock v. Union Bank*, 4 Humph. 337; *Creamer v. Perry*, 17 Pick. 335; *Robinson v. Berryman*, 22 Mo. App. 509; *Dodge v. Minnesota, etc., Co.*, 14 Minn. 49, (Gil. 39;) *Lyon v. Tams*, 11 Ark. 205; *Pike v. Douglass*, 28 Ark. 65. Nor is it sufficient that he should have notice of facts that, if followed up by inquiry, would have led to information that would have shown that he was discharged. *Thornton v. Wynn*, 12 Wheat. 187. Nor is there a waiver where one acts on a misapprehension of facts. *Spurlock v. Union Bank*, 4 Humph. 337, *supra*.

It is urged that Garland, as surety, with the knowledge of the erasure before the bond was filed, is now estopped from claiming his release on account of its invalidity by reason of the erasure. That theory is good only in case the surety has intentionally done something to injure the obligee, or has been guilty of such gross negligence as to amount to fraud. *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 336. There is nothing in the case to show such intent or such negligence, even if a surety be in any event answerable to the charge of negligence on account of his silence. *Miller v. Gilleland*, 19 Pa. St. 119. Mr. Garland's case, on principle, is not unlike that of two sureties, in the case of *Howe v. Peabody*, 2 Gray, 556, who signed after the alteration was made, and who were released, not directly because of the alteration, but because the sureties who signed before the alteration was made, were released by law, not having any knowledge of the alteration. The statement of the court in that case, that the last sureties had no knowledge of the alteration, evidently had reference to their want of knowledge of the circumstances attending the alteration, the same being evidently such as they would have seen. We conclude, therefore, that Mr. Garland is also released from liability as a surety on the first bond.

The special plea of S. W. Nilliams, surety on the first bond, that he signed the same conditionally, and that he delivered the same as an escrow to the principal defendant, Churchill, not to be delivered finally until certain things were done, are not sustained by the law and the evidence, except as to the first, and not as to that, except the retention of Radcliffe's name on the bond be regarded as one of the conditions of his signing, that being the only condition not performed. The rule in such cases is this: When the condition is suggested to the obligee by anything appearing upon the face of the bond, or is brought to his knowledge by extraneous evidence, before he accepts it, then the plea of conditional execution is good, otherwise not. It is needless, however, to discuss the subject further, as the object of the plea is fully obtained by the plea of *non est factum*. The plea that the bond was delivered to the principal obligor, Churchill, as an escrow, cannot be sustained, because Churchill was in no sense a third party or stranger, but was occupying the most important relation to the bond, and all its other obligors, as well as to the state, the obligee.

It will be seen from the report of the special master that defendant Churchill disposed of \$165,000 of Loughborough bonds during his first term, presumably all for state scrip, and accounted for only \$6,000 of the same, leaving \$159,000 unaccounted for in any way. The report shows also that during his second term he disposed of \$45,000 of the same class of bonds, and accounted for none of them. In each case the law required him to make a proper list of the scrip tendered for the bonds, have it certified by the burning committee, and then deliver the scrip to that committee to be burned, and the bonds to the purchaser thereof. The certificate of the burning committee was the only lawful voucher he could take for scrip received for bonds. Failing in any case of the sale of bonds for scrip to take this certificate, the pre-

sumption was that he still held the scrip. In December, 1877, after all the bonds referred to above had been disposed of, defendant Churchill, as treasurer, having on hand a large amount of state scrip which he had received from time to time from the beginning of his first term until then, (near the close of the first year of his second term,) caused the same to be destroyed under the provision of another act of the legislature than that under which Loughborough bonds were issued, and the scrip received therefor was canceled. Of this amount of state scrip which he caused to be canceled and destroyed in December, 1877, he, with the approval of the cancellation committee, appropriated \$145,000 to his Loughborough bond account generally. The special master placed \$45,000 of this amount to the credit of the bond account of the second term, balancing the same exactly; leaving \$100,000, which he applied as a credit to that amount of the first term; and, deducting that credit from the debit, there remained for the first term, unaccounted for and as a charge against defendant Churchill, the sum of \$59,000 of these bonds. This appropriation of the special master was adopted by the court below, and comes up for our consideration on exception by the plaintiff to the report of the special master, and the decree of the court confirming the same.

The general rule is that an unaccounted-for debit balance should be charged to the term or period in which the default or breach of duty occurred. But the difficulty in this instance is to determine in which term the breach occurred. True, in the first term, \$159,000 of the bonds were disposed of, and are unaccounted for, yet the same thing may be said of the \$45,000 of bonds disposed of in the second. In both instances the breach of duty—the breach of the official bonds—consisted in not taking proper vouchers for scrip delivered up to be burned, and in delivering the bonds to purchasers without first taking these vouchers. In the one case there is a defalcation of \$159,000, and in the other a defalcation of \$45,000. The scrip burned in December, 1877, and appropriated to this bond account, so far as we can know from the evidence, had no connection with the bonds disposed of and accounted for. Defendant Churchill might, perhaps, have appropriated the scrip to the full satisfaction of his bond account of one term, and the balance to the other, but he made no such appropriation, but left that to be done by the court as the law directs. The court can find no rule of law which would apply the credit to the one term more than to the other, because we cannot know from the evidence when the credit assets came to hand. We cannot even entertain a reasonable presumption that any particular portion was taken in during one term and the remainder in the other. Under this state of things, the court is authorized to make no other than an equitable appropriation. We therefore adopt the rule laid down by Chancellor WALWORTH in *Stone v. Seymour*, 15 Wend. 19, and appropriate the \$145,000 ratably between the \$159,000 and the \$45,000 debits, and this accordingly is done.

The plaintiff also questions the justice of the appropriation of the item of \$9,589.04 on the sinking-fund account as a charge against the third term instead of the second term. The first error was committed by entering an erroneous credit of that amount in the last quarter of the second term. This was attempted to be corrected by charging the same amount to the account of the first quarter of the third term. This was proper as between Churchill and the state, but the case is very different, and more difficult of solution, as between the two sets of sureties on the second and third bonds. The credit having been taken in the second term for so much money paid out, without a voucher to substantiate the truth of the payment, or to show to whom it was made, constitutes of itself a breach of the bond for that, the second, term. There is no evidence which satisfactorily explains the matter. The charge of the same amount back in the third term is no explanation whatever, nor does it purport to be. The \$9,589.04 appropriated by the chancellor as a charge against the third term must, under the rule governing such cases, and in ac-

cordance with the authorities, be charged against the second term and its obligors. See *Viotan v. Otis*, 24 Wis. 518; *Inhabitants of Rochester v. Randall*, 105 Mass. 295.

The decree of the chancellor is reversed as to the appropriation of credits and debits as herein indicated, and affirmed in other respects, interest at 6 per cent. on all amounts adjudged, from date of his decree; that portion of it distributing the costs being modified so that two-thirds of the costs be adjudged against defendant Churchill, and one-third thereof against him and his bondsmen for the second term herein sued, and the clerk will make up the decree in accordance with the opinion.

COCKRILL and BATTLE, JJ., did not sit in this cause.

KIRBY and others v. TOMPKINS.

(Supreme Court of Arkansas. February 19, 1887.)

1. REPLEVIN—CONDITIONAL SALE—TITLE OF PROPERTY IN PLAINTIFF—PLEADING—JUDGMENT.

In an action of replevin of a sewing-machine which had been sold to defendant by plaintiffs by a conditional sale, promissory notes being given for part of purchase money, which notes were conditioned that the right of property in the machine should remain in the plaintiffs until the notes were paid, the right of plaintiffs to recover was admitted by the answer of defendant, the only effect of which was to protect the defendant against damages and costs. *Held*, that the judgment awarding to defendant a return of the machine or its value was bad, because defendant had not claimed a return thereof.

2. CONDITIONAL SALE—SURRENDERING PURCHASE-MONEY NOTES BEFORE REPLEVIN SUIT.

In an action of replevin of a sewing-machine which had been sold by plaintiffs to defendant by conditional sale, where the evidence showed that plaintiffs were the owners and entitled to the possession of the machine, and there was nothing in the agreement between the parties requiring the plaintiffs to give up the notes which had been given for part of the purchase money before they could resume possession of the property, *held*, that an instruction by the court to the jury that plaintiffs could not maintain the action without first surrendering, or offering to surrender, the notes, was erroneous.¹

Appeal from circuit court, Nevada county.

Atkinson & Tompkins, for appellants. *Montgomery & Hamby*, for appellee.

SMITH, J. S. B. Kirby & Co. brought replevin against Tompkins for a sewing-machine. The answer denied that the defendant unlawfully detained possession, or that the plaintiffs had sustained any damage by the detention. On a trial before a jury the following facts were proved: On the fifteenth day of March, 1884, the plaintiffs had made a conditional sale of the machine to the defendant at the price of \$43, of which \$10 were paid, and notes payable at one and two months were taken for the residue. The notes were produced, in which the agreement for sale was thus expressed: "The Wilson Sewing-machine, style 3, plate number 202,789, for the use of which to the maturity hereof this note is given, is and shall remain the property and under the control of S. B. Kirby & Co., or assigns; and for default of payment, or if the said S. B. Kirby & Co. deem the machine in unsafety by removal or otherwise, it shall, on demand, be returned to S. B. Kirby & Co., or assigns, in good order, and with *pro rata* pay for its use, which shall be \$3 per month. It is understood and agreed that S. B. Kirby & Co. own this machine absolutely, and the title remains in them until the machine is paid for in full." Shortly after maturity of the notes, an agent of the plaintiffs demanded payment of the defendant or the surrender of the machine. The defendant refused

¹See *Redewill v. Gillen*, (N. M.) 12 Pac. Rep. 872, and note; *Tufts v. Cleveland*, (Tex.) 3 S. W. Rep. 288.

payment, and refused also to give up the machine unless his notes were surrendered at the same time. The agent replied that he had no instructions upon this point. The court, in effect, told the jury that the plaintiffs could not maintain their action without first surrendering, or offering to surrender, the notes. The verdict was for the defendant, and that he was entitled to the possession of the machine, the value of which was found to be \$32.50, and judgment was entered for the return of the machine or its value.

The judgment is bad, because it awards to the defendant restitution of a chattel of which he had not claimed the return. The right of the plaintiffs to recover was admitted by the answer, the only effect of which, if true, was to protect the defendant against damages and costs. *Mansf. Dig.* § 5181; *Brown v. Stanford*, 22 Ark. 76; *Neis v. Gillen*, 27 Ark. 184; *Wells*, Repl. §§ 485, 487, 491, 713.

Passing to the evidence, the uncontradicted facts are that the plaintiffs were the owners and entitled to the possession of the machine; and nothing in the agreement between the parties required the plaintiffs to give up the notes before they could resume possession of the property. *Fleck v. Warner*, 25 Kan. 492.

Reversed, and a new trial ordered.

ST. LOUIS, I. M. & S. RY. v. SMITH.

(*Supreme Court of Arkansas. February 26, 1887.*)

NEW TRIAL—VERDICT AGAINST EVIDENCE.

Plaintiff brought an action against a railroad company upon an account for services. He had been a station agent of the company, and had collected a large amount of money which had not been accounted for. The company discharged him, and refused to pay the salary and commissions due him; and, when the action was brought, pleaded as a counter-claim the amount of the missing funds. Plaintiff did not deny that the money had been collected by him, but undertook to prove that it had been appropriated by the company's telegraph operator and clerk in the same office, who, at his request, acted in his absence as his assistant. There was a conflict of testimony as to whether the clerk or plaintiff appropriated the funds. The jury found a verdict for the plaintiff. *Held*, that the evidence was insufficient to sustain the verdict, and that defendant was entitled to a new trial.

Appeal from circuit court, Ouachita county.

Dodge & Johnson, for appellant. *B. W. Johnson*, for appellee.

COCKRILL, C. J. The errors complained of in the court's charge to the jury were waived by failing to assign them as grounds for a new trial in the motion filed for that purpose. The only question presented by the record is, is the evidence sufficient to sustain the verdict? The suit was instituted by Smith against the company upon an account for service rendered. The correctness of this account was admitted by the company, the contest arising over a counter-claim presented by the company against the plaintiff. The facts as to that are as follows: The plaintiff had been the company's station agent at Camden, in this state. It was his duty to make a daily report of his business to the company, and with it to remit the day's collection of money made in the company's business. At the end of about a year's service it was discovered that a large amount of the company's money collected at his station had not been accounted for. He was discharged, and the company refused to pay the salary and commissions due him. It was for this he sued. He did not deny that the money claimed by the company had been collected and not accounted for, but undertook to prove that the missing funds had been appropriated by the company's telegraph operator and clerk in the same office, who, it appears, was his assistant. There was a conflict of testimony as to whether the clerk or the plaintiff appropriated the missing funds, but, for the purpose of fixing the plaintiff's liability to account to the company, it

is not material upon whom the odium of the misappropriation rests. All agree that the money was collected, and not accounted for, and there is nothing to vary or contradict the plaintiff's statement to the effect that he had general charge of the office and control of the business to which he was assigned; that he had the right to collect and handle the money to the exclusion of the clerk and all others; that the company looked to him for the payment of all money collected in his department at Camden, furnished him with a combination lock safe for its safe-keeping, and required a bond of him alone for the faithful discharge of that duty. It was the plaintiff's custom to permit the clerk to receipt for money due the company in his (plaintiff's) name as station agent. Now, if it is a settled fact that it was through his clerk that the deficit was brought about, the maxim *qui facit per alium facit per se* would still leave the liability to account to the company upon the plaintiff. Having assumed the responsibility to the company for the payment of all money collected through his office, he could not after a loss shield himself from liability by proving that one who acted with his assent in making collections had appropriated the money he was allowed to collect. The plaintiff seems to have fully appreciated his liability, for he testifies that he intended to make good the losses to the company as long as they appeared to be within reasonable bounds.

In the month of January, previous to his discharge, the plaintiff was relieved from station duty for a period of three days, and assigned by the company to other service, the clerk above mentioned in the mean time having sole charge of the station by direction of the plaintiff's superior officer. If it were shown that any defalcation occurred in this interval, the plaintiff would to that extent be exonerated from liability, because the responsibilities as well as the duties of the office had for that time been devolved by the company itself upon the agent. But there was no attempt to locate any mismanagement in the office in that interval. The plaintiff himself testifies that the first shortage in the accounts of the office discovered was on the seventh of the following June, in the account for that month; but the balance-sheet for each day showed for itself what had been or ought to have been collected, and any error could have been easily detected. The case was tried upon an erroneous theory of the principal's liability or non-liability for his agent's acts. The verdict is without evidence to sustain it, and the judgment must be reversed, and the cause remanded for a new trial.

DARNELL and others v. STATE *ex rel.*, etc.

(*Supreme Court of Arkansas. February 26, 1887.*)

1. CORPORATIONS—TURNPIKE COMPANY—FORFEITURE OF CHARTER—QUO WARRANTO.

It is a tacit condition, annexed to the creation of every corporation, that it is subject to dissolution by forfeiture of its franchise for willful misuser or non-user in regard to matters which go to the essence of the contract between it and the state, and a proceeding upon an information in the nature of *quo warranto*, filed by the attorney general on behalf of the state, is the proper mode of trying the issue.

2. TURNPIKE—FERRY—REVOCATION OF CHARTER OF TURNPIKE.

Where it was the intention of the charter of a turnpike company to establish a ferry merely as an incident to the turnpike, in order to render travel over it feasible, the privilege of maintaining the ferry falls in that event with the revocation of the turnpike franchise.

Appeal from circuit court, Ouachita county.

Barker & Johnson, for appellants. *H. G. Beeme and Jones & Martin*, for appellee.

COCKRILL, C. J. The appellants enjoyed a corporate franchise under a charter framed under the general act of January 8, 1851, (see Acts 1850-51, p. 851,) to take tolls from a turnpike road, and a ferry connected with it, over

the Ouachita river. The charter was annulled by the judgment of the circuit court upon an information, in the nature of *quo warranto*, filed by the attorney general on behalf of the state. The cause was tried by the court without a jury. No declarations of law were asked, and none were given; none of the evidence was objected to, and a new trial was not asked. The bill of exceptions sets forth the evidence adduced on the trial, nothing more. The court found as a fact that no effort had been made to keep the road up as required by the charter for more than five years next before the institution of this proceeding, and that the road had never been kept in any better condition than the ordinary county dirt roads; and thereupon gave judgment annulling the charter, and forfeiting to the state the franchise previously enjoyed by the corporation.

Upon this state of the record, the only question presented by the appeal is this: Concluding, as we must, the facts to be correctly found, does the effect given to them by the judgment of the court legally follow? *Smith v. Hollis*, 46 Ark. 17. It is a tacit condition annexed to the creation of every corporation that it is subject to dissolution by forfeiture of its franchise for willful misuser or non-user in regard to matters which go to the essence of the contract between it and the state, and the proceeding here adopted is the proper mode of trying the issue. *State v. Real Estate Bank*, 5 Ark. 595; *Smith v. State*, 21 Ark. 294; *State v. Leatherman*, 38 Ark. 81; *Terrett v. Taylor*, 9 Cranch, 43; *Mumma v. Potomac Co.*, 8 Pet. 287; *People v. Railroad Co.*, 9 Wend. 361.

It is the very substance of the duty a turnpike company assumes when incorporated to construct and maintain its road in substantial compliance with its charter requirements. The charter in this case specified how the road should be constructed and maintained; its width, the height of the road-bed, and the drains being specifically designated. The court found, upon issue of fact, that these requirements had been persistently disregarded for a period of more than five years. This long-continued neglect indicates a degree of willful non-feasance that justifies a revocation of the franchise. *State v. Royalton & W. Turnpike Co.*, 11 Vt. 431; *People v. Turnpike Co.*, 23 Wend. 253; *State v. Turnpike Co.*, 21 N. J. Law, 9.

2. It was probably the intention of the charter to establish the ferry merely as an incident to the turnpike, in order to render travel over it feasible. The privilege of maintaining the ferry would in that event fall with the revocation of the turnpike franchise. If the charter was designed to confer the independent privilege of maintaining a ferry, as the information alleged and the circuit judge seems to have supposed, it went beyond the powers conferred by the act under which it was drafted, and an attempt to exercise the privilege under it would have been a usurpation of right. The power to grant ferry privileges was then, as now, vested in the county courts, and there is nothing in the act of 1851 indicating an intention to interfere with this power, or to place it elsewhere. If, then, the corporation was attempting to exercise a franchise under its charter to which it was not legally entitled, the information was the correct remedy to reach the usurpation, and the judgment of ouster is right. High, Extr. Rem. § 650.

In any view, the judgment is correct, and is affirmed.

SHAUL v. DUPREY.

(Supreme Court of Arkansas. February 26, 1887.)

1. EXECUTION—SUPERSEDEAS BOND—INJUNCTION—MANUF. Dtg. ARK. ST. §§ 1369, 2435.

Where judgment has been rendered against a defendant and his sureties on a *supersedeas* bond on appeal from a justice of the peace in a criminal case, and entered by a clerical misprision against the principal only, and at the next term amended by the court by a *nunc pro tunc* entry, so as to show a judgment against

the sureties as well, a bill in equity will not lie to enjoin execution against the sureties; Mansf. Dig. Ark. St. § 2435, authorizing the rendition of judgment in appeals from justices of the peace in criminal causes, in case of conviction, against the principal and sureties on the bond without further notice; and the cases of *Rogers v. Brooks*, 31 Ark. 194, and *Freeman v. Mears*, 35 Ark. 278, deciding that a judgment against the sureties might be rendered at a subsequent term without notice; and there being ample remedy at law by appeal, or by *certiorari*, with a temporary restraining order, under Mansf. Dig. Ark. St. § 1369, or by application to the court which rendered the judgment to recall and quash the execution. *Ryan v. Boyd*, 33 Ark. 778, distinguished.

Appeal from circuit court, Lee county.

H. N. Hutton, for appellant.

SMITH, J. The object of this bill was to enjoin the execution of a judgment which was alleged to be void for want of notice. From the bill, answer, and exhibits, it appeared that one Richardson, having been found guilty of a criminal offense by a justice of the peace, had taken an appeal, giving a *supersedeas* bond with the plaintiff as his sureties; that he was again convicted in the circuit court, and judgment rendered against him and his sureties for a fine of \$200 and costs, but, by some clerical misprision, the judgment was in fact entered against Richardson alone; that at the next term the court, without any notice to the parties to be affected, had undertaken by a *nunc pro tunc* entry to amend its record so as to show a judgment against the sureties as well as Richardson, and for satisfaction of such judgment an execution had been issued and placed in the hands of Duprey, the sheriff of the county, under which the property of the plaintiffs had been seized. At the hearing the circuit court dismissed the bill.

In appeals from justices of the peace in criminal causes, where the judgment has been superseded, section 2435 of Mansfield's Digest authorizes the rendition of judgment, in case of conviction, against the principal and sureties in the bond without further notice. According to the cases of *Rogers v. Brooks*, 31 Ark. 194, and *Freeman v. Mears*, 35 Ark. 278, the judgment against the sureties might be entered at a subsequent term without notice to them. If those cases are correct, the decree dismissing the bill is obviously correct. If, on the other hand, it be conceded that those cases were wrongly decided, section 3910 of Mansfield's Digest, requiring proceedings to correct misprisions of the clerk to be on reasonable notice to the adverse party, and section 5201 declaring all judgments rendered without notice to be absolutely void, the decree is still correct; for the party aggrieved by such a judgment has an ample remedy at law by appeal, or by *certiorari*, with a temporary restraining order, (Mansf. Dig. § 1369,) or by an application to the court which rendered the judgment to recall and quash the execution. If the court was not in session, the judge in vacation could stay the execution of the process until the court met. Mansf. Dig. § 2988 *et seq.*; Const. 1874, art. 7, § 14; *King v. Clay*, 34 Ark. 291; *Stillwell v. Oliver*, 35 Ark. 184; 1 High, Inj. (2d Ed.) §§ 228, 231.

We do not mean to impugn the authority of *Ryan v. Boyd*, 33 Ark. 778. In that case the execution was levied upon real estate, and the title thereto was liable to be clouded unless the sale was restrained. So there might be instances where a court of equity would be justified in interfering to prevent the sale of chattels, as, for example, family pictures, which have a peculiar value far above their market price, or slaves, when the institution of slavery existed; but, ordinarily, the judgment defendant has an adequate legal remedy, and there should be some other element of equity besides the allegations that a judgment is void to call for the interposition of the chancellor. Decree affirmed.

FREY v. CAMPBELL.

(Court of Appeals of Kentucky. February 24, 1887.)

1. MORTGAGE—ABSOLUTE DEED—REDEMPTION FROM EXECUTION SALE.

Where one conveyed her interest in land to another by a deed absolute in form, but the grantee at the same time executed to her a written agreement binding himself to reconvey the land to her so soon as he might realize from the rents a sum sufficient to repay him what he had paid out in redeeming the land from an execution purchaser, *held*, the two instruments should be considered together, and being so considered, constituted a mortgage.¹

2. SAME—RENT.

The grantee in an absolute deed that is shown to be a mortgage, being a mortgagee in possession, is to be held to the care that a provident owner would exercise in the management of the land; and when he rents it out, he is to be charged with what appears from the evidence to be a reasonable rent, even though he may not have received so much, especially when he keeps no account showing his receipts.

Appeal from circuit court, Daviess county.

Owen & Ellis, for appellant. *G. W. Jolly*, for appellee.

HOLT, J. The appellee, Amy W. Campbell, on January 29, 1879, conveyed to the appellant, W. H. Frey, by a deed absolute upon its face, her life-estate in 20 acres of land, which had been allotted to her as dower. He at the same time executed to her a writing binding himself to reconvey the land to her so soon as he might realize from the rents thereof a sum sufficient to repay him what he had paid out for her in redeeming the land from an execution purchaser. The two instruments, considered together, were properly treated by the lower court as a mere mortgage.

Its commissioner charged the appellant with \$100 rent *per annum* for the land; and, upon a settlement of the accounts between the parties, found the appellant indebted to the appellee in a balance of over \$300. This was reduced by the lower court to \$191.02, and a judgment rendered therefor for the appellee, after first decreeing that the mortgage had been satisfied. The principal ground of complaint by the appellant is that the court charged him with what it regarded as a reasonable rent for the land, instead of what he in fact realized from it. The judgment of the lower court does not recite the amount of annual rent charged to him, but merely gives the result of its calculation as to the conflicting claims of the parties. It was, however, about \$75. It is shown by a decided weight of testimony that \$100 was a reasonable rent *per annum* for the land. Some three or four years before the appellant got it, he rented it out for the appellee at \$140 a year; and, after this suit was brought, it was put in the hands of the receiver, and rented by him for \$100 for a year.

The appellant says that for 1879 he realized \$60; for 1880, \$57; 1881, \$30; and for 1882, \$45. A mortgagee in possession is held to the care that a provident owner would exercise, and is chargeable with what he should, with reasonable care and attention, have received. If he occupies or uses the property in person, the value of such use or occupation must necessarily be determined by the evidence of experts as to what ought to have been received for the rent. It is also admissible, where, as in this instance, he has not had the possession in person, but has failed to keep proper accounts. This the appellant does not seem to have done. He exhibits no book-account whatever, and presumably kept none. He never rendered any account to the appellee; and, if he kept none, he is chargeable with what he might have received, and must be presumed to have received, by the exercise of ordinary care. Indeed the true rule is that a mortgagee in possession, either in person or by tenant, is bound to account for the rents and profits received by him, or which

¹See note at end of case.

he might have received by the use of reasonable diligence and care, and cannot be allowed for improvements which may even better the estate, or which are of a permanent character even, unless they were proper to keep the property in *necessary* repair, because the burden of redeeming would be thus increased. 2 Jones, Mortg. §§ 1124-1127.

We must presume that what is shown would have been a reasonable rent for the property could, by the exercise of reasonable diligence, have been realized, and the amount fixed by the chancellor appears to us to have been substantial equity between the parties. Judgment affirmed.

NOTE.

An instrument in the form of a deed containing a clause of defeasance, and intended as a security, is a mortgage. *Pearce v. Wilson*, (Pa.) 2 Atl. Rep. 99; *Mellon v. Lemon*, Id. 56. Where a deed absolute on its face and a written agreement are contemporaneously executed, they should be construed together; and if it then appears that there was a pre-existing indebtedness, on payment of which the debtor and grantor will be entitled to a reconveyance of the property, and that the grantee surrenders no remedies before available for the collection of his debt, but merely obtains the additional right to retain the title to such property until the debt is actually paid, such deed and agreement constitute a mortgage, *Voss v. Eller*, (Ind.) 10 N. E. Rep. 74; *Huscheon v. Huscheon*, (Cal.) 12 Pac. Rep. 411; as does also a deed with a bond to reconvey the same land on the payment, within a given time, of a specified amount of money, with a named rate of interest, *Bunker v. Barron*, (Me.) 8 Atl. Rep. 253; *Martin v. Pond*, 30 Fed. Rep. —; *Butman v. James*, (Minn.) 27 N. W. Rep. 66; *Jeffrey v. Hursh*, (Mich.) 25 N. W. Rep. 176.

But a bond given by the grantee three years after the delivery of the absolute deed, conditioned to reconvey to the grantor the same land, does not constitute such an instrument of defeasance as will convert the deed into a mortgage, *Stone v. Merrill*, (Me.) 1 Atl. Rep. 684; and where a farm was conveyed to one who, on the same day, executed a defeasance, evidence was held admissible to show that the deed was an absolute sale, and that the defeasance was an after-consideration, and was not a part of the transaction, but a mere agreement that was never complied with, *Murray v. McCarthy*, (Pa.) 6 Atl. Rep. 243.

JOHNS v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 1, 1887.)

1. JURY—CRIMINAL CASE—APPOINTING SPECIAL SHERIFF TO SUMMON IMPARTIAL JURORS.

Affidavits being filed in a criminal prosecution stating that the sheriff would not summon fair, competent, and impartial jurors to try the case, the court had authority to appoint another person to summon jurors, under Crim. Code Ky. § 193, providing that the court may for sufficient cause designate some other officer or person than the sheriff to summon petit jurors. And under this section the appointment may be made at the instance of either party,—either the prosecution or the accused.

2. MURDER—AIDING AND ABETTING A CRIME.

Evidence examined, and held sufficient to convict the defendant as aider and abettor in the crime of murder.

Appeal from circuit court, Magoffin county.

Wood & Day, W. W. McGuire, and W. S. Harkins, for appellant. *P. W. Hardin*, Atty. Gen., for appellee.

BENNETT, J. The appellant having been indicted as aider and abettor to the murder of Proctor Arnett, and having been tried and convicted of the crime, and his punishment fixed at confinement in the state prison for life, and his motion for a new trial having been overruled, he has appealed to this court. The killing of Arnett occurred in Salyersville on the first Monday in August, 1885, late in the evening. On the trial the commonwealth proved that the appellant, while on his way to Salyersville, fired off his pistol, and proclaimed himself the best man in the world; that after getting to Salyersville, and before the commencement of the difficulty in which Arnett was killed, the appellant waived his hand at Arnett, and said he was a cat; that

he and John Anderson, the person who did the killing, were seen together, talking in a low tone; that he was heard to say to John Anderson: "We have got a fight fixed up, and we will carry it through;" that he was standing in the road when the deceased and another person were walking in the direction of him, and he drew down his pistol on them, and ordered deceased to stop; that he commenced the difficulty by firing his pistol at deceased; that thereafter deceased took a position by the livery stable, and the appellant came up with him at that place apparently looking him up; that deceased took appellant's pistol away from him, and asked him to cease the difficulty; that deceased shortly afterwards took a position near the court-house fence, where he was shot by John Anderson, and, after he was shot by Anderson, the appellant tried to shoot him with a gun, which he had obtained after his pistol was taken from him. These are some of the prominent facts proven by the commonwealth; and, if accepted as true, which the jury evidently did, the charge of aiding and abetting the killing of Arnett was clearly made out. The jury heard the evidence on both sides, and doubtless considered that introduced by the appellant tending to show that the deceased brought on the difficulty, by first attacking the appellant, yet came to the conclusion that the appellant was the blamable party. We believe that the evidence in the case sustains the verdict.

The lower court did not abuse its discretion in overruling the appellant's motion for a continuance of the case.

The instructions given to the jury were full, correct, and covered the whole case. Those refused were correctly refused.

The lower court, upon the affidavits of several persons stating that the sheriff would not summon fair, competent, and impartial jurors to try the case, designated another person to summon jurors to try the case. This the court had the right to do under section 193 of the Criminal Code. Under that section sufficient cause must be shown. Certainly sufficient cause was shown if the statements in the affidavits are to be accepted as true. To authorize the court to act under the section *supra*, it makes no difference whether the information is furnished by the attorney for the commonwealth or the defendant.

The judgment of the lower court is affirmed.

ADAMS EXP. CO. v. CITY OF OWENSBOROUGH.

(Court of Appeals of Kentucky. February 24, 1887.)

1. MUNICIPAL CORPORATIONS—POWER TO IMPOSE A TAX IN FORM OF LICENSE.

The charter of the city of Owensborough, (1 Acts Ky. 1881, p. 817,) § 36, provides that the common council shall have power to grant a license to the following persons, and to provide by ordinance adequate penalties for doing business without license, viz., tavern keepers, concerts, menageries, and *express companies*; and section 37 provides that, upon granting such license, the city council shall charge such sum as they shall deem fit and reasonable. *Held*, that although the power given municipal corporations to require a license of useful trades does not, generally speaking, confer power to tax such trades with a view to revenue, but gives power to require only a reasonable fee for the license, and labor attending the issue of the license, yet the last section in the foregoing charter, enlarging the power given in the preceding section, shows that it was the legislative intent to confer upon the city council full power over the subject, and to authorize them to use the power to license express companies as a means of taxing such companies if they saw proper to do so.

2. SAME—FOREIGN EXPRESS COMPANY PAYING LICENSE TO STATE EXEMPTED FROM CITY LICENSE.

Act of March 2, 1870, (1 Acts Ky. 1869-70, p. 33,) imposing a tax on foreign express companies, and providing that they shall not be required by any county, city, or other corporation to take out any other or additional license, or pay any other or additional tax for the right or privilege of conducting business in or through such county or city, *held*, this act was not expressly or impliedly repealed by a sub-

sequent act (1 Acts Ky. 1881, p. 817, §§ 36, 37) conferring on a particular city the power to license *express companies*. The act of 1870 shows an intention upon the part of the state to exempt *foreign* express companies from local taxation upon the payment of the state tax, and that intent is not to be reversed in favor of a particular city by mere implication from the general terms of a subsequent act, so as to enable the city, under that act, to impose a license on a *foreign* express company that had previously paid the license to the state required by the act of 1870.

Appeal from circuit court, Daviess county.

The common council of the city of Owensborough having passed an ordinance requiring a license of all express companies doing business in the city for which the company should pay \$25, and for failure to take such license imposing a fine of from \$10 to \$50 for each day the business was carried on without such license, the appellant, the Adams Express Company, a foreign corporation, applied for an injunction to restrain the city from prosecuting the appellant under the ordinance in the city court. The court below denied the injunction, and the express company appeals.

Hallam & Myers, for appellant.

HOLT, J. The charter of the city of Owensborough, approved March 18, 1882, by subsection 36 of section 10, provides: "The common council shall have power to grant licenses to the following persons and business, and provide by ordinance adequate penalties for doing business without license, viz., tavern keepers, innkeepers, retailers of spirituous liquors, * * * concerts, menageries, circuses, astrologers, * * * *express companies*, telephone companies," etc. Acts 1881, p. 817.

It is urged that the power to *license* does not include the power to *tax*; and that the distinction between the power to license as a *police regulation*, and for the purpose of *taxation*, must be kept in view. In the one a reasonable fee for the labor and expense of issuing the license can only be charged, while in the other it becomes a source of revenue. It is not usual to resort to a tax upon useful occupations for revenue. The law draws a distinction between them and those which are harmful, or serve merely for amusement. Judge Dillon says: "Concerning useful trades and employments, a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases the former right, unless such appear to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation with a view to revenue; but a reasonable fee for the license, and the labor attending its issue, may be charged. Respecting amusements, exhibitions, etc., the authority of the corporation, under the power to license, has been regarded as greater than when the same word is employed as to trades and occupations." 1 Dill. Mun. Corp. § 357. This rule is supported by the cases of *St. Louis v. Boatmen's Ins. Co.*, 47 Mo. 152; *Freeholders of Essex v. Barber*, 7 N. J. Law, 67; and *Mays v. Cincinnati*, 1 Ohio St. 272.

A license may or may not include a tax. It is noticeable, however, that the charter provision *supra* includes both useful occupations and those which serve for amusement only. They are all put upon the same footing. And subsection 37 provides, as to all of them: "And, in granting such licenses as by this act the common council is authorized to grant, they shall charge such sum or sums of money as they shall deem fit and reasonable, and annex to such licenses such terms and conditions as in their opinion the peace, good order, and general interest of the city may require." This last provision enlarges the scope of the preceding one, or at least shows that it was "the legislative intent" to confer upon the city council full power over the subject, and to authorize them to use the power to license as a means of taxation if they saw proper to do so.

It is urged that the words, "as they shall deem fit and reasonable," must be construed to mean "as *are* fit and reasonable," and authorize the imposition of a fee only for the issuance of the license. There might be some ground

for such a construction if they related to *useful* occupations only. The words "sum or sums," as used in the act, do not mean merely "fee or fees." The sum to be charged is not for issuing the license, but for the license itself. If the construction contended for be correct, and express companies can only be charged a license fee, then a saloon keeper can be charged no more. It also follows that however proper it might be to charge one calling more than another, that yet it cannot be done. This leads to an absurdity.

It is true, subsection 27 authorizes the council, in its discretion, to license and tax places of amusement. Under it they may refuse to do so, and thus prohibit the business, because it says that they shall not be carried on without the license. Under subsection 36, however, they may or may not require the license, but cannot prohibit the avocations therein named, and it enumerates useful occupations and those of amusement without distinction; and subsection 37 applies equally to all.

The appellant is, however, a foreign corporation. By the act of March 2, 1870, (1 Acts 1869-70, p. 33,) *foreign* express companies are required to pay a certain tax to the state in lieu of all other taxation. It expressly provides that they "shall not be required by any county, town, or city or other corporation or local jurisdiction in this state, to take out or obtain any other or additional license, or to pay any other or additional tax or sum of money, for the right or privilege of conducting its business in or through such county, town, city, corporation, or other local jurisdiction." Clearly, this act was not *expressly* repealed by the provision *supra* of the Owensborough charter. The latter is not an amendment of the former, and cannot be considered as repealing the exemption unless by *implication*. General words should not be construed to so operate as to a *particular* statute unless they are otherwise inoperative. The act of March 2, 1870, indicated an intention on the part of the state to exempt *foreign* express companies from local taxation by the payment of the state tax; and we are now asked to suppose that it intended to reverse the policy so announced as to and for the benefit of one particular city or *local jurisdiction*.

In the case of *Adams Exp. Co. v. City of Lexington*, 7 Ky. Law Rep. 716, where a provision of the charter of the city of Lexington identical in substance with the one now under consideration—in fact almost *totidem verbis*—was in question, it was held that the legislature did not by its enactment intend to repeal as to one particular municipality the exemption in favor of *foreign* express companies existing by virtue of the act of 1870 as to the towns and cities generally of this commonwealth. That case is decisive of this one, and the judgment below is reversed, with directions to overrule the demurrer to the petition, and for further proceedings consistent with this opinion.

FIRE ASSOCIATION OF PHILADELPHIA v. DICKEY and others.

(Court of Appeals of Kentucky. March 3, 1887.)

FIRE INSURANCE—OWNERSHIP OF GOODS—FORMER JUDGMENT.

A. took out a policy of insurance on the goods in his store, and indorsed the policy to B., his brother, to secure to the latter a debt alleged to be due him by A. The goods being destroyed by fire, A.'s creditors sued him, making B. a party also, and garnishing the insurance company. The court in that action determined that B. was a joint owner of the goods with A., and liable to the creditors as a partner with A., and referred the case to the commissioner to take proof of loss, and collect the amount of the policy from the company. The company refusing to pay, A. and B. brought this suit, for the benefit of the creditors, to compel payment. The company defended on the ground that, A. not being the sole owner of the goods, as he represented in securing the insurance, the policy was void. A. and B. attempted to deny that the latter had any interest in the goods. *Held*, the judgment in the former action was conclusive as to such joint ownership of the goods, and the question could not be again raised in this action. The order referring the case to the commissioner to make out proof of loss was not, however, conclusive as to the lia-

bility of the company on the policy so as to preclude it from contesting its liability in this action upon the ground of A.'s misrepresentation of the ownership of the goods.

Appeal from circuit court, Barren county.

Temple Bodley and C. S. Grubbs, for appellant. *W. L. Porter and W. P. D. Bush*, for appellees.

PRYOR, C. J. This is a peculiar case. M. L. Speer and M. F. Speer were brothers. The first named was an infant, but doing business in his own name, in the sale of goods, wares, and merchandise. The last named was an adult, and claimed to have loaned his brother money to enable him to conduct his business, for which he held his brother's notes. The infant, M. L. Speer, obtained an insurance policy on the goods in his store to the extent of \$3,000 in the company represented by the appellant, the Fire Association of Philadelphia, and had it indorsed for the benefit of his brother to secure him in his indebtedness. The goods were destroyed by fire, and the amount due by the policy from the company to M. L. Speer was attached, or garnished by the appellees, who had sold him goods, for the payment of their debts; the appellees, the creditors, claiming also that M. F. Speer was a partner or the sole owner, and liable for their debts. The younger Speer pleaded infancy, and the elder Speer denied that he was liable as a partner or otherwise, but insisted that the insurance was made to indemnify him against loss by reason of the loans to his brother. The cases, several in number, were heard, having been consolidated, and a judgment rendered for the creditors against M. F. Speer for their debts.

The insurance company was served as garnishees, and appeared through their general agents, upon whom the service was had, and made answers to the several actions by the creditors. They answered, in the one case, that they owed nothing to the debtors, and in the other cases, in substance, that there had been no proof of loss, and they might or might not be indebted to the parties. In this condition of the several actions, the judgment was rendered in the attachment cases against M. F. Speer, "directing the court's commissioner to report as to the priority of liens on the fund attached, and collect from the garnishees the fund that may be due or become due before the next term of this court to the defendant M. F. Speer. He will collect said fund. He may make proof of loss under the policy of insurance issued to defendant M. L. Speer, payable, in case of loss, to defendant M. F. Speer by said Fire Association of Philadelphia, and will report at the next term." To this order exceptions were taken by the insurance company, and, if a final judgment, no exceptions were necessary.

That the judgment was final as to M. F. Speer is certain, because it was adjudged that he pay to the creditors the amounts due them for the goods purchased, and upon which an execution might have issued. The judgment also determined that M. F. Speer was the owner or part owner of the goods,—a judgment rendered at the instance of these creditors, who are the appellees. If the judgment had been against the infant, or if the judgment had resulted in favor of M. F. Speer, then the latter would have been entitled to the insurance money, as the policy was indorsed for his benefit as an indemnity for money loaned. There was no judgment against the garnishees, no amount of recovery fixed, and none could have been ascertained at that time, because they answered merely as garnishees, and denied any liability until proof of loss had been made. The case was referred to the commissioner to make proof of loss; and this, of course, applied to all the proof necessary to enable a recovery on the part of the insured. The commissioner was authorized to collect the fund, because, when the proof of loss was made, the company could then pay the money over, and this might have been done before the next term of the court. By the terms of the order the liability of the appellant (the in-

surance company) depended on the proof of loss, and there was nothing in the order making it final as to the company, or from which an appeal could have been taken.

The company refused to pay the sum for which the goods were insured, or their value, and then this action was brought by M. L. Speer and M. F. Speer, for the benefit of these creditors, against the company, for the amount of the insurance. They pleaded that M. L. Speer was not the owner of the goods at the time of the insurance; that they belonged to M. F. Speer, and therefore they were not liable. If they did belong to M. F. Speer at the date of the policy, then the insurance was void. M. L. Speer represented himself as the absolute owner, and while, from the evidence, this court might so determine, yet, at the instance of these appellees, who are claiming the insurance money, it has been judicially determined that M. F. Speer was the owner or a part owner at the time the goods were insured.

The issue presented by the pleadings in the attachment cases was as to the liability of M. F. Speer as a partner. This M. F. Speer denied, and the court on that issue adjudged against M. F. Speer. M. L. and M. F. Speer were both parties to the actions, and it seems to us that this precludes the appellees from denying that M. F. Speer was a partner. The contract of insurance is that, after due proof of loss, the company will make payment. No claim had been made out against the company, and no pleading filed setting up any such claim; and the object, or one of the objects, in referring the case to the commissioner, was to enable the court to determine whether or not a liability existed. This seems to us was the extent only to which the order was intended to affect the insurance company. Why authorize the commissioner to make proof of loss but to enable the court to say whether this liability existed? The company answered, and said it was liable when proof of loss was made, and in the attempt to make this proof it had already been developed that M. F. Speer was a partner. If so, the terms and conditions of the policy had been violated by the representations of M. L. Speer that he was the sole owner when in fact he was not.

The judgment below must therefore be reversed, and remanded for proceedings consistent with this opinion.

LEWIS, J., not sitting.

McHARRY v. IRVIN'S EX'RS, etc.

(Court of Appeals of Kentucky. March 8, 1887.)

EQUITY—FRAUD—DEED FROM MOTHER-IN-LAW TO SON-IN-LAW.

A son-in-law obtained from his mother-in-law a conveyance to him of all her interest in the estate of her deceased husband in consideration of the payment to herself and her sister of annuities amounting to \$3,500. It appeared that the interest of the grantor in her husband's estate was represented to her by the grantee as worth \$50,000, when it was in fact worth more than double that sum; that the grantee had exclusive management and control of the entire estate from the time of his marriage into the family to the date of the deed; that grantor had implicit confidence in him; that, though the deed stated that a settlement and accounting had been made to grantor, such in fact had not been made; and that the deed operated to disinherit a son of the grantor. *Held*, the deed should be set aside as made upon a grossly inadequate consideration, and as obtained by the undue influence and fraud of grantee.

Appeal from Louisville law and equity court.

Goodloe & Roberts and Edward J. McDermott, for appellant. A. P. Humphrey, Geo. M. Davis, and Muir & Heyman, for appellees.

LEWIS, J. In February, 1857, Francis McHarry died, a resident of the city of Louisville, intestate, leaving appellant, then about 48 years of age, his

¹See June v. Willis, 30 Fed. Rep. —, and note.

widow, and Amelia, Francis A., and Florence his only children and heirs at law; the first named of these having just arrived at full age, and the other two being infants. In due time appellant was appointed administratrix of the estate and guardian of the infants; but, in about five months after the death of her father, Amelia became the wife of James F. Irvin, then between 45 and 50 years old, and the entire estate was immediately turned over to him to manage and control as the agent of the appellant, which he did continuously and without hinderance by her until December 16, 1882, when a tripartite deed between appellant, of the first, James F. Irvin, of the second, and J. H. Lindenberger, of the third, part, that is the principal subject of controversy in this action, was executed. James F. Irvin died in March, 1883, testate, leaving Florence Irvin, his widow; Guy Irvin, his infant and only child, and Lindenberger, Brown, and Dowling executors of his will, all of whom are appellees. This action was instituted by the appellant in September, 1883, to set aside the deed mentioned, upon the ground of fraud by James Irvin, actual and constructive, and mistake by her as to the nature of her title to some of the property conveyed thereby, and as to the extent of her interest in the estate of her deceased husband.

In that deed are contained, substantially, the following recitals: (1) That appellant is entitled to dower and distributable share in her husband's estate; has, since the death of her husband, resided in the family of the second party; and her business has at her request been conducted by him in all respects to her satisfaction. (2) That at the request of the second party, and in view of his impaired health, "there has been between the first and second parties a full, complete, and final settlement of all and every the accounts, business, and transactions of every kind and character between them up to and including the date hereof; and, by said settlement of all accounts as aforesaid, there has been and is found to be the sum of \$50,000 belonging to the first party, in the possession and custody and control of the second party as her agent, which said sum of \$50,000 is now by the first and second parties distinctly and conclusively agreed to be in full of all demands, claims, estate, principal, interest, income, avails, accretions, dower, rights of distribution, and all other rights of the first party. (3) That the first party is desirous of settling said sum to the use and on the trusts thereafter set forth; and the second party is desirous to secure the first party an ample income for life, and in like manner to her sister Mrs. Isbell. And thereupon the first party, by the terms of the deed, for the recited "consideration of the sum of \$50,000, paid over as representing the ascertained balance, as aforesaid, by the second party to the first party, * * * doth * * * sell and convey unto the third party all said sum of \$50,000, ascertained as aforesaid, and all the rights of dower and distribution of every kind, * * * and all her estate, real and personal and mixed, wherever situated," to be held in trust, and upon the condition that at the death of the first party all the property and accumulations thereof are to be delivered and paid over to the second party, and belong to him in fee-simple, or to such persons and upon such conditions as he, the second party, may by his will appoint in case he dies before the first party. It is further agreed that there shall be paid out of the trust fund and property annually, during her life, to the first party, \$2,000, and a comfortable residence furnished to her, and to Mrs. Isbell annually, during her life, and upon condition she remain with the first party, \$1,500.

In their answer, appellees file and rely on (as a defense to the action) a writing dated May 12, 1880. But appellant denies it is binding or valid, and asks that it be held for naught upon the ground of fraud, and because, as she specially pleads, it is not her act and deed. In that writing, which is signed by appellant alone, though called an agreement between her and James F. Irvin, it is recited that a full settlement and final accounting had that day been had between the parties, embracing every account, transaction, claim,

and demand, and said Irvin had paid over to appellant all money and property of every kind in his hands belonging to her, and she thereby acknowledged the receipt of the same, and discharged him from all claims against him and his wife, Florence Irvin; and, in the language of the instrument, "for the purpose of more effectually carrying out the intention of the parties, the said Emily McHarry, in consideration of the premises, * * * hereby sells * * * and transfers to the said Florence Irvin every account, claim, and demand due or to become due * * * from James F. Irvin."

As pertinent to the question of the validity and force of these two papers we will first ascertain, as far as practicable and necessary, the character, value, and condition of the estate of Francis McHarry at the time Irvin took control and management of it as the agent of appellant, and the amount she was entitled to receive from him December 16, 1882. But, in the absence of a commissioner's report, which the judgment of the lower court dismissing the action precluded, it would be premature, even if practicable, to determine the exact value or amount of either what Irvin received, or what appellant was entitled to, at the date mentioned. It, however, satisfactorily appears that Francis McHarry left at his death a large and productive estate, consisting of more than 2,000 acres of land in Indiana, besides several houses and lots in New Albany, a farm of 100 acres in Kentucky, one-half the franchise and property of the Louisville & New Albany ferry, a cement-mill and 60 acres of land in Shippingsport, near Louisville, an interest in a warehouse in the same, besides a large amount of personal property. The indebtedness of the estate was but little over \$10,000, besides a balance of the purchase price of the ferry payable in cement, all of which indebtedness was discharged in a short time with the income from the estate. The precise amount of receipts and disbursements by him while he was acting as the agent of appellant never can be arrived at; for, so far as this record shows, no books were kept by him subsequent to December 31, 1867. But, from evidence of joint owners who have accounts of the net profits of the ferry, it appears that the share thereof belonging to the McHarry estate, annually paid over to Irvin, amounted, from March, 1858, to February, 1864, to \$39,950, and from the latter date to December 16, 1882, to about \$150,000, making the whole amount received by him near \$190,000. The exact amount received by him from other sources between 1857 and 1865 cannot be arrived at though it was a very large sum; for it appears that money loaned on real estate security, and used by him in the purchase of real estate between the years 1858 and 1865, amounted to upwards of \$90,000; and on the — day of —, 1865, the cement-mill, and land on which it was situated, was sold for \$150,000 in gold, all of which was received and thereafter used by him; though a tract of land, the title of which was in Irvin, was sold at the same time and estimated at \$30,000, and appellees contend should be deducted from the purchase price, leaving \$120,000 belonging to the McHarry estate. Without taking into account rents of lands or of the warehouse, or profits of the cement-mill from 1857 to 1865, or interest on the amounts received and used by him, he was indebted to the estate, and, as agent of appellant, December 16, 1882, when the deed in question was executed, at least the sum of \$310,000. Without making a minute calculation, which is not necessary to a decision of the question before us, it may be therefore safely assumed that, when that deed was made, Irvin's indebtedness to the appellant was more than double the sum of \$50,000, stated in it as the ascertained balance. In addition to his indebtedness, she was, under the law of Indiana, entitled to one-third of the real property in that state left by her husband, which was worth between \$20,000 and \$25,000, that likewise passed by that deed.

It is claimed in the pleadings, and contended by counsel, that Irvin had, at the time of his marriage, in 1857, a considerable estate of his own, which was used in extricating the McHarry estate from indebtedness. But there is no

competent evidence before us that he had any property or money besides a farm in the southern part of this state, worth, perhaps, \$2,500. On the contrary, the books kept by his direction show but a single credit to his account, and it does not satisfactorily appear that even that sum, which was about \$6,000, was actually advanced or paid out of his own means. The evidence shows that appellant is a plain, economical woman, of simple and unostentatious wants and habits, and that throughout the entire period her expenditures were small. It seems to us clear that the consideration for the conveyance of December 16, 1882, regarding it as a contract of sale and purchase, was grossly inadequate. But inadequacy of consideration of itself is not generally sufficient to avoid an executed conveyance, though it should always induce close scrutiny of the circumstances attending the transaction. It therefore becomes necessary, in order to properly determine the issues of fraud and mistake involved, to review the conduct of Irvin, the immediate beneficiary of that conveyance, in respect to the estate placed in his hands as agent, and towards those to whom it belonged.

The first notable event that occurred after he assumed control was in 1858, when the only son of appellant became estranged from her, and never afterwards was sheltered under the same roof with her. September 14, 1859, Irvin procured a conveyance by his wife, Amelia, of her interest in the estate, to appellant, who immediately reconveyed it to him. September 20, 1859, he purchased from Francis A. McHarry, the son, his interest in the estate at the price of \$28,000, which was far from its full value; and, though he took the title to himself, the evidence satisfactorily shows the consideration was paid with the proceeds of the estate. In January, 1869, Amelia Irvin died leaving no children; and in January, 1874, after a tour together of about 15 months in Europe, he and Florence, the second daughter, were married, he being upwards of 60, and she 26 years of age. There is no evidence that the son of the appellant, either before or after the estrangement, treated her disrespectfully. He was somewhat dissipated, and the sale of his interest in the estate to Irvin shows that he was improvident. But he never gave her any offense except that, in her language, "he married a woman I did not like;" nor, on the other hand, does it appear she was naturally implacable, harsh, or wanting in maternal affection. It does not appear that he openly used his influence to keep mother and son apart, except that, when absent in Europe, he directed his agent to loan money to the son upon his promise to stay away from Louisville. Nor is there evidence that he at any time made the slightest effort to reconcile them. In her own language: "I had every confidence in the world in Irvin. I did not think he would do anything wrong. I thought he was perfection. I had more confidence in him than I had in myself, because I thought he understood things better than I did. My confidence in him was perfect and complete, and I thought everything he did was right; and I did whatever he asked me to do, and this continued to his death." On the other hand, one witness describes Irvin as secretive; and another testifies that "Capt. Irvin was looked up to by the family as an authority on all subjects, and what captain said was law." We thus have in the blind confidence of this plain and uneducated woman, and the dominating will of this man, an explanation of the unnatural estrangement of mother and son for 25 years; her ready acquiescence and aid in the conveyance by her elder daughter of her interest in the estate; her submission to a sale by the son of his interest at a price which she might by inquiry, never made, have learned was at a great sacrifice, and paid for out of the estate; and her consent to the unnatural marriage of the second daughter,—all done for the benefit of Irvin, and all, as we think the record shows, in furtherance of his design to possess the entire estate.

Such being the relation and attitude of appellant and Irvin at the date of the two papers of May 12 and December 16, 1880, there is no reason to dis-

credit her statement that she did not understand the effect of either of them, but signed both in ignorance of her rights and interests, at his request, and because she trusted him.

As to the paper of May 12th, we think very little need be said. Appellant alleges in her pleading that she signed it without reading it, or hearing it read, and no witness to it testifies in this case that she read or understood it. On the contrary, one of them states facts which make it evident she did not understand it. In one clause she is made to acknowledge a full settlement between her and Irvin had been made, and all the money and property she was entitled to had been paid over to her; and in the other clause she conveys and transfers to Florence Irvin her claims and demands on James F. Irvin. It is impossible to reconcile the two clauses of that paper with each other, or the latter with the deed of December 16, 1882; for if she had already, by the paper of May 12, 1880, conveyed and transferred to Florence Irvin her claims and demands against him, she could not, by the deed of December 16th, transfer such claims and demands, then called "an ascertained balance of \$50,000," to Lindenger, trustee. Neither Dowling, one of the executors of the will, who, as an attorney, wrote the paper of May 12th, nor Florence Irvin, testify in this case in regard to it. For the reasons stated, and others to be stated, alike applicable to the deed of December 16th, we think the paper of May 12th should be held void; and that even Irvin regarded it of no effect is shown by his failure to inform Brown, his executor and lawyer, of its existence before the deed was written and executed.

In that deed it is stated with precision, and in terms that fully and distinctly convey the idea that a settlement and accounting had taken place between Irvin and appellant. Yet the evidence in this case places it beyond dispute that no settlement had ever taken place between them. We are thus, at the beginning, confronted with a false, and as we think must be regarded a fraudulent, statement, made not as mere form, but made in such manner as to bind the appellant, as well as to deceive her; for, when we consider the relation of the two parties, her confidence in him, and her ignorance of the actual condition of the business of the estate, and inability to make such settlement, we are forced to the conclusion that she accepted that statement as a declaration on the part of Irvin that \$50,000 was the balance due her, and believed it. If the object was not to deceive and overreach her, why was the false statement made? Both Brown, who wrote the deed, and Lindenger testify the deed was explained to her, and give it as their opinion she understood it. But she just as positively swears she did not understand it, or give particular attention to it, trusting in Irvin, and willing to do what he directed, because she believed he would do right. No doubt, Brown in good faith attempted to explain the nature and effect of the deed; but in at least two respects it cannot be explained in such manner as to relieve it of the character of an unconscientious bargain and fraudulent device on the part of Irvin to deprive her of what he justly owed her, and of property belonging to her: (1) As already in effect stated, no satisfactory explanation can be made in regard to the false statement that a settlement had been made, and a balance of \$50,000 ascertained. (2) She owned absolutely one-third of the Indiana land, worth not less than \$20,000. Yet, although Brown swears that he was, at the time he wrote the deed, ignorant of her right to the land under the Indiana law, the deed is so written as to pass her title thereto; and it is now claimed and held by Irvin's executors, or by Lindenger, under that deed.

The doctrine is too well settled to need a reference to authorities that "contracts between principal and agent should be jealously scrutinized, and slight circumstances of inequality, surprise, and hardship may be sufficient to vacate them, even sometimes without proof of fraud." In this case we have not merely concealment by the agent of the amount due his principal, which he

knew, and she did not, nor could inform herself, but a false statement, or what we think had the same effect as a direct false statement, as to the balance due; for, as already said, she actually conveyed by that deed more than double in value what it purports to convey, and what she was induced to believe it conveyed. We think it satisfactorily appears from the circumstances of this case, independent of her own statement as a witness, that at the date of the deed she was ignorant of the nature of her title to the Indiana lands; and it is equally well established that Irvin did at the time know she had a fee-simple title to the land, and knowing it was his duty to inform her of the fact, and his failure to do so must be held as fraudulent, and sufficient to vacate the deed.

But it is relied on as a defense to this action that appellant was fully informed of the fact that the execution of the deed was intended as part of the plan of a family settlement, which included, with the deed, a subsequent deed by Florence to James F. Irvin of all her interest, and his will devising all his estate to Florence and Guy Irvin, the son; and, as appellant intended and desired that all her estate should go to her daughter and grandson, she was not defrauded by the deed made to carry out that plan. But we do not understand this to be a family settlement in the sense of a compromise of doubtful and disputed claims, but a sale to James F. Irvin. And, even if it was a family agreement or compromise, the circumstances attending the transaction make it a case of at least constructive fraud; for in such cases an agreement made in ignorance of one party of material facts, which it is the duty of the other side to disclose, would render the agreement invalid. 1 Story, Eq. Jur. § 217. The fact that appellant, situated as she was, and under the influence of Irvin, as she had been for years, did at the date of the deed desire to leave her property to her daughter and grandson, ignoring the existence of her own son and his children, does not preclude her from now having that unjust, unnatural, and fraudulent conveyance set aside; for it may be, if fully and truly informed, at the time, of the actual amount of her wealth, she might have found a warm place for the discarded son. But, be that as it may, we think she was induced to make that deed, not merely through mistake and ignorance of the kind and value of her estate, which it was the duty of Irvin to disclose to her, but that she was then, as she had been for years, under the irresistible influence of her son-in-law, who caused that deed to be made as part of a long-cherished and partly-executed plan, to possess himself of the entire estate of Francis McHarry, which was fully accomplished by the deed from his second wife, made December 19, 1882.

In conclusion, it is proper to say there is nothing in this record reflecting upon the personal or professional integrity of Brown, who prepared the deed, as he was informed it was a settlement made according to the wish of appellant, and was ignorant of the actual amount due to her, and of her title to the land.

Wherefore the judgment is reversed, and cause remanded, with directions to cancel the paper of May 12, 1880, and the deed of December 16, 1882, and for further proceedings consistent with this opinion.

STATE v. MONTGOMERY.

(*Supreme Court of Missouri.* February 14, 1887.)

ASSAULT WITH INTENT TO KILL—SHOOTING WRONG PARTY.

On an indictment for an assault with intent to kill, an instruction to the effect that if defendant feloniously shot at a third party with the intention of killing him, and, missing him, shot deceased, he was guilty, is correct.

Appeal from circuit court, Lawrence county.

B. G. Boone, Atty. Gen., for respondent. J. T. Tiel, A. G. McCune, and J. C. Cravens, for appellant.

NORTON, J. Defendant was indicted, tried, and convicted in the Lawrence county circuit court of an assault with intent to kill one George Browning, and his punishment assessed at a fine of \$500, from which he has appealed, and assigns for error the action of the court in receiving improper evidence, and giving improper instructions. The evidence introduced on behalf of the state tends strongly to show that defendant sought, provoked, and brought on a fight in a public street in the town of Lawrenceburg, Lawrence county, with one McBride, in which defendant fired three shots from a pistol at said McBride, with the intention of killing him; that one of these shots missed McBride, and struck Browning, who was in said street, on the arm, inflicting a severe and painful wound. It is the reception of this evidence which is complained of. The evidence was properly admitted, for it is well settled that if, with a felonious intent, A. shoots at B. to kill him, and misses B., and wounds C., that the law transfers the felonious intent with which the ball started, from B. to C. This principle is expressly approved in the cases of *State v. Henson*, 81 Mo. 384, and *State v. Payton*, 2 S. W. 394, (decided at present term.) The law of the case was fairly given to the jury. The instructions, after properly defining the words "malice aforethought" and "feloniously," told the jury, in substance, that if they believed from the evidence the defendant feloniously shot at McBride with the intention of killing him, missed him, and shot Browning, they would find him guilty. They were further instructed that, if they believed defendant shot at McBride in defense of himself, (there being some evidence in the case that McBride fired the first shot,) they would acquit. The jury were further told under what circumstances defendant had a right to shoot in self-defense, and also to acquit if they had a reasonable doubt, from all the evidence, of defendant's guilt.

We perceive nothing in the record justifying an interference with the judgment, and it is hereby affirmed.

(All concurring, except BRACE, J., absent.)

NAUMAN v. OVERLEE.

(*Supreme Court of Missouri. February 14, 1887.*)

SALVAGE—BREACH OF WARRANTY OR DECEIT—WHETHER WAIVED BY PAYMENT.

A purchaser can maintain an action for false representation or breach of warranty in the sale, although, after discovering it, he paid the agreed price.

Appeal from circuit court, Ste. Genevieve county.

Wm. Carter and H. S. Shaw, for respondent. *Nicholson & Whittedge* for appellant.

NORTON, J. This is a suit to recover damages, in which the petition, in substance, alleges that plaintiff bought of defendant a quantity of hides, tallow, and sheep-pelts, for the price and sum of \$1,300; that defendant falsely, fraudulently, and deceitfully represented and guaranteed that the number of hides so sold was not less than 340, when in truth and in fact the number was only 259; that plaintiff, relying on the representations and guaranties of defendant, bought the said hides, etc., at the above price, and paid for them. The answer denies that any such representations or warranty was made, and avers that plaintiff paid the said consideration of \$1,300 after having received delivery, and counted the hides, and with full knowledge of their number. It appears from the evidence that at the time of the purchase plaintiff paid defendant five dollars, and received the property, and thereafter sold it to a third party, and, in counting the hides, the fact was ascertained that the number of them was only 259, and that with a knowledge of this fact, thus ascertained, plaintiff paid defendant the balance of the purchase price. On the trial plaintiff obtained judgment, from which the defendant has appealed,

and assigns for error the action of the court in giving and refusing instructions.

On the part of plaintiff the court instructed the jury to the effect that, if they believed that defendant falsely and fraudulently represented the number of the hides to be not less than 340, and knew the representation was not true, and that the representation was made to induce plaintiff to buy, and, relying thereon, he did buy, or that, if they believed defendant made such representations as of his own knowledge, not knowing them to be true, and plaintiff made the purchase relying thereon, that plaintiff was entitled to recover. These instructions are in harmony with the principle announced in the following cases: *Dulaney v. Rogers*, 64 Mo. 201; *Walsh v. Morse*, 80 Mo. 568; *Jones v. Railroad Co.*, 79 Mo. 92.

On the other hand, the jury were told that, if they believed what defendant said as to the number of the hides was only an expression of his opinion, plaintiff could not recover, nor could he recover if he did not rely solely on the false representation, if any was made; and that the burden of proof was on plaintiff to make out his case by a preponderance of the evidence.

It is insisted that the court erred in refusing to instruct the jury to the effect that, if plaintiff counted the hides after he made the purchase, and ascertained the shortage in the number, and, after acquiring this knowledge, paid defendant the price agreed upon, that he thereby waived his right to recover on the warranty, although the jury might believe defendant did warrant the number at the time of the sale. This instruction was properly refused, under the ruling of this court in the case of *Parker v. Marquis*, 64 Mo. 38, in which the case of *Whitney v. Allaire*, 4 Denio, 554, was quoted, where it is said: "There is no principle or authority showing that, where a person has been defrauded by another in making an executory contract, a subsequent performance of it on his part, even with knowledge of the fraud, acquired subsequent to the making, and previous to the performance, bars him of any remedy for his damages for the fraud. The party defrauded, by performing his part of the contract with a knowledge of the fraud, is deemed to have ratified it, and is precluded thereby from subsequently disaffirming it. That is the extent of the rule. His right of action for the fraud remains unaffected by such performance. But, having gone on after discovering the fraud, he cannot afterwards disaffirm the bargain, or sue for the consideration." The cases to which we have been cited by the learned counsel for defendant, establishing the doctrine that money voluntarily paid with full knowledge cannot be recovered back, have no application to the case before us.

Perceiving no error in the record justifying an interference with the judgment, it is hereby affirmed.

(All concur, except BRACE, J., absent.)

DAVIS v. HALL and others.

(Supreme Court of Missouri. February 14, 1887.)

1. ATTORNEY—DISMISSING SUIT.

An attorney has implied authority to dismiss a suit.¹

2. SAME—WHAT MAY BE DONE BY ATTORNEY.

Power given by statute to a party to dismiss a suit in vacation may be exercised by his attorney.¹

3. LIS PENDENS—DISMISSAL OF ACTION—SUBSEQUENT MOTION TO REINSTATE—INTERVENING INCUMBRANCE.

Plaintiff, in an action of ejectment, after his attorney had dismissed the action, filed in vacation a motion to have it reinstated. Afterwards, but before the defendant had notice of the motion to reinstate, the latter gave a mortgage on the premises sued for, the mortgagee accepting it in reliance upon the dismissal, and in ignorance of the motion to reinstate. Held, that the title under the mortgage was free from any lien created by the pendency of the action of ejectment, and that the subsequent reinstatement of the action would not affect it.

Appeal from circuit court, Barton county.

Robinson & Harkless, for plaintiff in error. *R. F. Buller*, for defendant in error.

BLACK, J. This is an action of ejectment for 160 acres of land in Jasper county. Both parties claim title from Thomas F. Phillips, the plaintiff, by a sheriff's deed, and the defendant under a deed of trust and trustee's deed. The plaintiff in this case commenced a suit in the common pleas court of Jasper county in 1876, against Phillips and others, and attached the land in question. The venue of the cause was changed to the Newton county circuit court. After the cause had reached that court, and in the vacation thereof, the plaintiff's attorney paid the costs, and caused the clerk to make an entry dismissing the suit. This was done on the twenty-seventh April, 1877. On the twenty-second May, 1877, and in the vacation of the court, the plaintiff filed a motion to reinstate the cause, but gave the defendant in that suit no notice of the filing of the same. The court, at the following term, sustained the motion, and the plaintiff finally recovered judgment against the defendants, under which he sold and purchased the land, and received the sheriff's deed before mentioned. After the attachment suit had been dismissed, and before the motion to reinstate had been filed, Phillips applied for and received of Mrs. Clark a loan of \$800 on the land. Abstracts showing a dismissal of the attachment suit were furnished her, but the deed of trust securing the loan bears date the first of June, 1877, some 10 days after the filing of the motion. There is evidence that the attorney's authority was only that which he had by virtue of his engagement to commence and prosecute the suit. On the other hand, there is evidence that several suits were pending between the parties to the attachment suit, and that plaintiff instructed the attorney to settle them, which he did on fair terms to plaintiff, and, in compliance with that settlement, dismissed the attachment suit.

1. For the appellant it is insisted that the plaintiff alone can dismiss his suit in vacation, under section 23, p. 1061, 2 Wag. St. The statute says the plaintiff in any suit in any court of record may dismiss the suit in vacation upon payment of all costs. No good reason is assigned for the construction of the statute here contended for, nor do we believe any can be given. The plaintiff's authorized agent or attorney may dismiss the suit with the same effect as could the plaintiff if he were before the clerk in person.

2. The trial court probably found as a fact that the attorney had special

¹ As to the implied authority of an attorney to settle his client's case, see *Haverty v. Haverty*. (Kan.) 11 Pac. Rep. 364, and note.

As to the extent of his authority otherwise, see *Crawford v. Nolan*, (Iowa,) 30 N. W. Rep. 32, and note.

authority to settle the various suits, and to dismiss the one in question; but, under the instruction given and refused, we must consider the extent of his power as if no such special authority had been given. It has been repeatedly ruled by this court that an attorney, merely from his employment as such, has no right to compromise the debt or claim of his client, (*Semple v. Atkinson*, 64 Mo. 506; *Spears v. Ledergerber*, 56 Mo. 465; *Walden v. Bolton*, 55 Mo. 405;) still the authority of the attorney in virtue of his employment extends to the conduct and management of the cause in which he is engaged, in and out of court, and he may do all things incidental to the prosecution of the suit, and which affect the remedy only, and not the cause of action. He has authority to agree that the suit in which he is employed shall abide the judgment in another suit, the facts being the same, and the plaintiff being the same in the several suits. *North Missouri R. Co. v. Stephens*, 36 Mo. 150. He may stipulate that the other party may take judgment on a verdict then rendered without further notice. *Barlow v. Steel*, 65 Mo. 611. Elsewhere it is held he may discontinue a suit, (*Gaillard v. Smart*, 6 Cow. 385;) and release and discharge property from the lien of an attachment, (*Monson v. Hawley*, 30 Conn. 51; *Moulton v. Bowker*, 115 Mass. 36.)

The dismissal did not affect the cause of action at all, but only the remedy. It follows from the foregoing cases, as well as from the general rule as before stated, that the attorney had the power to dismiss the suit without special authority therefor. If there was any abuse of the authority, the remedy is against him. Persons dealing with the property had a right to rely upon his act as being the act of the client.

3. The dismissal of the suit put the parties out of court, and the entry of the clerk was sufficient evidence of that fact. The *lis pendens* created by filing an abstract of the attachment in Jasper county ended with the dismissal of the cause. We do not see how the mere filing of a motion to reinstate with the clerk in vacation, and no notice thereof given to the defendants, could operate as constructive notice to Mrs. Clark. The defendants were not in court until they subsequently appeared to the motion. We see no reason for disturbing the judgment in this case, and it is therefore affirmed.

(All concur, except BRACE, J., absent.)

STATE *ex rel.* ATTORNEY GENERAL v. MANUFACTURERS' MUT. FIRE INS. CO.

(*Supreme Court of Missouri.* February 14, 1887.)

FIRE AND MARINE INSURANCE — MUTUAL COMPANIES — HOW THEY MAY DO BUSINESS — Rev. St. Mo. 1879, § 5988.

Since the amendments introduced into the fire and marine insurance laws by the act of 1877, providing, among other things, (Rev. St. Mo. 1879, § 5988,) that any mutual fire and marine insurance company may, upon a majority vote of its members, "charge and receive for the mutual benefit of all its policy-holders cash in payment of premiums on such of its policies" as shall be determined on, a company organized as a mutual company does not expose itself to the charge of doing business upon the joint-stock plan by receiving all-cash premiums on all policies running less than six years; nor is there any objection to its issuing policies for less than six years, except policies issued on account of notes given at the organization of companies organized without a guaranty fund, which are expressly required to run for not less than six years.

Quo warranto.

The Attorney General, C. P. Elerbe, and G. Campbell, for relator. Taylor & Pollard and Relfe & Reynolds, for respondent.

BLACK, J. This case stands upon a demurrer to an information filed by the attorney general for a writ of *quo warranto*. The object sought by the writ is to require the respondent to show cause why it should not be dissolved for

using the franchises of a stock insurance company, it being only a mutual insurance company. The respondent was incorporated in December, 1884, under article 8, c. 119, Rev. St. 1879, as a mutual fire and marine insurance company. The information, in substance, states that the respondent has issued a great number of policies, known as stock policies,—that is to say, policies running for periods of time less than six years, and varying from two days to five years, and for which it receives at the time of the issuance of the policies a total cash premium; that on the eighteenth February, 1886, respondent had policies of this description in force, insuring the total amount of \$3,275,119.37, for which it has received in cash premiums the amount of \$60,535.85, and that at the institution of this suit the outstanding policies of this character numbered 8,200. It is also alleged that on the eighteenth February, 1886, the respondent had outstanding 406 mutual policies, insuring the aggregate sum of \$997,532.31, for which it held premium notes of the face value of \$149,201.25, and that at the commencement of this suit there were but 400 policies of this description in force.

The questions presented by the demurrer are—*First*. Has the respondent a right to issue policies running for a period of time short of six years? *Second*. Has it a right to issue policies for premiums payable wholly in cash at the time the policies are issued?

An answer to these questions must, in a great measure, depend upon a proper construction of the statutes with respect to the organization of these companies. The legislation upon that subject has been so varied and diverse that we do not regard it essential to go back further than the act of March 10, 1869, (Acts 1869, p. 45.) That act provided for the incorporation of fire and marine insurance companies on the "stock plan" and on the "mutual plan." It is there expressly declared that mutual companies shall not issue policies known as stock policies, or do business as joint-stock companies, or upon the joint-stock plan, (section 2,) and the remainder of the act is consistent with the legislative assertion. After the organization, the distinguishing features of the mutual companies, so far as defined by that act, are that every person who insures must make his note to the company for the premium, a part of which, not less than 10 per cent., must be paid in cash at date of the policy. The notes are made payable at any time, in part or in whole, as the directors may demand, by assessment for payment of losses and other liabilities of the company. The assessment must be made upon all notes held by the company which have been in existence for one year at the date of the loss. The notes upon which all assessments have been paid, at the expiration of the policies, are delivered up to the makers, whether paid in full or not. The principle of the scheme throughout is mutuality; and, the contrary not being declared by the law, each policy-holder becomes a member of the association, and continues such, certainly, during the life of the policy. Wood, Ins. § 509. The law, as it then stood, does not contemplate the issuing of policies for all-cash premiums, nor can the right to issue what are called "short-time policies" be easily reconciled with the various provisions of the act of 1869. Enough has been said to show the general policy of that act, which is the basis of the present law upon the subject. Many of the sections are the same, others have been amended, and some new ones have been added.

It remains to be seen what effect is to be given to the amendments. The present statute, as before, points out in detail how the stock companies and mutual companies may be organized, and when they may commence business, and section 5988 makes it the duty of every company organized on the mutual plan to have the word "mutual" affixed to the name; and it is made unlawful for such companies to do business on any other plan. The same section also declares: "And mutual companies shall not issue policies known as 'stock policies,' or do business as joint-stock companies, or upon the joint-stock plan; [but any mutual company, upon a majority vote of its members present at an

annual meeting, or at any special meeting called for that purpose, after one week's notice by advertisement in * * *, may charge and receive, for the mutual benefit of all its policy-holders, cash in payment of premiums on such of its policies as shall be by a majority vote at such a meeting determined upon.]” Section 6000, among other things, provides: “Every person who shall insure in such mutual company [whose premium is payable in note] shall, before he receives his policy, deposit with the company a note,” etc. The quoted words included in brackets were introduced by the act of 1877. These amendments are significant, and this must be apparent when they are considered in connection with the act of 1869. They show a determination to make a most important change in respect of the powers of these mutual companies. Express authority is given them to charge and receive all-cash premiums for the benefit of all policy-holders.

In the present case the information shows that, by a vote after due notice, it was resolved to charge and receive cash in payment for premiums on policies issued for a period less than six years. Such a course of business, it is argued, has nothing in common with, and is inconsistent with, mutual insurance. The first answer to this argument is, if the law clearly gives companies organized on this mutual plan power to issue policies for all-cash premiums, and we hold it does, then we can only declare the law as we find it. It is no objection that this power is one conferred upon stock companies, or one not usually possessed by mutual companies. The legislature can for itself define what it means by the “mutual plan,” and this it does in specifying the duties and powers of these companies. Some of these powers may well be common to both. But the argument is not sound for another reason. The theory of mutual insurance, as generally understood, is that the premiums paid, or to be paid, by the members for their insurance, constitute a fund for the liquidation of losses. It is not essential that the premiums should be paid by note. They may be paid in cash, and, when so paid, the cash stands for the note. The policy is still a mutual policy, and the holder thereof a member of the association. *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35; *Ohio Mut. Ins. Co. v. Marietta Woolen Factory*, 3 Ohio St. 348; *Mygatt v. New York Protection Ins. Co.*, 21 N. Y. 52; *Schimpf v. Lehigh Valley Mut. Ins. Co.*, 86 Pa. St. 373; *Spruance v. Farmers' & Merchants' Ins. Co.*, 10 Pac. Rep. 287.

Under the present statutes of this state, these mutual insurance companies may, therefore, issue policies for all such premiums paid at the time the policies are issued. The only limitation as to the time policies shall run is that found in sections 5999 and 6001. The first provides for an organization with a guaranty fund, and without a guaranty fund. If the company is organized without a guaranty fund, then, before it can commence business, it must have a designated amount of agreements for insurance, with 30 per cent. of the premium paid in cash, and the balance secured by premium notes of solvent parties founded on *bona fide* applications for insurance. The company may then receive a certificate to do business from the superintendent of insurance. The policies required to be issued for a period not shorter than six years are the policies to be issued on account of the notes given at the organization. The whole section seems to relate to matters pertaining to the preliminary steps to be taken for the commencement of business, and we cannot see that this requirement to issue six-year policies has any application save as to those policies issued upon the notes made for the purpose of commencing business. Section 6001 does require that the assessments to pay losses, expenses, etc., shall be made upon each and every note held by the company at the time of the assessment, and which has been in existence for one year prior to the date of the assessment. Had these companies no power to issue cash policies, then this provision would indicate that short-time policies should not be issued. But, as they have the power to issue policies for all cash, there cannot be any

difficulty because of short-time policies; for they can be issued for all cash, and no assessments will be required. We cannot see that these mutual companies are limited as to the time for which policies shall be issued. Effect must be given to the amendments before noted, and they show a determination to make a radical change in the law of 1869.

The amount of business done by the respondent by way of all-cash policies exceeds that done by way of notes for premiums in the ratio of about ten to three, and it is earnestly insisted that the legislature never contemplated such results, and it is said these policy-holders are without security. The answer is that the legislature has fixed no limit as to the amount of cash business these mutual companies may do. If the law is defective in this respect, the remedy must come from the law-making power.

There are statements in the information that the respondent has issued and is issuing large numbers of policies known as "stock policies," but this we understand to be the conclusion of the pleader based upon the other facts alleged, the most prominent of which are that the policies are issued for all cash and on short time. These facts do not make the policies stock policies.

It results from what has been said that the demurrer must be sustained, and it is so ordered.

(BRACE, J., absent. The other judges concur.)

PHILPOT v. PENN and others.

(*Supreme Court of Missouri.* February 14, 1887.)

1. TRUST—RESULTING—EVIDENCE NECESSARY TO ESTABLISH.

In order to establish a resulting trust by parol evidence, the evidence must be so clear, definite, and positive as to leave no reasonable ground for doubt.

2. SAME—EVIDENCE STATED—PUBLIC LANDS—ENTRY BY ONE IN ANOTHER'S NAME.

In a suit to establish a trust in favor of the grantees of B., in land which was located and entered in 1857, in the name of A., under a land warrant running to B., and assigned by B. to A., it appeared that the patent was issued in 1860 in A.'s name; that B. and his grantees knew this, and did not controvert his title until 1883, long after A.'s death, which occurred in 1876. B., who was A.'s brother, testified that he entered the land with a land-warrant which he owned; that he entered it in A.'s name, instead of his own, in order to avoid a certain regulation of the land-office, (but he did not explain how the warrant happened to be assigned to A. instead of to him;) and that A. assigned the certificate to him, and he assigned it and made a deed to C., to whom he sold the land at two dollars per acre. C. testified to obtaining the land from B. by a trade for another land-warrant. Deeds from B. to C., and from C. to the plaintiff, dated, respectively, in 1857 and 1859, but not recorded until 1876, were produced, but no assignment of A.'s certificate. It was shown that plaintiff had paid the taxes since 1873, except for one year. *Held*, that the evidence was not sufficient to establish a resulting trust.

Appeal from circuit court, Bates county.

Holcomb & Silvers, for appellant. *John T. Smith*, for respondents.

NORTON, J. It appears from the record in this case that in 1857, at the United States land-office in Warsaw, a certain military land-warrant for 80 acres of land, which had been issued to one Frances Sudbury, and by her assigned to S. Milton Penn, was located on 76.98 acres of land in Bates county, and a certificate of entry issued to said S. Milton Penn, who died in 1876, leaving as his heirs the defendants in this suit, against whom the suit was instituted in the Bates county circuit court in 1883, for the purpose of having the court decree that the land so entered was held by said Penn and his heirs in trust for plaintiff. The plaintiff in his petition bases his claim to the relief asked on averments therein made to the effect that one F. S. Penn was the real owner of said land-warrant; that the consideration for the assignment thereof by said Sudbury was wholly paid by him, and that the assignment to said S. Milton Penn was so made that he might hold the same in trust for

the said F. S. Penn; that the said F. S. Penn located said warrant on the land in question, and took the certificate of entry in the name of S. Milton Penn; that said S. Milton Penn, by his writing in due form, assigned and transferred said certificate of entry to said F. S. Penn, who on December 16, 1857, for a valuable consideration, sold and conveyed the land by his deed, duly executed, to M. W. Dallas, and also assigned to him the certificate of entry; that said Dallas, on the sixteenth July, 1859, conveyed the land by his deed to plaintiff; that said certificate has been lost; that a patent issued from the general land-office on the third day of January, 1860, conveying said land to S. Milton Penn; that, while the record of conveyances shows the apparent title to said lands to be in S. Milton Penn or his heirs, they have no real interest therein, but hold the same in trust for plaintiff. The answer of defendants, besides being a general and specific denial, sets up that S. Milton Penn died a long time after he had taken out a patent to the land in his own name, which was issued after the alleged assignment of the certificate of entry, and that plaintiff and his grantors were duly apprised thereof, but failed and neglected to question his title during his life-time. On the hearing the trial court dismissed the bill, and it is this action of the court we are asked to review on plaintiff's appeal.

Plaintiff put in evidence a deed to the land in controversy from F. S. Penn to M. W. Dallas, dated December 16, 1857, and filed for record October 3, 1876; also a deed from said Dallas to S. B. Philpot, the plaintiff, dated July 16, 1859, and filed for record October 3, 1876; also tax receipts showing payment by plaintiff of taxes for the years 1873 to 1883, inclusive, except the year 1876. F. S. Penn, whose deposition was taken in 1884, testified that he entered the land in dispute in the name of S. Milton Penn at the land-office in Warsaw on the fifteenth of December, 1857, with a land-warrant which he owned; that, shortly after he entered it, the certificate was assigned to him by S. Milton Penn, who resided in the state of Ohio; that he sold the land to M. W. Dallas for two dollars per acre, and passed all title papers in his possession to him; that S. Milton Penn, at the time he sold, had no interest in the land. He further testified that he dealt considerably in western lands, and that in October, November, and December, 1857, he purchased for himself and others, at the land-office, 30,000 acres, and in 1858 over 50,000 acres for himself and as agent for other parties; that the number of persons interested in the lands purchased was probably over 100; that what he said about the land in controversy was purely from memory; that he might be mistaken as to his ownership of the land in question, but it was not probable; that his memory was not as good as it was years ago, and for the last six months has been very bad at times, by reason of severe injury; that S. Milton Penn was his brother, and died in 1876; that the relations between them were unfriendly from 1875 up to the time of his death; that over 26 years had elapsed since the transactions occurred about which he was testifying; that owing to the rush at the land-office to enter lands, the register would not permit one person to enter more than 320 acres, and, in order to evade said regulation, he made entries in the names of various friends of his, who afterwards conveyed by assignment of certificates of entry or quitclaim; that the entry of the land in suit was one of them.

M. W. Dallas testifies as follows: "I met F. S. Penn in Warsaw, Benton county, Missouri, in the fall of 1857. I was in Missouri for the purpose of locating some land-warrants, at the Warsaw land-office. I had some warrants for myself and others, among them land-warrants of S. B. Philpot. The office at Warsaw was temporarily closed, and I arranged with F. S. Penn to locate some warrants, and traded some land-warrants for land already located, and, as I now recollect, bought some land entered in his name. I think that some of the land was entered in the name of S. Milton Penn, who was represented as being the brother of F. S. Penn. Among other lands was a tract of land

containing 76 acres and a fraction. My recollection is that this 76 acres was for S. B. Philpot, and was transferred to me to be retransferred to him. I have no recollection of any fractional lot but the one, in the whole transaction. Mr. Penn, in transferring the land to me, made said transfer in due form, as I now recollect, accompanied with all papers connected with chain of title, and all of said papers were given to S. B. Philpot, or his attorneys, Hollister & Okey. I have no certificate of location, or any papers or documents of any kind in my possession, and I have no knowledge where such papers are, further than herein stated."

Plaintiff, Philpot, testified as follows: "In 1857, M. W. Dallas went to Missouri to locate land-warrants for himself and others. I sent with him four land-warrants to be located for me at the general land-office in Warsaw, Missouri. In making disposition of my warrants, M. W. Dallas traded one of them to Elijah G. Penn for the 76.93 acres of land now in controversy in this case. Said Penn made M. W. Dallas a deed for said land, and Dallas afterwards conveyed the same to me. These deeds are both on record in Bates county, Missouri. In drawing the deed from said Dallas to me, by a mistake of the scrivener and mutual mistake of the parties, one-half of lot No. 12 was left out of the deed. The whole 76.93 acres was bought and paid for by me, and intended to be included in the deed. I have not got the certificate of entry of said land, nor have I any recollection of ever seeing it."

Deposition of William Okey, as follows: "I am an attorney at law. Reside at Woodsfield, Monroe county, Ohio. Was in partnership in the practice of law with Nathan Hollister, at said Woodsfield, in 1857, and for many years thereafter. Nathan Hollister is now deceased. I am acquainted with M. W. Dallas. Knew him in 1857. Recollect the time he went to Missouri to locate land-warrants on public lands of the United States for S. B. Philpot and others. After said Dallas returned he delivered to Nathan Hollister and myself some certificates of entries he had made, but I have no recollection of ever seeing the certificate of entry for the 76.93 acres of land in controversy in this case. Mr. N. Hollister and myself procured the deed from M. W. Dallas to S. B. Philpot for said land. I have made diligent search for said certificate, but never been able to find it."

It has been repeatedly held by this court that the *onus* of establishing a resulting trust rests upon him who seeks its enforcement; and, where it is sought to establish such trust by parol evidence, it must, to warrant a decree, be so clear, definite, and positive as to leave no reasonable ground for doubt. *Johnson v. Quarles*, 46 Mo. 423; *Forrester v. Scoville*, 51 Mo. 268; *Jackson v. Wood*, 88 Mo. 76. We are of opinion that the evidence, a full detail of which has been herein given, does not meet the requirements of the above rule. And in view of the fact averred in the answer, and not denied either by replication or proof, that the patent issued (in 1860) to S. Milton Penn long before his death; that plaintiff and his grantors knew this fact, and did not controvert his title till long after his death; and in view of the fact that said Penn died in 1876, and that the deeds of plaintiff and his grantor, though made, respectively, in the years 1857 and 1859, were not placed of record till October, 1876, and that this suit was not brought till in 1883, six or more years after the lips of S. Milton Penn had been closed in death, who was the only other party to the transaction; and in view of the further fact that plaintiff's claim for relief rests solely on the evidence of F. S. Penn as to the facts giving rise to the alleged trust; and the fact that he gave his evidence concerning them purely from memory, 26 years, and was mistaken either as to the consideration paid him by Dallas, or Dallas & Philpot were mistaken, —he testified that the consideration paid him was two dollars per acre, they testified that one of Philpot's warrants was given in exchange for the land, —in view of these facts, and the further fact that, while F. S. Penn undertook to give a reason why he entered the land in the name of his brother, no

attempt was made to explain the reason why the land-warrent was in the first instance assigned by Frances Sudbury to S. Milton Penn, the trial court was justified, under the rule above adverted to, in denying the relief prayed for, and in dismissing the bill. It is claimed by counsel that the payment of taxes for two or three years preceding said Penn's death, and several years afterwards, should control in the decision of the case. It does not appear who paid the taxes, or whether they were paid at all between the years 1857, when the land was entered, and 1878. If it had appeared that after the land was entered, and plaintiff received his deed, he had regularly, from year to year, paid the taxes thereon, and that S. Milton Penn had knowledge of this, or gave no attention to the matter, there would be some force in plaintiff's contention.

On the case as made, the judgment was for the right party, and it is hereby affirmed.

(All concur, except BRACE, J., absent.)

LONG and others v. TALLEY and others. .

(*Supreme Court of Missouri.* February 14, 1887.)

1. HIGHWAYS—COMMISSIONERS' REPORT—AMENDMENT OF.

Where a report of commissioners appointed by the county court to assess damages caused by opening a road has been filed in time, the court may order it to be amended, and, on the amended report being filed, may approve it.

2. SAME—APPEAL—WAIVER OF EXCEPTIONS.

Where remonstrators against the order of a county court opening a road file exceptions to the award of damages, and request a jury, and subsequently appeal to the circuit court, where, on trial anew, the same result is reached, but at such trial the remonstrators do not insist upon their exception, or on their demand for a jury, they cannot rely on these points, on an appeal from the circuit court.

Appeal from circuit court, Johnson county.

W. W. Wood, for respondents. A. Comingo and Sparks & Campbell, for appellants.

SHERWOOD, J. This litigation grows out of establishing a public road in Johnson county.

1. Looking over the evidence in the cause, I see no reason to doubt the correctness of the conclusion reached, both in the county and in the circuit court, that three of the petitioners lived in the "immediate neighborhood" of the proposed road, in the sense those words are employed in the statute. On this point evidence was adduced *pro* and *con* in the county court, and again in the circuit court, and the finding in this regard should not be disturbed. And it was admitted that the petition was signed by 12 freeholders, as required by law.

2. The report of commissioners appointed by the county court to assess the damages caused by opening the road was filed in vacation anterior to the term at which they were required to report. At that term, and on the second day thereof, the report being informal, and not sufficiently specific, the commissioners were directed to file an amended report, which they thereupon did, and their report was approved; and the damages assessed being paid to those entitled thereto, except Bolejack, for whom the damages assessed were paid into court, the county court ordered the road opened, and continued to its next term the exceptions filed by the remonstrators, who claimed that the damages assessed were insufficient, and asked for a jury to assess their damages. The remonstrators then appealed to the circuit court, where, on trial anew, the same result was reached as in the county court. I have no doubt of the power of the county court to have the report of the commissioners amended, the first report having been filed in due time, and being informal, the report in such case occupying the position of a verdict, (*Woodrow v. Younger*, 61 Mo. 395;)

and, where a verdict is informal, the common course is to direct that it be put in proper shape, (*Cattell v. Publishing Co.*, 88 Mo. 356.)

3. And, when the case was appealed to the circuit court, the *whole* case was removed by the appeal for a trial *de novo*, exceptions and all. *Colville v. Judy*, 73 Mo. 651. If, therefore, the remonstrators were desirous of having their exceptions heard, and of having their damages, etc., assessed by a jury, they should have called the attention of the circuit court to the matter, and insisted on their rights. Having failed to do this at the opportune time in the circuit court, they cannot rely on the point in this court; for now it must be deemed waived.

4. And it was competent for the road to be located after the payment of the money into court for the owner; and the *quantum* of damages could have been settled afterwards, as has been decided. *Railroad Co. v. Evans, etc.*, *Brick Co.*, 85 Mo. 307. The proper course for the remonstrators to pursue has already been indicated, but this course they failed to pursue when opportunity for that purpose was afforded them in the circuit court.

5. In so far as the judgment of the county court as to the route of the road is departed from in the judgment of the circuit court, the latter judgment will be modified in this court, by striking out the words "*as near thereto as practicable*," and the judgment, as thus modified, will stand affirmed; but, inasmuch as this error was one of the grounds of this appeal, the costs of the same must be taxed against the petitioners.

(All concur. BRACE, J., absent.)

HOWE v. WILSON, Ex'r, etc.

(*Supreme Court of Missouri*. February 14, 1887.)

CHARITIES—BEQUEST—CERTAINTY.

A bequest as follows: "I direct said Wilson [the executor] to divide said remainder among such charitable institutions in the city of St. Louis, Mo., as he shall deem worthy,"—is sufficiently definite, and will be carried into effect.

Appeal from St. Louis circuit court.

G. R. Lockwood and *Noble & Orrick*, for plaintiff in error. *Hitchcock, Madill & Finkelnburg* and *M. M. Cohn*, for defendant in error.

BLACK, J. The petition in this case contains two counts. The first is an action at law to contest the validity of the will of James W. Handfield. On this count there was a trial which resulted in a judgment sustaining the will. The second count is in the nature of a bill in equity to have a clause of the will declared void for uncertainty. A demurrer to this count was sustained, and to reverse the judgment sustaining the demurrer, and dismissing the petition, the plaintiff sued out this writ of error. From the petition it appears the plaintiff is the only heir of Elizabeth Handfield, who died in 1882. She was the widow and only heir of James W. Handfield, who died in 1881. The will was duly probated at the death of Mr. Handfield. It is set out in full, and in substance is as follows: The testator enumerates the property of which he is possessed, which is wholly personal property, all of which is bequeathed to Alexander Wilson in trust for the sole use of Elizabeth Handfield, wife of the testator. Directions are then given the trustee as to the management of the property, with power in him to apply the interest and income, and to use from the principal if needed, for her support, and at her death to provide a suitable burial. The trustee is required to buy a cemetery lot for the burial of the testator and his wife, and to reserve sufficient funds to keep the graves in good condition. There is then the following provision: "If there should be a remainder after such sums are provided for after the death of my said wife, I direct said Wilson to divide said remainder among such charitable institutions of the city of St. Louis, Mo., as he shall deem

worthy." Wilson is made executor of the will, qualified as such, and the estate is alleged to consist of property valued at five or six thousand dollars.

The law is well settled that the courts of this state have jurisdiction over the subject of charities, charitable devises, and bequests. *Chambers v. City of St. Louis*, 29 Mo. 543; *Academy of Visitation v. Clemens*, 50 Mo. 167; *Schmidt v. Hess*, 60 Mo. 591; *Baptist Church v. Robberson*, 71 Mo. 326; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. Rep. 327. The jurisdiction is not dependent upon St. 43 Ellz. c. 4; for it is not conceded that courts of chancery had an inherent jurisdiction over charities before the enactment of that statute. That the statute, in so far as it declared what were existing charities, has had an influence in many of the states, this state not excepted, must be conceded, though the details are wholly inapplicable here. We have no statute which undertakes to exercise the prerogative power of the king over those charities which did not come within the ordinary jurisdiction of the courts, and hence with us some charities will fail which would not fail in England.

Coming, then, to the question in dispute in this case, two things are to be kept in view which render it unnecessary to examine a number of cases cited by the plaintiff. In the first place, the bequest is for charitable institutions. The testator must be taken to have used the word "charitable" in its legal signification. No question, then, can arise as to the character of the bequest. The trustee has no power to dispose of the fund for any purpose other than that strictly charitable. In the next place, there is a living trustee in whom the testator vested the power to divide the fund among such institutions as he should deem worthy. Though the institutions are not designated, yet the means of designating them is provided, and there is no claim that the trustee refuses to act. The case concedes that he will discharge the duty imposed upon him. The question, then, is, with the bequest purely charitable, and a trustee with power to execute it, is it void for uncertainty?

Mr. Perry says: "There is a wide distinction between a gift to *charity*, and a gift to a *trustee* to be by *him* applied to *charity*. In the first case, the court has only to give the fund to charitable institutions, which is a ministerial or prerogative act; in the second case, the court has jurisdiction over the *trustee*, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable. The courts in America have generally declined, in the absence of legislative authority, to administer these indefinite gifts to charity or religion or education or public utility unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons." Perry, Trusts, § 719.

In *Chambers v. City of St. Louis*, *supra*, the devise was: "In trust to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way, *bona fide*, to settle in the west." That devise was held valid, and sufficiently definite and certain, after an elaborate and thorough investigation of the subject. There, it is true, a class of persons was selected to receive aid from the fund. Here charitable institutions, within a limited and defined locality, are selected. We do not see that the difference affects the application of any principle upon which that case was decided.

The more recent case of *Schmucker's Estate v. Reel*, 61 Mo. 592, does not in the least conflict with *Chambers v. City of St. Louis*, or with anything before stated in this opinion. In that case it clearly appeared that the executor took the bequest clothed with a trust for specific and definite purposes known to the executor, but not defined as stated in the will. As to the purposes not stated, it was as if no will had been made. The principal question in the case has no relevancy here whatever.

In *Saltonstall v. Sanders*, 11 Allen, 446, the testator gave the residue of his estate to his executors as trustee to hold and invest the same and the in-

come in such manner as might to them seem expedient, and, among other things, "in aid of objects and purposes of benevolence or charity, public or private." The conclusion was reached, both upon principle and authority, that a bequest for "objects and purposes of charity, public or private," was a valid charitable gift. It is to be observed the word "benevolence" was used in connection with the word "charity." This gave rise to a further discussion, about which we are not called upon to express any opinion in this case. In this case we have endeavored to show, at the outset, that the bequest is to charity only.

In *Miller v. Teachout*, 24 Ohio St. 525, the will contained the following clause: "I direct that my said executor shall appropriate and use all the residue of my estate for the advancement and benefit of the Christian religion, to be applied in such manner as in his judgment will best promote the object named." It is there suggested that, if the object of the trust had not been aided by further provisions, the validity of the bequest might well be questioned. The gift was held to be valid, however, because the testator had invested the executor with power to specify the particular use of the fund, and all objections because of uncertainty were thereby removed.

It is essential to a charitable bequest that the objects to be benefited should be, to some extent, indefinite; or, as said in *Fontain v. Ravenel*, 17 How. 384: "It is no charity to give to a friend. In the books it is said that the thing becomes a charity when the uncertainty of the recipient begins."

The foregoing examples will serve to show that if the general objects of the bequest are pointed out, or if the testator has fixed a means of doing so by the appointment of trustees with that power invested in them, then the gift must be treated as sufficiently definite for judicial cognizance, and will be carried into effect. Perhaps the rule may be stated more favorably to the validity of the trust. *Perry, Trusts*, §§ 720, 732. But we have no occasion to go any further in this case. Here the testator has provided a means for making that certain which otherwise might appear to be uncertain. We see no difficulty in upholding the gift in this case. It comes fairly within that class of charities where the courts can and will direct the trustee to carry out the will of the testator. The judgment is therefore affirmed.

(BRACE, J., absent. The other judges concur.)

RAFFERTY and another v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. February 14, 1887.)

RAILROADS—RINGING BELLS—LOOKOUT—CITY ORDINANCE NOT APPLICABLE TO RAILROAD YARD.

An ordinance of the city of St. Louis requires that, when moving within the city limits, the bells of locomotives shall be constantly sounded, and, if cars or locomotives are backing, a man shall be stationed on the top of the car furthest from the engine, and no freight train shall be moved within said limits without it be well manned, with experienced brakemen at their posts." *Held* not to apply where the employes are simply engaged in setting cars in a car-yard over which there are no street crossings.

Appeal from St. Louis circuit court.

J. P. Kerr, for respondent. T. J. Portis, for appellant.

BLACK, J. The plaintiffs, who are husband and wife, brought this suit to recover statutory damages for the loss of their child, a boy 11 years old, who was run over and killed by the defendant's cars in the city of St. Louis. At the close of the evidence the defendant prayed for an instruction in the nature of a demurrer to the evidence, which was refused, and this ruling of the court necessitates an examination of the pleadings and the evidence.

The negligence consists in the violation of an ordinance, which is pleaded, was read in evidence, and is as follows: "Sec. 26. It shall not be lawful, within the limits of the city of St. Louis, for any car, cars, or locomotive propelled by steam-power, to obstruct any street crossing by standing thereon longer than five minutes; and, when moving, the bell of the engine shall be constantly sounded within said limits; and if any car, cars, or locomotives propelled by steam-power be backing within said limits, a man shall be stationed on the top of the car at the end of the train furthest from the engine, to give danger signals; and no freight train shall at any time be moved within said limits without it be well manned, with experienced brakemen at their posts, who shall be so stationed as to see the danger signals, and hear the signals from the engine."

The petition states that the defendant's agents backed a freight train down to and against a box car upon which the boy was standing, causing him to fall off, and the trucks of the car to run over and crush his body; that the moving freight train was propelled by a steam-engine, the bell of which was not constantly sounded while the engine was moving the train; that the agents of defendant backed the train on Levee street without having a man stationed on the top of the train furthest from the engine, to give danger signals; that the train was not well manned, with experienced brakemen at their posts, so as to see and hear the signals. The evidence shows that, from Chouteau avenue on the north to Convent street on the south, the defendant has six or seven parallel tracks next to the river bank, and on and along the levee. The space thus occupied is used for no other purpose, and is called the "Chouteau Avenue Yard." These tracks are connected with the ferry, and are used for the reception and distribution of cars and freight from the boats. The track nearest the river is designated No. 1, and is used for storing "empties." Plaintiff's evidence tends to show that the boy was standing on the north end of a box car standing in this yard, but the witnesses differ as to whether the car was on the first, second, or third track. They agree that there were other cars standing to the north on the same track, and detached from the one on which the boy was standing. These cars to the north, they say, ran against the one on which the boy was standing, and the witnesses saw him fall off. They say they heard no bell, and saw no man on the moving cars, but they do not give any account as to how the cars were moved, nor does it appear from their evidence that the moving cars were a part of any train.

The evidence for the defendant shows that the car on which the boy was standing stood on the first track. To the north, and disconnected with it, and on the same track, were several other cars. Two empty box cars belonging to a train of four or five cars were detached at Chouteau avenue by the engine "giving the slack." Kelley, a brakeman, got upon the two detached cars, and rode them down the incline, at the same time applying the brake to keep them from going too fast. When he got within six or seven feet of the standing cars, he got down, and made the coupling. These standing cars moved on, and ran against the car on which the boy was standing, and moved it a short space,—half a car-length. The fireman says he rang the bell constantly whenever the engine moved. Plaintiffs lived within three or four blocks of these tracks, and the boy was at the time playing upon the car. He had previously been ordered away, but there is no evidence tending to show that the employes knew that he was about the cars at the time of the accident.

It is to be observed the cause of action is not based upon any alleged negligence in kicking or shunting the cars. It stands solely on the alleged violation of the ordinance. We are of the opinion the proof does not make out a case which comes within the fair meaning of its provisions. There is no evidence tending to show that these cars, when placed in on the track, were not sufficiently manned, nor that the brakeman was inexperienced. The ordinance, among other things, does provide that, if any freight car or cars, or locomotive propelled by steam-power, be backing, a man shall be stationed on top of the car, at the end of the train, furthest from the engine, to give danger signals. To say that when these two box cars were dropped down from Chouteau avenue without an engine attached, and reached the others, the whole constituted a backing train within the meaning of the ordinance, is unreasonable. We cannot overlook the undisputed fact that this portion of the levee was used exclusively for the purpose of storing and distributing cars and freight. There were no cross-streets over it to the river. There being no evidence to the contrary, we must assume that the defendant had a right to thus use it. We held in *Merz v. Missouri Pac. Ry. Co.*, 88 Mo. 672,¹ that this ordinance applied where the defendant had two parallel tracks on uninclosed private property of the company. There can be no doubt but the company must comply with reasonable municipal regulations as to the movement of trains on or off the streets. Still, in so far as the ordinance in question requires a man to be stationed on a backing train to give danger signals, we hold it does not apply where the employes are simply engaged in setting cars in a car-yard. The ordinance, taken as a whole, does not lead to such a conclusion. The requirement that the bell of the engine must be sounded, evidently means that it must be sounded when the car or cars are moved by the engine. Conceding that the cars in this case are to be regarded as moved by the engine because first put in motion by it, still it did not accompany them down to their stopping-place; and the failure to ring the bell, if such was the fact, could have had no possible connection or agency in producing the injury, for on all the evidence it was at least 100 yards off at the time of the accident. If there was any negligence in the case, it was other than a violation of the ordinance, and the demurrer to the evidence should have been sustained. The judgment is therefore reversed.

(BRACE, J., absent. The other judges concur.)

¹ 1 S. W. Rep. 382.

CITY OF ST. LOUIS v. WITHAUS.

(Supreme Court of Missouri. February 14, 1887.)

MUNICIPAL CORPORATIONS—SPECIAL SESSION OF COUNCIL—ORDINANCE 12,509 OF THE CITY OF ST. LOUIS.

Ordinance 12,509 of the city of St. Louis is void, having been passed in violation of section 18 of article 4 of the city charter, (2 Rev. St. Mo. 1592,) providing that, on call of a special session of the municipal assembly by the mayor, he shall state the objects for which they are convened, and their action shall be confined to such objects.

Appeal from St. Louis court of appeals.

The respondent was prosecuted in the First district police court of St. Louis for violating section 1 of ordinance 12,509, which ordinance is as follows:

"An ordinance to prohibit heavy driving in certain streets.

"Be it ordained by the municipal assembly of the city of St. Louis as follows:

"Section 1. From and after September 1, 1883, or so soon as the said streets are reconstructed under existing ordinances, Lucas place and Locust street from Fourteenth street to Ware avenue, and Pine street from Seventeenth street to Grand avenue, and Lindell avenue from Grand avenue to King's highway, shall be used for light driving, and as approaches to Forest park; and on and after said day it shall be unlawful to do, or cause to be done, any heavy hauling on said place, streets, and avenue within the limits mentioned, or to use the same for wagons, drays, or trucks carrying coal, lumber, hay, iron, machinery, ice, merchandise, farmers' produce, stone, brick, sand, dirt, or earth, building material, baggage or express matter, and all vehicles loaded with heavy merchandise, products, or materials whatever, or for driving cattle, horses, mules, or hogs in droves or herds, or for the passage of empty drays, wagons, trucks, or vehicles not having springs; provided, however, that nothing herein contained shall be construed to restrict the right to cross at intersecting streets the place, streets, and avenue mentioned, or to use the same within and to the extent of one block for the delivery of building material, coal, baggage, merchandise, and farmers' products at premises on the block so used; provided, however, said vehicles shall not be driven at a greater speed than an ordinary walk.

"Sec. 2. Any person violating the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than five dollars, nor more than twenty-five dollars, for each offense.

"Sec. 3. The street commissioner shall cause to be erected at Lucas place and Fourteenth street, at Locust street and Ware avenue, at Pine street and Seventeenth street, at Pine street and Grand avenue, at Lindell avenue and Grand avenue, at Lindell avenue and King's highway, prominent placards giving public notice of the terms of this ordinance, and warning all persons not to disregard the same.

"Sec. 4. It shall be the duty of the police force to enforce this ordinance, and to arrest all persons found violating the same.

"Approved August 4, 1883."

The trial took place on January 12, 1884, and the respondent was adjudged guilty, and fined \$20 and costs. He appealed to the St. Louis court of criminal correction. On trial anew in the court of criminal correction, on April 22, 1884, the respondent was found not guilty. The appellant duly moved for a new trial, which was denied, and duly excepted. An appeal was granted to the St. Louis court of appeals. The judgment was affirmed. An appeal was then granted to this court.

The case was tried in the court of criminal correction on an agreed statement of facts in substance as follows: A special session of the municipal as-

sembly of the city of St. Louis was called by the mayor of said city, to commence on June 9, 1883. The proclamation calling said special session was duly published. When the two houses of the municipal assembly were assembled under this proclamation, at the time and place therein stated, the mayor, in a message delivered to each house, stated the objects for which they were convened by him in special session. The message so delivered was in the following words:

"MAYOR'S OFFICE, ST. LOUIS, June 9, 1883.

"*To the Municipal Assembly of St. Louis*—GENTLEMEN: You are convened in special session to-day under the proclamation of the sixth inst., issued pursuant to section 18 of article 4 of the city charter, and I will briefly state the objects for which you are convened; first remarking, however, that your action is, by the above-mentioned provision of the charter, confined to such objects as I may now, or shall hereafter, during the pendency of this session, submit to you. * * * The primary object of the present special session is the adoption of an appropriation bill. * * * I also submit to you the dram-shop ordinance * * * matter. A third, to which your attention is called, is the question of licensing meat-shops. * * * I have no other legislation to submit at present. It is not my wish to unnecessarily prolong the session. I have called it to obviate any embarrassment arising by the recess taken in the first special session from June 5th to October 16th. It rests with you to determine when the special session shall end. It must, of course, terminate prior to October 16th. I am not averse to submitting for your consideration any measure, if satisfied that the public interests demand that it shall be heard.

"Respectfully,

WM. L. EWING, Mayor."

During the special session, and on one of the days when the municipal assembly was in session under the proclamation above mentioned, G. W. Parker, temporarily and lawfully acting as mayor of the city, sent a message to the assembly in the following words:

"EXECUTIVE DEPARTMENT, MAYOR'S OFFICE, ST. LOUIS, June 15, 1883.

"*To the Municipal Assembly of the City of St. Louis*—GENTLEMEN: I submit for your consideration and action an ordinance, introduced through the house of delegates, entitled 'An ordinance to prohibit heavy driving on certain streets.' Pine street, from Nineteenth street to Grand avenue, is being reconstructed with asphalt; and if heavy driving is to be prohibited on that street, and upon others to be reconstructed in a similar manner, the ordinance should take effect by the first day of next September. This measure was pending before your honorable body at the date of the recess taken on the fifth instant.

"Respectfully,

G. W. PARKER,

"President of the Council and Acting Mayor."

The ordinance referred to in said message was subsequently passed by the municipal assembly at said special session, and was approved by the mayor of said city on the fourth day of August, 1884.

The defendant, John Withaus, was arrested on the day laid in the complaint while driving upon Pine street, between Seventeenth street and Grand avenue, with an empty stake wagon or truck not having springs, such as are used for hauling hay, and at the time of his arrest he had used said Pine street with the said truck or stake wagon for the distance of three blocks without having unloaded anything therefrom. The defendant is a citizen of the United States and of the state of Missouri, and resides in the city of St. Louis, and is a citizen of said city. The wagon he was driving at the time of his arrest belonged to Henry W. Beck, who is also a citizen of said state and city. At the time of the arrest of the defendant the said Beck had paid a license

tax to the city of St. Louis, and had received a permit or license, in accordance with the revised ordinance of said city, to use the streets of the city of St. Louis with the said wagon, there being no exception in said license as to any streets whatever.

The St. Louis court of appeals discharged the respondent on the ground that ordinance 12,509 is unconstitutional and invalid. The fact that the respondent violated section 1 of the ordinance is conceded by the agreed case.

L. Bell, for appellant. *Klein & Fisse*, for respondent.

SHERWOOD, J. The defendant, prosecuted and fined in the police court for violating section 1 of ordinance 12,509, appealed to the court of criminal correction, where on trial anew he was found not guilty. The city then appealed, and the judgment was affirmed in the St. Louis court of appeals. 16 Mo. App. 247.

This case brings in question the validity of the ordinance mentioned. It was passed at a special session of the municipal assembly of the city of St. Louis. Section 18 of article 4 of the city charter, (2 Rev. St. 1592,) in reference to such sessions, provides: "The mayor may, by proclamation, call special sessions of the assembly, giving not less than three days' notice, and shall specially state to them, when assembled, the objects for which they have been convened, and their action shall be confined to such objects."

The case hinges on the proper interpretation of the words "*when assembled*." Words are to be taken in their ordinary sense. The ordinary meaning of the adverb "when" is "at the time that." Webster. Dict. The meaning for which the city contends would convert "when" into "while," the effect of which would be to turn special sessions into general ones, in open repugnance to charter provisions. If this conclusion is correct, then such conclusion is not in the least affected by the concluding words of the mayor's message to the special session: "I am not averse to submitting for your consideration any measure if satisfied that the public interests demand that it shall be heard," because the mayor, being required by the charter to specially state to the municipal assembly the objects for which they have been convened, could not "reserve the right to submit other measures if the public interest demanded a hearing for them." Such a reservation is unknown to the charter, and, besides, does not "specially state" the objects for which the assembly has been convened. A special statement is a very different sort of thing from a right reserved to make a special statement at some subsequent period.

The judgment of the court of appeals is therefore affirmed.

(All concur.)

STATE v. MURRAY.

(*Supreme Court of Missouri. February 14, 1887.*)

1. CRIMINAL PRACTICE—SEPARATION OF JURY—MURDER.

On a trial for murder a separation of the jury, by which some of them remain in the dining-room of a hotel, while others go out of their sight into a saloon, with the sheriff, during the progress of the trial, and after the jury were put in charge of the sheriff, is ground for reversal. *Norton, C. J., and Ray, J., dissenting.*

2. SAME—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Where, on an indictment for murder, a main ground upon which a verdict of guilty is arrived at on circumstantial evidence is the identification of a knife as belonging to defendant by a principal witness, an affidavit by a member of the grand jury to the effect that such witness had made very different statements as to the character and description of the knife outside of the court-room to those made by him on the witness stand, is newly-discovered evidence, sufficient to form grounds for a new trial.

Appeal from St. Louis county.

Atty. Gen. Boone, for respondent. *Henry R. Watson*, for appellant.

SHERWOOD, J. The defendant was indicted for the murder of John Prince. On being tried, he was found guilty of murder in the first degree, and sentenced accordingly. The evidence on which the verdict of guilty rests is altogether circumstantial. The dead body of Prince was found on Monday, the twenty-first of September, 1885, lying, face downwards, in Maline creek, with his throat cut, and various injuries on the head, inflicted, apparently, with a club which was found near by, as also was a knife, which it was sworn was that of the defendant. Prince was last seen alive in company with the defendant, something like a quarter of a mile distant from the scene of the crime, about 1 o'clock on Saturday, the nineteenth day of September, prior to the day when the body was found, and this is the date fixed by the indictment as the day of the murder. The body of Prince, when found, was dressed in a new suit of clothes, and it was disclosed in evidence that it was Prince's intention to visit the city of St. Louis that day, and it does not appear that he had on a new suit of clothes when last seen alive. The inculpatory circumstances relied on by the state to sustain the conviction consisted in these facts: That the defendant was last seen with the deceased when alive, and within about a quarter of a mile from where the body was found; that tracks were found at the supposed scene of the crime resembling tracks which it was stated the defendant made by the shoes he then wore; that about two hours after Prince was last seen alive, going towards Ferguson station, with the defendant, the latter was seen returning from that direction, going towards Carsonville, with both knees and the right thigh of his pants soiled with earth; that on the south side of the bank of the creek where the body was found there was an indication that somebody had slipped in getting up the bank; and that the knife found near the body of Prince was the knife of the defendant. For the defense the good character of the defendant was well established, and there was evidence tending very strongly to contradict that of the state's witnesses as to the knife being that of the defendant, and as to his wearing shoes such as could have made the tracks in question. It was also disclosed in his behalf that, on his return towards Carsonville, he was seen going towards and quite near Mrs. Heine's spring, and that a person getting a drink at that spring without a cup would have to kneel down, or get down on all fours, and the defendant testified that he soiled his pants in that way. And Hempstead, a witness for the state, testified positively that he saw the deceased on Saturday and Sunday in a bar-room in Normandy, immediately preceding Monday, the twenty-first day of September, on which he was reported to be and was found dead.

1. Owing to the conclusion reached in the case it is unnecessary to discuss the first instruction given on behalf of the state in reference to the omission of the words "malice aforethought" from the definition of murder in the first degree. It is always safer, however, to follow approved precedents in drafting instructions. 2 Bish. Crim. Law, § 673b.

2. There was no error in refusing an instruction on the subject of an *alibi*. The testimony of Hern on the subject of defendant living in the city of St. Louis at the time the murder was committed was too vague and inconclusive, unsupported, as it was, by the statement of any fact showing that the witness knew *when* Prince was killed, to base an instruction upon.

3. Nor was there any error in instructing the jury that if the defendant, etc., killed Prince "in some of the modes and by some of the means specified, defined, and described in the indictment," etc. The indictment contained two counts; one charging the killing to have been done with a knife, and the other charging that the killing was done in some way and manner, etc., to the grand jurors unknown. The indictment had been read to the jury, and it was

impossible for them to have been misled by the language of the instruction as to this point.

4. The jury in this cause were allowed to separate. Some of them were suffered to remain in the dining-room of the hotel, while others of them went up to the bar of the saloon, out of sight of those who were in the dining-room, the sheriff standing inside of the saloon, and two or three feet from the door; and this occurred during the time trial was in progress, and after the jury had been put in charge of the sheriff. Mr. Bishop states that the rule in this country prohibiting the separation of the jury in capital cases is nearly universal. 1 Bish. Crim. Law, § 995. The earliest case in this state in relation to the enforcement of this rule arose in a capital case, that of *McLean v. State*, 8 Mo. 153, where the judgment was reversed upon the sole ground that the jury, after being sworn, were permitted to separate. This was the unanimous opinion of the court. At the same term of the court, the case of *Whitney v. State* was decided. Id. 165. It was not a capital case, and the judgment was affirmed. There, however, the jury had brought into court an informal verdict whereby the defendant was found guilty; but, inasmuch as the verdict was informal, the jury was sent back to put their verdict in shape. During this interval one of the jurors absented himself from the others for the space of half an hour, but on his return to his fellows the verdict of guilty was put into proper shape, and returned into court, and the absence of the juror was held no ground for a reversal, and very properly was it so held. This, also, was a unanimous opinion, and no intimation is given that the rule established in *McLean's Case* is disturbed. Yet, strange to say, the latter case is ignored, and *Whitney's Case* constantly cited as upholding the rule of the immateriality of the mere separation of the jury, even in a criminal case of the highest grade.

The law being thus established, the legislature at the revising session, in 1879, enacted several new sections in relation to juries in criminal prosecutions. Section 1909 provides: "With the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess of the court during the trial, in all cases of felony, except in capital cases; and in misdemeanors the court may permit such separation of its own motion." It will thus readily be seen that the legislature saw fit to establish a rule dividing criminal prosecutions into three classes: (1) To permit the trial court to exercise its own discretion of allowing the jury to separate in cases of misdemeanor; (2) to permit such separation, "with the consent of the prosecuting attorney and of the defendant, in all cases of felony except *in capital cases*;" (3) to cut off all power in the trial court, either with or without the consent of the prosecuting attorney and the defendant, of permitting the jury to separate in the class of cases last mentioned. This view is emphasized by the provisions of section 1910, a new section, which requires that in cases of a felony, when the jury retire to deliberate on the verdict, they shall do so in charge of an officer, "who shall be sworn to keep them together," etc. This view finds further emphasis in the provisions of section 1966, another new section, making it a cause for a new trial that the jury has "been separated without leave of the court," etc.; and this, too, in cases where the court could have permitted their separation, in the first instance, by consent of parties, and though no proof be offered of prejudice by reason of such separation. In view of this recent legislation, so zealously guarding against the separation of juries in "capital cases," there would seem to be but one conclusion to be drawn from this action of the legislature, and that was to overthrow the rule then prevailing of regarding the mere separation of the jury in capital cases as immaterial.

If this is not the correct view to take of the matter, then it must be confessed that such stringent legislation has failed of its purpose in establishing a rule of procedure in criminal cases; for, if the legislative behest can be violated with impunity unless something in addition to such violation be shown,

it cannot be said to possess any of those sanctions which ordinarily pertain to legislative enactments. Within reasonable bounds, I regard this legislation as *mandatory*. The whole history of the rule of law as established in *McLean's Case*, and as subsequently departed from in other cases, with which rule, and the departure therefrom, the legislature must be presumed familiar, and the recent legislation on the subject, go to uphold and confirm me in this view. If the trial court could not in the first instance, even with the consent of parties, in a capital case, permit the jury to separate, it is difficult to see how its subsequent sanction of such separation could accomplish more. Of course, in holding that the law on the point under discussion is mandatory, it is not intended to give it any unreasonable construction; and it is not to be presumed that the legislature intended any such unreasonable result to flow from their action. *State v. Hayes*, 81 Mo. 585, and cases cited. If any imperious necessity demands that a juror withdraw from his fellows in order to answer a call of nature, and this withdrawal is done under official supervision, while the remaining jurors are securely locked in their room, this would be, in spirit and reason, if not in letter, a compliance with the law; and this was the ruling in *Collins' Case*, 86 Mo. 245. In the case at bar, however, the law was not complied with either in spirit or in letter. Without the existence of any compelling necessity, the sheriff failed to observe his oath, and his duty to keep the jury together; he allowed them to separate; and this conduct of his brings this case within the principle announced in *Collins' Case* when first here, when we reversed the judgment because of such separation. 81 Mo. 652.

5. After some hesitation, I incline to the opinion that the motion for a new trial ought to have prevailed on the ground of newly-discovered evidence. The evidence disclosed by the affidavit of Schulenberg, a member of the grand jury by whom the indictment in this case was found, is certainly material and relevant, and no laches concerning the information contained in the affidavit can be imputed to the defendant. *State v. Curtis*, 77 Mo. 267. Evans was the principal witness, by whose testimony the ownership of the knife found as being that of the defendant was established. Taking Schulenberg's affidavit as true, it clearly shows that Evans had made very different statements as to the character and description of the knife outside of the court-room than he did when on the witness stand; and, if these statements of Evans had been shown to the jury, they would certainly have had a tendency to have shaped their verdict. And, although this testimony would have the effect of impeaching or contradicting Evans, yet this is not its only tendency; it has the further tendency to show that one of the main things relied on by the prosecution to fix guilt on the defendant, to-wit, that he was owner of the knife, was not true. This, it is believed, takes this affidavit out of the operation of a familiar rule. *Sargent v. —*, 5 Cow. 106; 1 Grah. & W. New Trials, 172. And, if the affidavit disclosed matters which should have gone to the jury, the counter-affidavit of Evans should not have been permitted to have cut the defendant off from the introduction of Schulenberg's testimony.

For the reasons given the judgment should be reversed, and the cause remanded.

NORTON, C. J., dissents as to paragraph 4 of the opinion, and RAY, J., does the like. BLACK, J., concurs.

CITY OF ST. LOUIS v. JUPPIER.

(Supreme Court of Missouri. February 14, 1887.)

MUNICIPAL CORPORATION—OPENING ALLEY IN BLOCK—2 REV. ST. MO. ART. 6, § 5010.

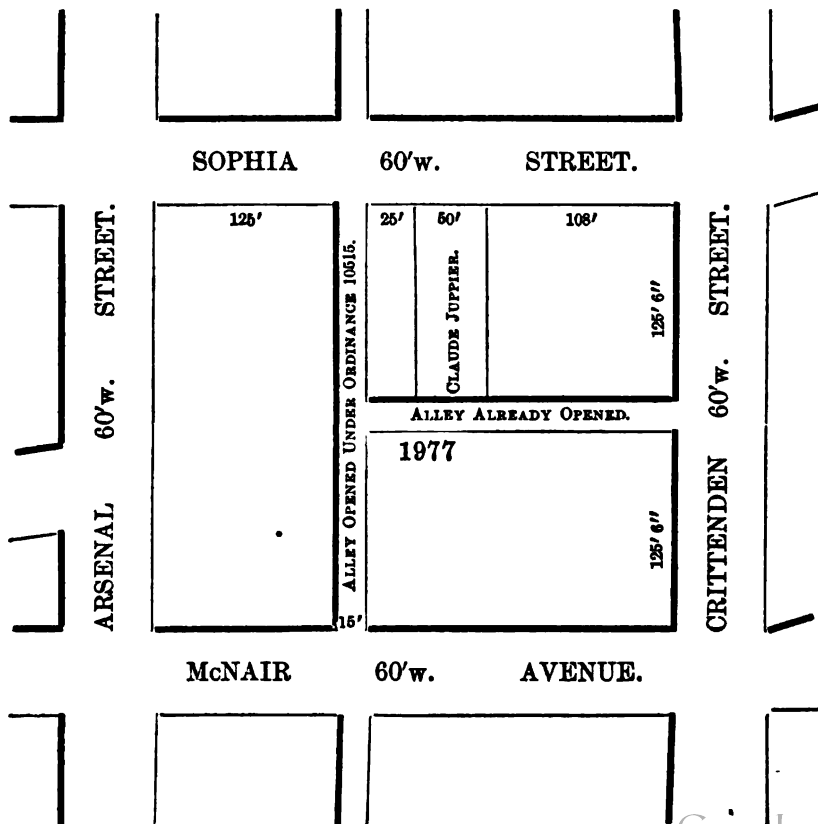
Under 2 Rev. St. Mo. art. 6, § 5010, providing that the benefits arising from the opening of alley-ways in cities shall be assessed to the owners of property in the block where the alley is situated abutting on the proposed alley, "a lot abutting upon an alley to be intersected by the new alley" is not assessable.

Appeal from St. Louis court of appeals.

This is an action to collect the amount assessed upon defendant's property in a block in which an alley-way was opened by the city of St. Louis, brought under 2 Rev. St. Mo. art. 6, § 5010, that the expenses of such improvements shall be paid for by the owners of property in the block where the alley is situated, "*abutting on the proposed alley.*"

By section 1 of an ordinance of the city of St. Louis approved January 18, 1878, numbered 10,515, an alley 15 feet wide was directed to be opened east and west through block 1,977, from McNair avenue to Sophia street. The northern line of this alley crossed and intersected with the southern end of an alley already established, which last-mentioned alley, commencing at Crit-

S. >>> —————> N.



tenden street on the north, proceeded southwardly about 180 feet, and terminated in the center of block 1,977, and had no outlet. The commissioners, in assessing benefits arising from the opening of the east and west alley established by ordinance 10,515, included in the assessing district, and assessed with benefits, the lots in block 1,977 abutting on the north and south alley, which was already in existence to the extent of about one-half the distance north and south through the block, but which had no southern outlet. The present action is to recover the assessment of benefits against one of the lots last above mentioned, owned by the respondent, namely, a lot abutting on the north and south alley, but which does not abut on the east and west alley. The circuit court and the court of appeals held that the lot in question was not subject to assessment, and the plaintiff has appealed.

Leverett Bell, and *Theo. H. Culver*, for appellant.

The contention of the plaintiff is that the charter provision which limits the assessment of benefits for an alley to property in the block "*abutting on the proposed alley*" is to receive such a construction as will carry out the intention of the framers of the charter in establishing the provision, and at the same time do no violence to the language employed. Under the charter of St. Louis, property condemned and taken for public use for an alley is required to be paid for by the property in the block abutting on the alley. All the damages allowed for property so taken are required to be assessed against other property in the block abutting on the alley. The public cannot be subjected to the payment of any part of such damages. The costs of court attending a proceeding to condemn property for the establishment of an alley are a charge against and are paid by the public treasury, but the treasury is subjected to no other expenditure. This rule is based on the proposition that the benefits arising from the establishment of an alley in a block accrue to the property abutting on the alley, and not to the city at large. The alley is a public highway, and is open to all. At the same time, however, the main purpose of its creation is to furnish access from the streets to the rear of the lots in the block, for the purpose of delivery and removal of supplies, etc. At the date of the passage of ordinance 10,515, establishing an east and west alley in block 1,977, a north and south alley was partially opened in the block, extending from Crittenden street southwardly, and terminating in the center of the block, on private property, and having no means of access to its southern termination. It had a width of only 15 feet, and it was impossible to drive a vehicle southwardly from Crittenden street on the alley, and return with the vehicle to Crittenden street.

L. Gottschalk, for respondent.

SHERWOOD, J. As the lot of defendant did not abut on the new alley, no assessment of the benefits could be made against him in consequence of being the owner of such lot. The language of the city charter is too plain to admit of any other construction. Nor does it matter that the old alley on which defendant's lot did abut intersected the new alley at the distance of 25 feet from the corner of the lot. Judgment affirmed.

(All concur.)

PAYNE v. LOTT and others.

(Supreme Court of Missouri. February 14, 1887.)

1. TAX SALE—APPARENT OWNER—PLAT-BOOK—NOTICE OF CONVEYANCE.

The plat-book of the lands of a county on file in the county clerk's office, duly certified to by the register of the United States land-office, may be resorted to by a collector charged with the duty of suing the owner of land for delinquent taxes thereon, and a sale of land, in a suit to enforce a tax against a party who appears on such book as the owner, in the absence of notice of the fact that he is not the true owner, but has parted with his title by conveying it to another, is valid.

2. SAME—SERVICE BY PUBLICATION—RESIDENT OWNER—CONVEYANCE—NOTICE.

Under the provisions of Rev. St. Mo. §§ 6837, 3494, regulating the service of notices and process in tax suits and suits to enforce liens, an allegation in a petition to foreclose a tax lien that the owner of the land is a non-resident of the state, authorizes the clerk to issue an order of publication, which, when issued, published, and proved, gives the court jurisdiction to proceed to judgment; and a sale made under it will be valid and binding, as against the apparent owner and his grantees, although he was not in fact a non-resident, when the purchaser had no notice that he was a resident, or that he had conveyed his title to another previous to the institution of the suit.

Appeal from circuit court, Putnam county.

Swallow & Mullins, for appellant. *S. P. Huston*, for respondents.

NORTON, C. J. It appears from the record in this case that in 1858 one John Rucker entered the W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ section 29, township 67, range 19, in Putnam county, as shown by the plat-book of said county, duly certified to by the register of the land-office at Boonville; that in January, 1878, the state, at the relation of the collector of said county, instituted suit against said Rucker in the circuit court of said county to enforce the lien of the state on said land for delinquent taxes assessed against it, running back to 1867, and up to and including 1876; that it is alleged in said petition, which was not sworn to, that said John Rucker was a non-resident of the state; that the clerk of said court in vacation issued an order of publication of notice, which was duly published, and upon motion, at the March term, 1878, of said court, judgment by default was rendered, under which the land was sold in September, 1878, to defendant Melvina I. Lott, (then Carson,) who received a sheriff's deed therefor, and filed it for record on the eleventh September, 1878. It is this deed which this suit is brought to set aside.

On the trial plaintiff put in evidence a deed from said Rucker for the land in question to one John C. Hutchinson, dated April 17, 1858, but not filed for record till the fourth February, 1881; also a deed from said Hutchinson to plaintiff, dated January 12, 1881, and recorded February 4, 1881. Plaintiff also put in evidence the deposition of said Rucker, who testified that he was born in the state, and had always lived in it; that he moved to Andrew county, Missouri, in 1861, where he has ever since resided. Plaintiff also put in evidence the record in the suit of *State v. said Rucker*, in which, among other things, it is recited as follows: "Now, at this day, to-wit, March 29, 1878, comes the plaintiff, by attorney; but the defendant, although having been notified of the commencement of this action by publication made in this cause, and being three times solemnly called, comes not, nor makes answer in this cause, but makes default," etc. Defendants put in evidence the plat-book of the lands in Putnam county, duly certified by the register of the United States land-office at Boonville, on which the name of John Rucker was written on the plat of the land in question, and date of entry. The trial court rendered judgment for the defendant, from which plaintiff has appealed; and the first ground relied upon to sustain the appeal is that Rucker, against whom the suit was brought to enforce the lien for taxes, was not the owner of the land at the time the suit was instituted.

It was held in the case of *Vance v. Corrigan*, 78 Mo. 94, that the requirement of the law that a suit to enforce a lien on land for taxes must be brought against the owner thereof, was met and fulfilled by bringing the suit against the person who appeared from the record of deeds to be the owner, in the absence of notice of the fact that such person was not the true owner, but had parted with his title by conveying it to another. This case has been followed in the cases of *State v. Saak*, 79 Mo. 661; *Watt v. Donnell*, 80 Mo. 195; *Cowell v. Gray*, 85 Mo. 169. It was further held in the case of *Vance v. Corrigan*, *supra*, that a purchaser under a judgment rendered in a suit brought in the absence of notice or knowledge to the contrary, against the person appearing from the registry of deeds to be the owner, would be protected in his

purchase against the holder of an unrecorded deed from such apparent owner.

It is, however, contended by counsel that the case before us does not fall within the principle announced in the above-cited cases; inasmuch as the apparent ownership of Rucker was not made to appear from the registry of deeds in Putnam county, but from the plat-book of the lands of said county on file in the county clerk's office, duly certified to by the register of the United States land-office.

In the case of *Wilhite v. Barr*, 67 Mo. 286, it is held that such a plat-book, so certified and on file in the county clerk's office, was receivable in an ejectment suit to show title in plaintiff. If receivable in evidence for the purpose of establishing ownership, we are unable to perceive why a collector, charged with the duty of suing the owner of land for delinquent taxes thereon, may not resort to such plat-book as well as to the registry of deeds for the purpose of ascertaining who is the apparent owner of such land; especially so in view of sections 6697, 6708, Rev. St., inclusive, under which it is made the duty of the county courts to procure such plat-books, and keep them on file in the respective county clerks' offices, in order that resort may be had to them in ascertaining which lands are subject to taxation.

The next point made is that, although it was alleged in the petition in the suit against Rucker that he was a non-resident of the state, and although it appears that on filing such petition the clerk in vacation made an order of publication of notice which was duly published and publication proved, that the court did not thereby acquire jurisdiction over said Rucker, as it appeared *dehors* the record that he was in fact a resident of the state at the time suit was brought, and living in Andrew county, and always had been a resident of the state. It is provided by section 6837 of the revenue law as follows: "All notices and process in suits under this act shall be sued out and served in the same manner as in civil actions in circuit courts; and in case of suits against non-resident unknown parties, or other owners on whom service cannot be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property. In all suits under this act, the general laws of the state as to practice and proceedings in civil cases shall apply, so far as applicable, and not contrary to this act." And it is provided by section 3494, Rev. St., as follows: That "in suits * * * for the enforcement of mechanics' liens, and all other liens against either real or personal property, * * * if the plaintiff, or other person for him, shall allege in his petition, or file an affidavit stating, that part or all of the defendants are non-residents of the state, * * * so that the ordinary process of the law cannot be served upon them, the court or clerk, in vacation, shall make an order, directed to the non-residents," etc. We think it clear, under these statutory provisions, that the allegation contained in the petition that Rucker was a non-resident of the state authorized the clerk to issue an order of publication, and that, when issued, published, and proved, the court had jurisdiction to proceed to judgment in the case, and, having such jurisdiction, that the sale made under it to the defendant is valid and binding as to Rucker and his grantees; defendant having purchased at said sale without notice of the fact either that Rucker was a resident of the state, or that plaintiff had acquired by mesne conveyance the title of Rucker previous to the institution of the tax suit. *Hahn v. Kelly*, 84 Cal. 391; *Ogden v. Walters*, 12 Kan. 282; *Callen v. Ellison*, 13 Ohio St. 446.

Judgment affirmed; all concurring except BRACE, J., absent.

PETRING v. HEER DRY-GOODS Co., Interpleader, etc.

(Supreme Court of Missouri. February 14, 1887.)

1. ATTACHMENT—PRIORITY—CHATTEL MORTGAGE—DELIVERY OF GOODS TO MORTGAGEE.

Where a debtor executes a chattel mortgage to secure an actual indebtedness to a creditor, and subsequently delivers possession of the goods to the creditor under a written agreement reciting the mortgage, and he takes actual possession prior to the levy of an attachment, and continues to hold possession up to the time of the levy, he will be protected, and hold the goods as against the subsequent attaching creditor, although the mortgage covers after-acquired property, and would be void except as between the parties.

2. SAME—FORTHCOMING BOND—ESTOPPEL—INTERPLEADER.

Where goods subject to a mortgage, that have been delivered into the possession of the mortgagee to secure payment of his debt, are subsequently attached by another creditor of the mortgagor, and the mortgagee executes a forthcoming bond to the sheriff, and retains possession, he is not, as an interpleader, by reason of having given such bond, estopped from denying that the goods were the property of the mortgagor, in the absence of evidence to show that the attaching creditor has been deceived or induced, in some way injurious or prejudicial to him, to alter his position with reference to the property of his debtor in the writ, in consequence of the execution of the bond.

Appeal from circuit court, Lawrence county.

Goode & Cravens, for appellant. *McAfee & Teel*, for respondent.

RAY, J. In April, 1881, plaintiff begun this suit, against the defendants John and A. J. Chrisler, by petition in the ordinary form for actions on account, with affidavit and bond for attachment against the property in controversy, which consists of a certain stock of dry goods and merchandise. The attachment writ was thereafter levied by the sheriff upon the said stock of goods while the same was in the possession of the Heer Dry-goods Company. Said Heer Dry-goods Company gave the sheriff a forthcoming bond, as provided in section 421, Rev. St., and retained the possession; and by permission of the court filed its interplea in the cause, claiming the property under a chattel mortgage executed by the said Chrislers, and acknowledged and recorded in December, 1878, conveying to C. H. Heer & Co. the said stock of goods and other described property, to secure the payment of a certain note therein specified. It was stipulated on the trial that the interpleader, the Heer Dry-goods Company, was the successor to and had duly acquired the rights of the said C. H. Heer & Co., the mortgagee in said mortgage. The defendants John and A. J. Chrisler filed no answer, and judgment was taken by default against them. The trial of the interplea, before the court, sitting as a jury, resulted in a finding and judgment in favor of the interpleader, from which the plaintiff has appealed. The mortgage further contained a provision, purporting to convey property to be thereafter acquired, viz., "all goods and property that may be placed in the store thereafter, at Chesapeake, by purchase or otherwise," and was otherwise valid and operative, on its face. The mortgagor, it is true, was authorized, by the terms of the mortgage, to sell the goods in the usual course of trade, but he was also thereby required to account for and pay over the proceeds of sales to the mortgagees. Prior to the institution of the attachment suit by plaintiff, the said Chrislers, father and son, delivered to the interpleader the possession of the goods in controversy under the following agreement:

"CHESAPEAKE, Mo., March 22, 1881.

"We, John and Andrew J. Chrisler, composing the firm of John Chrisler & Son, of Chesapeake, Mo., have this day delivered full and entire possession of all our stock of merchandise, embracing dry goods, notions, groceries, hardware, clothing, hats, caps, drugs, and medicines, store fixtures, show-cases, scales of all kinds, and everything in our possession and in our store at Chesapeake, Mo., to W. C. Hornbeck, for Messrs. Chas. H. Heer & Co., of

Springfield, Mo. *This delivery is made under the provisions of a mortgage executed by us to said Chas. H. Heer & Co., dated December 12, 1878, and recorded in office of the recorder, at Mt. Vernon, Mo., December 19, 1878. This delivery also embraces the books and all unpaid accounts due the firm of Chrisler & Son.*

[Signed]

"JOHN CHRISLER.

"ANDREW CHRISLER."

This, we think, brings the case within the operation of the rule heretofore declared by this court in *Greeley v. Reading*, 74 Mo. 309, and by the St. Louis court of appeals in *Nash v. Norment*, 5 Mo. App. 545. The doctrine of these cases is that, where the mortgagee in good faith takes actual possession of the goods prior to the levy of the attachment, for the purpose of securing the payment of his debt, and continues to hold the actual possession up to the time of the levy, he will be protected, and will, in that event, hold the goods, as against the subsequent attaching creditor; and that, under this state of facts, it is immaterial that the mortgage contains stipulations which render it void, except as between the parties. Treating of this subject, Jones, in his work on Chattel Mortgage, says: "Delivery of possession under a mortgage, before rights have been acquired by others, will cure any invalidity there may be in the instrument, whether arising from an insufficient execution of it, the omission to record it, or from its containing a provision which makes it void, except as between the parties." Section 178.

In this case the debt secured by the mortgage was due and unpaid, and, as the possession was delivered under said agreement some time prior to the levy of the attachment by plaintiff, the trial court evidently, as appears from its ruling upon declarations of law asked by the parties, tried and determined the case in favor of the interpleader in harmony with the rule supported by these authorities. Some effort is made to distinguish this case, and to take it out of the rule announced in those cases, but not, as we apprehend, upon any solid grounds. The execution of said agreement of March 22, 1881, and the delivery of the possession, was, we think, entirely voluntary on the part of said Chrislers, father and son; and whether or not they, or either of them, supposed the sheriff could take the possession under the mortgage, is not, we think, material or important. Nor do we perceive why the stipulation in said agreement, that such delivery was made under the provisions of the mortgage, should, under the facts and circumstances, vary, modify, or affect the rule. The theory, as to this, of plaintiff's counsel, is, if we understand him, that the mortgage was fraudulent *per se*, and void on its face, (and we may observe the trial court so declared in the first declaration given at his instance,) and that the mortgage had been so treated by the parties to it as to amount to actual fraud upon other creditors; and hence a delivery of possession thereunder would be a mere continuation of the fraud, and therefore ineffectual to remove or cure the vice existing in the mortgage by reason of such fraudulent and void provision.

To avoid misconception, we may call attention to *Wright v. Bircher*, 72 Mo. 179; *France v. Thomas*, 86 Mo. 80; and *Frank v. Playter*, 73 Mo. 672, where similar mortgages, with like provisions as to after-acquired property or chattels not *in esse* at the date of the mortgage, were before this court. A full discussion of this question, and exhaustive review of the authorities, was there had. It is, we think, sufficient in this case to say that we adhere to the rule announced in these cases, which makes such mortgages inoperative to pass the legal title to property not *in esse* at the date of the mortgage, but does not go to the length now claimed, or make them fraudulent *per se*, or absolutely void, without regard to the intention of the parties. Whether the mortgage became fraudulent in fact as to other creditors by reason of the conduct of the mortgagees, in permitting or encouraging the mortgagor, after

breach in the condition of the mortgage, to continue to sell, without requiring the proceeds of sale to be turned over on the mortgage, was, we think, a question to be determined upon competent intrinsic evidence in that behalf. *Bullene v. Barrett*, 87 Mo. 188.

The extrinsic evidence, if any, in support of this alleged fraudulent conduct of the parties, was, we think, properly submitted in the declarations of law numbered 2 and 3, given at plaintiff's instance, and which are as follows: "(2) That if it appears from the evidence that said C. H. Heer & Co. permitted said mortgagors to remain in possession of the goods which were covered by the mortgage after said mortgagors had failed to comply with the express terms of said mortgage, and to continue to sell said goods, and all after-acquired stock, in the course of trade, and without requiring said mortgagors to pay over the proceeds of such sales on said mortgage debt, then said mortgage became fraudulent in fact, as against all other creditors of the said mortgagors; (3) that the burden of proving itself to be the owner of the goods attached rests upon the interpleader, who is a stranger to the original suit, and unless the court believes that the said interpleader has established, by the weight of evidence, that it was at the date of said levy the real owner of said goods, in good faith, the issues should be found against said interpleader."

The finding of the court, sitting as a jury, in favor of the interpleader, must therefore have been adverse to the plaintiff on the facts relied on as showing actual fraud in this behalf.

In *Greeley v. Reading*, above cited, it will be observed the mortgage was void under the statute as being a conveyance to the grantor's own use, and the agreement between the mortgage debtor and mortgagee was that the latter should take the possession, and hold the same until his debt was paid; which was the same in legal effect as an agreement to hold according to the terms of his mortgage, which would be satisfied and discharged by the payment of the debt. For these reasons, therefore, we think the positions of counsel for plaintiff are not, in these respects, well taken.

The remaining question, not covered by the discussion already had, and insisted on by plaintiff, is that the interpleader is estopped from denying that the goods were the property of the defendant by reason of having given the forthcoming bond to the sheriff. We do not think we should so hold in a case of this sort. The recital in the delivery bond pertinent to this inquiry is that the obligors stand indebted to the sheriff in the sum named, upon condition that they shall have the property found in their possession, and attached by virtue of the writ against the said Chrislers, forthcoming when and where the circuit court shall direct. There has been no breach of this bond, nor is this a suit by the officer thereon. By the levy of the writ the officer ordinarily acquires the possession and a special interest or lien on the property. It may be that by giving the delivery bond or receipt, as occurs in some of the cases, for the goods, and thereby inducing the officer to part with his possession, or to forbear taking and holding the actual possession, the obligor or receptor would, in an action by the officer on such bond or receipt, for failure to deliver the property, be estopped or precluded, upon grounds of public policy or otherwise, to set up afterwards his title or ownership to defeat the action. Such a course is, under many authorities, held to be a fraud on the officer and on the law. As to this, however, the authorities are not entirely harmonious; and, as that question is not now directly presented, we do not pass on but waive it. The cases to which we have been referred are, for the most part, actions of this sort by the officers for failure to deliver to them the goods seized, but released on bonds or receipts. *Bursley v. Hamilton*, 15 Pick. 40; *Dezell v. Odell*, 3 Hill, 215; *Dewey v. Field*, 4 Metc. 881.

There are other cases where the party has been precluded, upon the doctrine of estoppel, from setting up title in themselves to the property; as

where, for instance, a party informed of the facts relating to his own title gives the attaching officer a receipt for property, promising to deliver on demand, without any notice that he claimed to own it, and it appeared that when the attachment was levied or the receipt given there was other property of the debtor which the officer could have attached, if the party had then set up his claim. *Bigelow, Estop. 437*, and cases cited in note 2. But the receipt does not in these cases, in and of itself, create the estoppel, which depends upon the accompanying conduct and silence of the receptor, and the consequent injury and loss of his debt which the attachment creditor thereby suffers. The case before us does not possess these features, and is wanting in the essential elements of estoppel. The *onus* is on the party who sets up the estoppel to make out the facts on which it rests.

It is not claimed, or, if claimed, not shown, that plaintiff has been misled or injured by the action of the interpleader in giving said bond, or that plaintiff or said officer was thereby induced to believe that the interpleader was waiving, and not interposing or asserting, a claim to the property in its own behalf; or that, in consequence of this course on the part of said interpleader, the plaintiff was prevented from further search for other property of his debtor; or that he failed for this reason to find other property, or was for this reason injured and prevented from collecting his debt. None of these matters appear from extrinsic evidence, or from the face of the bond, or by any necessary inference which can be drawn in this behalf. Moreover it appears, we think, necessarily, that at the time of the levy the interpleader was, as plaintiff and the officer must have known, asserting its ownership and claim on the goods. The mortgage was of record in that county, and had been for several years, and the interpleader was in the actual possession of the property when seized by the officer. The fact of actual possession on the part of the interpleader, which is not only in itself a claim of ownership, but, as to such personal property, presumptive evidence of title, appears on the face of the bond itself. In the absence of evidence to show that plaintiff has been deceived or induced, in some way injurious or prejudicial to him, to alter his position with reference to the property of his debtor in the writ, in consequence of the execution of the delivery bond, we see no good reason why the mere giving of the bond, which is done simply to retain the possession, should, as against such a plaintiff, be held an admission of ownership in the defendant in the attachment writ, or should, of itself, preclude the interpleader, upon a trial between him and the attaching creditor, from asserting his title and ownership of the goods covered by the bond.

These views, if correct,—and under the authorities cited we have no doubt of their correctness,—lead to an affirmance of the judgment of the trial court, and it is accordingly so ordered.

(All concur, except BRACE, J., absent.)

CITY OF ST. LOUIS *v.* GERARDI and others.

(*Supreme Court of Missouri. February 14, 1887.*)

INTOXICATING LIQUORS—LICENSE TO SELL AT ONE PLACE—THREE BARS IN HOTEL.

The proprietor of the Planters' House in St. Louis, Missouri, having procured a license to keep a dram-shop at No. 111 North Fourth street, which was the main street entrance to the hotel, kept three separate bars where liquors were sold on the ground floor of the hotel, screened off by partitions having direct and immediate connection by doorways, all of which were accessible to the guests without going out of the hotel, and all of which bars were located on the premises occupied for hotel purposes, and a part of the Planters' House. *Held*, that keeping the three bars did not violate the ordinance of the city providing that no person to whom a license should issue should keep a dram-shop at any other place than the place designated.

Appeal from St. Louis court of criminal correction.

T. P. Dyer and L. Bell, for appellant. Dyer, Lee & Ellis, for respondent.

NORTON, C. J. This case is before us on plaintiff's appeal from the judgment of the St. Louis court of criminal correction, discharging defendants from a prosecution instituted by the city against them for selling liquor in violation of an ordinance of said city. The cause was tried on the following agreed statement of facts, viz.: The defendant was managing proprietor of the hotel known as the Planters' House, situated in City block No. 101, of the city of St. Louis, state of Missouri. Said hotel covers and occupies the entire east half of said City block, being bounded on the north by Pine street, on the east by Fourth street, and on the south by Chestnut street; and was kept by the respondent for the accommodation of the public as a hotel and restaurant. At the date of the original complaint herein, the respondent had one dram-shop license, which had been duly issued to him by the collector of the city of St. Louis, to keep a dram-shop at No. 111 North Fourth street, in the city of St. Louis and state of Missouri, said number being the main Fourth-street entrance to the office of said hotel. At said date the respondent kept in said Planters' House three separate bars, at each of which spirituous liquors were sold at retail for money. One of said bars was situated about 20 feet west of Fourth street, near the center of said hotel building; another of said bars was situated next to the southern entrance to said hotel, on Chestnut street; and another of said bars was situated on the north side of said hotel, on Pine street. Said bars were screened off by partitions, and had direct and immediate communication, by means of doorways, with the office rotunda and restaurant, which together made up to the greatest extent the ground floor of said hotel. All of said bars were easily accessible to the guests without going out of said hotel, and in point of fact were each patronized by guests and others. All of said bars were located upon the premises which the respondent leased and occupied for hotel purposes, and were a part of the Planters' House, which was *one building and one place*. Guests and persons visiting said Planters' House were in the habit of entering the hotel through the entrances on Fourth, Pine, and Chestnut streets, and it was more convenient for guests and others desiring to purchase liquors by the drink, to have said bars so located than if one bar only had been used.

Plaintiff also put in evidence the ordinance which defendant is charged with violating, the material provisions of which applicable to the case are as follows: "Applications for any license under this ordinance shall be made in writing to the collector, and shall state specifically where the dram-shop is to be kept," and that "all licenses issued under this ordinance shall be kept posted up in some conspicuous place behind the bar, and as near the center thereof as possible;" that "no person or persons to whom a license shall be issued shall keep a dram-shop at any other place than the place designated: provided, that he or they may remove the carrying on of such business, during the continuance of such license, from the tenement designated therein to any other tenement in the city: provided, that he or they shall first have obtained permission for such transfer of business from the collector," etc.; and that "any such license shall authorize the business therein designated to be carried on at one place only."

It is clear that this ordinance contemplates that the location of the place where a dram-shop is to be kept shall be designated, and that a license to keep a dram-shop at such place does not authorize it to be kept anywhere else; and, if the facts in the agreed statement brought the case within the operation of this principle, the judgment of the court of criminal correction is erroneous. But we are of the opinion that the facts agreed upon fall short of this. They show that defendant, the proprietor of the Planters' House, procured a license to keep a dram-shop at No. 111 North Fourth street, in the city of St. Louis; that said number was the main Fourth-street entrance to said hotel; that

three bars were kept on the ground floor of the hotel, screened off by partitions having direct and immediate connection by doorways, all of which were accessible to the guests without going out of the hotel, and all of which bars were located on the premises occupied for hotel purposes, and a part of the Planters' House, which was one building and one place. The place at which the dram-shop was to be kept was the Planters' House, and a bar is only a means of carrying on the business, and, where it is kept at the place designated, the mere fact of the licensee erecting more than one bar at such place, so connected as they were in the present instance, would not render him liable to the penalty of the ordinance in question. We can see no reason why a dram-shop keeper, for his own convenience as well as that of his customers, might not, at the place where he is authorized to conduct a dram-shop, erect a bar from behind which to sell beer, another to sell wine, and another to sell whisky, brandy, gin, etc. The rooms in which the bars in this instance were located were all on the ground floor of the Planters' House, the place at which defendant was licensed to keep a dram-shop, only separated by screen partitions with doors to pass from one to the other.

We have been cited, in support of the position of the city counselor, to the cases of *State v. Fredericks*, 16 Mo. 382, and *State v. Hughes*, 24 Mo. 147. In the first case cited it is only held that a license to keep a dram-shop in one house does not authorize the licensee to keep a bar in another house, distinct from the other house, and not necessary to its use, although there might be an internal connection from one to the other; and in the last case cited it is simply held that a license to sell liquor at a place named, in a specified block in the city of St. Louis, as, for instance, in block 15, will not authorize a sale of liquor in another and distinct block, as, for instance, in block 179.

The judgment is hereby affirmed, in which all concur except BRACE, J., absent.

STATE, to Use, etc., v. SPENCER and others

(*Supreme Court of Missouri*. February 28, 1887.)

SHERIFF NOT A STATE OFFICER—SUIT—MISSOURI SUPREME COURT.

In Missouri a sheriff is not a "state officer," within the meaning of the constitution of Missouri, art. 6, § 12, and fifth section of the amendment thereto adopted in 1884, (Laws Mo. 1883, p. 216,) giving the supreme court of Missouri exclusive appellate jurisdiction in causes where "any state officer is a party;" and the words "state officer," as used in the constitution, are to be construed in their popular sense, and refer only to officers whose official duties and functions are co-extensive with the boundaries of the state; following *State v. Dillon*, 2 S. W. Rep. 417. BLACK, J., dissenting.

Appeal from circuit court, Buchanan county.

J. W. Boyd, for appellant. *H. K. White*, for respondent.

SHERWOOD, J. Satisfied with the reasoning in the case of *State v. Dillon*, 2 S. W. Rep. 417, that Spencer, one of the defendants herein, though a sheriff, is not a state officer, and, as this is the only ground for entertaining jurisdiction of this cause, an order will be entered transferring the same to the Kansas City court of appeals. Since writing the above I have met with section 18 of article 9 of the constitution, which I regard as conclusive on the point discussed. That section provides: "In cities or counties having more than two hundred thousand inhabitants no person shall, at the same time, be a state officer and an officer of any county, city, or other municipality," etc. If there is any reliability in plain words, this language must set the point discussed at rest, and "make assurance doubly sure."

(All concur, except BLACK, J., who dissents.)

MORRISON and another, Surviving Partners, etc., v. DAY.*(Court of Appeals of Kentucky. March 3, 1887.)***CONTRACT—"OPTIONS"—DELIVERY OF GOODS.**

In an action upon an option contract to recover the difference between the purchase price of pork and the sale price, the purchaser resisting recovery on the ground that no delivery was made of the pork, the broker's evidence that he sold the pork at a certain price, by the purchaser's direction, is competent, as a sale and delivery to a third person, at the request of the purchaser, was equivalent to a delivery direct to the purchaser.

Appeal from circuit court, Fleming county.

W. J. Hendrick and Wm. Lindsay, for appellants. A. Duvall, for appellee.

BENNETT, J. The appellants alleged in their answer that on the twentieth of January, 1877, the appellee, by written contract, bought of them 50,000 pounds of bulk shoulders, pork, at six and three-quarter cents per pound, to be delivered at appellee's option during the month of March, 1877; that appellee was to pay cash for the shoulders on their delivery, and was to keep up a margin of \$250; that on the sixth of March, 1877, appellee purchased of the appellants another 50,000 pounds of bulk shoulders, at the price of five and five-eighth cents per pound, to be delivered during that month at the appellee's option, and to be paid for on delivery. Appellants alleged in their petition that they delivered to appellee both lots of shoulders. By their amended petition they alleged that they delivered to the appellee the 50,000 pounds of shoulders bought on the sixth of March, 1877, immediately; that they delivered to him the 50,000 pounds bought on the twentieth of January, 1877, on the thirtieth of March, 1877; that appellants agreed with appellee to hold for him, subject to his order, the 50,000 pounds of shoulders bought on the sixth of March, 1877, until the first of September following, by appellee paying at the rate of 25 cents per hundred pounds per month therefor; that appellants agreed with appellee to hold for him, subject to his order, the 50,000 pounds of shoulders bought on the twentieth of January, 1877, by appellee paying at the rate of 25 cents per hundred pounds per month therefor; that, in case appellee failed to pay at the rate of 25 cents per hundred pounds per month, then he agreed that appellants should sell the shoulders, and apply the proceeds to his debt; that appellants, in accordance with the terms of their contracts with the appellee, and at his request, held the 100,000 pounds of shoulders for him from the thirty-first of March, 1877, until the twenty-seventh of September, 1877, when the appellants, as was their right, the appellee having failed to pay the agreed margins, sold the 100,000 pounds of shoulders, and applied the proceeds to the payment of the appellee's debt, which left a balance due appellants of \$847.57, for which they asked judgment. The appellee, in his answer, denied the delivery of the shoulders; and by the second paragraph in his answer alleged that the appellants failed to deliver him the shoulders according to the terms of the contract, and that they refused to deliver them according to the terms of the contract, for which he claimed damages.

When the evidence was concluded, on the trial in the lower court, the court gave the jury a peremptory instruction to find against the appellants as to their claim, which the jury did. The jury also, under instructions from the court, rendered a verdict for the appellee on his claim for damages. The appellants' motion for a new trial having been overruled, they have appealed.

On the trial the appellants swore, in substance, that they held the shoulders for the appellee at his request, for which he was to pay them at the rate of 25 cents per hundred pounds; and that about the first of September, 1877, the appellee agreed that they should sell the shoulders at about six cents, using their best judgment; that pursuant to this agreement they did, during the month, sell the shoulders, etc. The proof was competent in two points of

view: (1) To show that there was in fact a delivery of the shoulders. It is certainly true that, if the appellants sold and delivered the shoulders to a third person by the request of the appellee, and on his account, then such sale and delivery was equivalent to a delivery direct to the appellee; and such sale and delivery, although having occurred after the time alleged in the amended petition, was sufficient to sustain the allegations of the petition. Time was not of the essence of the contract, nor did the amended petition allege a delivery in any particular manner. Therefore the appellants' proof showing that the shoulders were delivered by a sale thereof according to the directions of the appellee, subsequent to the time alleged and before the action was brought, was competent under the pleadings. (2) Regarding the contracts as either executed or executory, if the appellants held the shoulders for the benefit of the appellee, and at his request sold them for his benefit, and the proceeds were to be applied to the appellee's indebtedness to the appellants on account of the purchase of the shoulders, then, under the allegations of the appellants' petition and amended petition, they would recover the difference between the proceeds of the sale and the other credits to which appellee was entitled and the contract price of the shoulders. For these reasons the questions should have been submitted to the jury by proper instructions, and the peremptory instruction was an error.

The whole judgment is reversed, and the case remanded, with directions for further proceedings consistent with this opinion.

FLANNARY and another v. UTLEY and others.

(Court of Appeals of Kentucky. March 8, 1887.)

SUBROGATION—VOLUNTEER—HUSBAND AND WIFE—VENDOR'S LIEN.

A wife having loaned money to her husband, and desiring to have it back again to pay off a vendor's lien on land which she had bought, and had conveyed to herself, the husband raised the money by executing a note, on which he induced appellants to become his sureties, and paid over the money to the wife, who in turn used it to discharge the lien. The husband afterwards failing to pay his note, and the sureties having it to settle, they claimed to be subrogated to the vendor's lien on the land for the amount of the note. *Held*, no right of subrogation existed. The doctrine of subrogation cannot be applied in favor of one who officiously, or as a volunteer, pays the debt of another for which neither he nor his property is liable, and which he is under no obligation to pay. In this case appellants were mere volunteers, so far as paying off the lien was concerned. Their liability, and consequently their right of subrogation, arose only on the note executed by the husband, on which they were sureties. *PRYOR, C. J.*, dissenting.

Appeal from circuit court, Livingston county.

Bennett & Blue, for appellants. *J. C. Hodge* and *W. D. Greer*, for appellees.

HOLT, J. The appellee, Sarah M. Utley, with money derived from the sale of her slave, purchased a tract of land in Union county, which was conveyed to her as her general estate. She sold it in 1869, and thereafter, but during the same year, purchased the land in contest of one Greer, and it was conveyed to her as her general estate. She used a part of the money arising from the sale of the Union county land in part payment for the land last purchased, and loaned the balance of it to her husband, M. H. Utley; but no writing was executed therefor, and the right to it, by virtue of his marital relation, vested absolutely in him. The remainder of the Greer purchase money, and which was a lien upon the land, becoming due, and the creditor demanding it, Mrs. Utley, in order to pay it, applied to her husband for what she considered he owed her. He, not having it, borrowed \$400 of one Hitchcock, on September 24, 1872, for which a note was executed by him as principal, and by the appellants, Flannary and Barnis, as his sureties. They claim that they bor-

rowed the money, and then loaned it to M. H. Utley. One of them says, in substance, that he borrowed it, and that the other became his surety. It was, however, paid off by them equally, and the weight of the evidence shows that the loan was to Utley. In our opinion, however, it also shows that the latter then represented to them that the money was to be used in discharging the lien upon the land; also that it belonged to him; that the title was perfect; and that he would secure them from liability as his sureties by giving them a mortgage upon the land. Of all this, however, the wife was ignorant. In fact, she had nothing whatever to do with the loan. Her husband gave her the money thus obtained, and she paid it over to the holder of the Greer lien. Her husband failing to pay the Hitchcock note, one Johnson, to whom it had been assigned, brought suit upon it, and the sureties were compelled to pay the judgment which was obtained against them and Utley, and which was thereupon assigned to them. On January 17, 1876, they procured from Utley and his wife a note for the sum so paid, and the interest which had accrued upon it, and a mortgage to secure its payment upon a part of the Greer land. Subsequently they brought suit to enforce it. Mrs. Utley resisted it upon the ground that the mortgage had been extorted from her by threats, and had neither been properly acknowledged nor certified. After elaborate preparation, the suit was dismissed without prejudice, upon the motion of the plaintiffs, as against Mrs. Utley, and so far as it sought an enforcement of the mortgage; but a personal judgment was rendered against her husband for the debt. The appellants, on January 3, 1882, brought this action, claiming the right of substitution as to the Greer lien, and asking that it be enforced for the payment of their debt.

The hardship of the case as to them, and the morality of their claim, entitles it to a patient and kind consideration. It is the result of kindness upon their part towards M. H. Utley, as their preacher. A regard for his sacred calling, and the rule, "Whatsoever ye would that men should do to you, do ye even so to them," should prompt him to right what is beyond question a wrong, and which is the result of his conduct. These considerations, however, must not lead the court away from the law. Subrogation is a creation of equity, born of the civil law. Its object is to secure essential justice, without regard to form. Being of purely equitable origin, it is always controlled by equitable principles; and, as between a principal and his sureties, has been applied much more extensively in the American than in English jurisprudence. We do not mean to say, however, that its application is controlled alone by the chancellor's conception of right. The doctrine cannot be applied in favor of one who officiously, or as a volunteer, pays the debt of another for which neither he nor his property is liable, and which he is under no obligation to pay, nor is it allowable where it will work injustice to the rights of others.

In the case of a surety, as his liability is limited to the express terms of his contract, so his right of subrogation is confined to the rights and securities of the contract for which he was surety. It is well settled in this state that a surety who pays the debt of his principal has a right in equity to be substituted to all the liens and securities to which the creditor was entitled. *Rice v. Downing*, 12 B. Mon. 45; *Havens v. Foundry*, 4 Metc. (Ky.) 248. If a surety for the price of land is made responsible, the chancellor will give him the benefit of the lien of the vendor. *Burk v. Chrisman*, 3 B. Mon. 50. But this doctrine must be extended in order to embrace the case in hand. The appellants were not liable for the Greer debt. They did not pay it. They were bound only to Hitchcock, and as the sureties of M. H. Utley they paid his debt. The wife was not a party to the transaction, and she held the title to the land. Hitchcock or the assignee of his note had no lien upon it. There was no agreement, even with the husband, that he or the sureties should be substituted to the vendor's lien. The land was in no way a secu-

rity for the contract to which the sureties were parties, and they can only be subrogated to such rights as attached to it.

It is urged with force that the Greer lien existed; that the land was liable for it; that the husband was in law the agent of the wife to procure its removal; that, if the land is now subjected to this claim, the wife's interests are not hurt, as the land was in any event liable for the purchase money; and that as the money borrowed discharged it, and is therefore invested in and traceable to the land, it should be subjected to the claim of the sureties. Waiving the question whether a husband is so far the agent of the wife that where he, without her knowledge or consent, and upon fraudulent representations, made without her knowledge, obtains money by way of loan to pay for land to which she already has the title, whether the loaner may, by reason of the fraud, and the fact that the money was so used, look to the land for repayment, yet, in this instance, Hitchcock loaned the money to Utley by reason of his giving the personal security for its repayment. He was entitled to no equitable lien upon the land, none attached to the contract in his favor, and hence none accrued to the sureties by way of subrogation when they paid the debt. To so hold would, in our opinion, be extending the doctrine of subrogation unwarrantably, and would as often result in wrong as right. Mr. Bispham says that subrogation is the equity by which one who is secondarily liable for a debt, and has paid it, is put in the place of the creditor so as to make use of all the securities and remedies possessed by the creditor. The appellants were not secondarily or at all liable for the Greer debt. They merely, as a matter of favor, became the sureties of the husband to another party for borrowed money. They were mere volunteers.

In the case of *Reid v. Jackson*, 6 Ky. Law Rep. 743, it was held that one who loans money with which to pay off a vendor's lien is not thereby substituted to the rights of the vendor, and does not acquire a lien; and that, therefore, the sureties of the vendee in the note executed for the money borrowed for this purpose do not acquire a lien by substitution to the rights of the obligee, he having none himself.

It is said in *Sheldon on Subrogation*, § 243: "The mere loaning of money to a judgment debtor, to be applied by him in part satisfaction of a judgment which was a lien upon his real estate, does not subrogate the lender, in whole or in part, to the lien, even though it was understood between the parties to the transaction that it would have this effect. The lender of money which is applied by the borrower in part payment of the purchase money of land is not thereby subrogated to the vendor's lien upon the land."

It is said, however, that the husband in this instance has so much money in the land; that he has that much interest in it; and that his creditor can therefore, to that extent, subject it. When the claim of the appellants, however, arose, the land had been conveyed to the wife. It was her homestead, and worth less than a thousand dollars. She has occupied it as such since about October, 1869; and, there being no lien upon it in favor of the sureties by way of subrogation to the Greer lien, we fail to see how it can be subjected to their claim. Judgment affirmed.

BENNETT, J., not sitting.

PRYOR, C. J., (*dissenting*.) I dissent from this opinion for the following reasons: The husband, representing that he was the owner of the land, induced these parties to raise for him money to discharge a lien upon the land, promising to secure them in their liability by a mortgage on the premises. It turned out that the land belonged to the wife. The husband gave her the money that he obtained by the aid of the appellants, and she discharged the lien with it. She now claims that the husband owed her, and denies the right of the sureties to subject the land. The husband was jointly liable with the

wife on the lien note that was paid off. The sureties should be substituted to the lien. The land should be subjected because the money of the husband was invested in it. It was a fraud on the creditors.

WESTERN ASSURANCE CO. v. RECTOR.

(Court of Appeals of Kentucky. March 5, 1887.)

1. FIRE INSURANCE—KEEPING GUNPOWDER IN STOCK—REPRESENTATIONS OF AGENT.

A policy of insurance was issued on a country store-house, and the stock of dry goods, clothing, hardware, and groceries contained therein, but the policy provided that, if gunpowder and certain other highly inflammable substances were kept, the policy should be void. The insured had gunpowder in the store at the time the building and stock were destroyed by fire. *Held*, there could be no recovery on the policy, although it appeared that the agent of the company knew, when the application for insurance was made, that the insured kept gunpowder in stock, and intended to keep it, and the agent represented that the provision in the policy did not prevent the insured from keeping the powder. Such representation could not prevail against the express prohibition of the policy. Nor does the fact that gunpowder is usually kept in country stores of the kind here insured impliedly give the consent of the company to keep gunpowder, in disregard of the express provision of the policy.

2. SAME—MISSTATEMENTS OF COMPANY'S AGENT—APPLICATION FOR INSURANCE—ESTOPPEL.

False statements made in an application for insurance do not affect the insured, where it appears that the statements were written out by an agent of the company, and did not conform to the statements made by the insured. The company is estopped to take advantage of such misstatements.

Appeal from circuit court, Warren county.

Wm. Lindsay and James A. Mitchell, for appellant. *Richards & Hines, Wilkins & Sims, and W. T. Cox*, for appellee.

PRYOR, C. J. This was an action instituted in the court below to recover upon a policy of insurance issued by the appellant upon the store-house and goods of the appellee. On the trial of the case, numerous special interrogatories were propounded to the jury, and, upon the return into court of the special findings, each party moved for a judgment. The motion of the appellant was overruled, and the case is here on appeal. Many questions are presented by the record, only one of which is necessary to be considered.

By the terms of the policy the appellee, Rector, was insured to the extent of \$2,000, as follows: \$400 on his one-story shingle-roof frame store-house building, occupied by the assured for general merchandising, situated seven miles from Bowling Green, on the Scottsville road; \$800 on his stock of dry goods and clothing, while contained therein; \$250 on his hats and caps and notions, while contained therein; \$400 on his boots and shoes, while contained therein; and \$150 on his hardware, queensware, and groceries, while contained therein. It is further provided on the face of the policy that "if in said premises there be kept gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, or benzine varnishes, etc., (except use of refined coal kerosene, or other carbon oil, for lights, if the same is drawn and lamps filled by daylight,) without written permission in this policy, then, and in any such case, this policy shall become void." The testimony conduced to show that the appellee kept gunpowder in his store, and the jury, by their special finding, said that Richardson, the agent of the company, knew that fact when the application was prepared, and informed the appellee that keeping gunpowder for sale would not affect his policy. The jury also said that gunpowder was an article usually kept in a country store of general merchandise. It is admitted by the answer of the appellee that he had gunpowder in his store, and, besides, he testified that he made no effort to save anything, as he was afraid of the powder, as there was 18 or 20 pounds of it near the fire in the building at the time of the loss. The only evidence, however, before this court, consists in the spe-

cial findings by the jury upon the evidence adduced on the trial. The motion for a new trial was not entered until the motion for a judgment on the special verdict, made by the appellant, had been overruled, and this was some eight or ten days after the verdict. So this court can look alone to the pleadings and the findings of the jury in disposing of the errors complained of.

It is admitted that some 18 or 20 pounds of gunpowder was in the store, and that the appellee had kept it for sale since and before the policy issued. This was expressly prohibited by the contract; but the appellee, to avoid this defense, alleges in his petition or reply that, when the application for insurance was made, the agent of the general agents of the appellant saw the powder, and told him he had the right to sell gunpowder, and that this provision of the contract had no binding force when it was usual or customary to sell gunpowder from retail stores; that, when regarded as a part of the ordinary merchandise kept in the establishment insured, it could be sold to customers. The fact that such a representation was made by the agent at the time is sustained by the special findings. It is also maintained by counsel for the appellee that although the keeping of gunpowder is prohibited by the terms of the policy, that "*when such goods as are usually kept in country stores are insured, it includes gunpowder, and gives the insured the right to sell.*" That the term '*general merchandise*' embraces gunpowder, and the right to sell is implied, although the prohibition is express."

There is neither fraud or mistake alleged in the execution of the policy in question, but, on the contrary, it is conceded that the appellee (the insured) knew what the policy contained, and his right to keep and sell powder in his store-house is based on the representations made by the agent at the time of the application that this provision of the policy did not prevent him from selling it as he did the other merchandise in his store-house. The policy was signed and delivered by the company, containing stipulations forbidding the use of certain inflammable substances, including gunpowder, within the store-house, and that certainly, if kept, enhanced the risk; and now it is urged that this part of the contract may be disregarded by showing that the agent had made representations, at the time of the application, that destroyed the efficiency of that part of the contract; in other words, that what the agent said at the time the application was made is to govern, and not the stipulations embraced in the policy itself.

We perceive no reason why the rule excluding parol evidence contradicting or varying the terms of a written contract should not apply to contracts of insurance, as well as to any other written contract evidencing the purpose and intention of the parties. Here the verbal statement made by an agent prior to or at the delivery of the policy is held sufficient to establish a contract entirely inconsistent with the writing, in the absence of either fraud or mistake in its execution. Cases with reference to insurance policies may be found where the policy or its meaning has been interpreted, in the light of the circumstances surrounding its execution, that would seem to be at variance with this rule; as where a building insured is being used for the manufacture of certain articles that require the use of inflammable material, and without which the building and the business in it would be useless, it was held that the right to keep and use everything necessary to the manufacture of the articles existed, although the policy forbid it, consent having been given by the insurance company that the building insured might be used for the purpose of manufacturing the particular article. *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Archer v. Merchants' Ins. Co.*, 43 Mo. 434.

In this case no such question can arise, and, because gunpowder is usually kept in a country retail store, it is maintained that the insured has the implied consent of the company to keep and sell that which is expressly forbidden by the written contract. The fact that an insurance is obtained upon the stock of merchandise, and that powder is usually kept and sold or classed with the

articles comprising this merchandise, will not authorize the sale of powder if by the terms of the contract it is prohibited, and the policy declared void if violated in that particular. As said by the court in the case of *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64: "The reason for the prohibition may arise from the fact that the custom of selling gunpowder does exist in a country store, and if such articles were never found among such stocks this provision in the policy would be useless."

The keeping of gunpowder certainly increased the hazard, and its prohibition from sale was a material part of the contract, and the statement made by the agent is so much at variance with the policy that, if permitted to supplant the writing, it seems to us would be opening the door to an assault upon every written contract by the mere verbal statement of the parties or their agents made at the time of its execution. That a written contract may be canceled or reformed upon a state of pleading that would admit parol proof of its terms will not be denied, but when the written contract is plain in its meaning, and purports to express the intention of the parties, it would be a departure from a well-recognized rule of evidence applicable to all contracts to permit the introduction of parol evidence to show that the parties intended to give no force to certain stipulations of a contract that, if enforced as written, must, from its terms, have been regarded as an essential part of the contract, and perhaps without which the contract would never have been executed.

Applications for insurance policies, although signed by the insured, are sometimes written out, or the answers to the questions propounded reduced to writing, by the company's agent; and, when the agent has himself made a false statement by writing that which he knew was false and different from the statement given him by the assured, the company will be estopped from taking advantage of its own wrong, or that of its agent; and the principle, as said by Mr. Justice MILLER in the case of *Insurance Co. v. Wilkinson*, 13 Wall. 222, is "that, when one party has by his representation or conduct induced the other party to a transaction to give him an advantage which would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage." It then becomes the statement of the company, and not that of the applicant, and the rule recognized proceeds on the idea "that the application thus made is not the instrument of the party whose name is signed to it."

Here is an instrument that the insurance company signed and delivered as its obligation to pay in the event of loss by fire. It contains a stipulation, unmistakable in its meaning, by which the policy is to be void if gunpowder is kept and sold in the store-house. This fact is known to the appellee, but he has seen proper to follow the interpretation of such contracts given by the sub-agent of the local agents, or by the local agents, made at the time of the application, "that, notwithstanding such provisions, you [the insured] can disregard them, and sell as if no such writing had been executed."

In this case the answers purporting to have been made by the applicant to the questions propounded are held not to affect him, although untrue and material to the risk, because the agent of the company in reducing the answers to writing made a false statement as to the title which he knew was untrue, and when, if he had written the response as given by the assured, the company could not have been deceived. The insured stated to the agent that he held a bond for title, with a lien on the property for \$200, when the agent made him state that he had a fee-simple title. The answer was made truly by the assured, and in good faith, and the falsehood stated was by the agent, and not the assured. The latter did not, perhaps, know the difference between an equitable and a fee-simple estate, and the doctrine of estoppel should apply. But the court has gone further, and made the policy of insurance signed by the company, with its written stipulations, subject to the interpreta-

tion given by the agent of the language used, and that is, the stipulation "that, if gunpowder is kept and sold by the insured without the consent in writing of the company, the policy shall be void," means that you may sell if gunpowder is usually sold in such stores. If such testimony is admissible, in the absence of some appropriate pleading to reform or cancel the writing, any stipulation contained in the policy may be disregarded in the same manner, and each party left to determine at last the terms of the insurance by such parol proof as would be competent to establish a contract if no writing had been executed. The mere fact that the party insured has gunpowder in his store at the time, and the agent knew it, or that he intended to keep it, will not estop the company, as some of the opinions indicate, from enforcing the terms of the policy. If there is no powder kept or sold in the dry-goods or grocery store, there is no necessity for any such clause in the policy; but, as the keeping of gunpowder is especially hazardous, where there is a contract forbidding its sale, it should be enforced. That part of the contract may, it is true, be waived; but there is no such question raised in this case, and, applying the rule of evidence to this class of contracts that is applied to all other written instruments, it must be held that the mere statements of the agent cannot vary the terms of the written contract between these parties.

In the case of *Steinbach v. Insurance Co.*, 13 Wall. 183, where a like character of argument was presented, the court, in response, said: "But the plaintiff contends that they are included in the description of 'other articles in his line of business.' The answer to this is that the policy itself requires that fire-works shall be specially written in it."

In the present case the company and the insured enumerated all the articles to be insured, and their value. First, the store-room at \$400; stock of dry goods, \$800; hats and caps, \$250; boots and shoes, \$400; hard ware and queens-ware, \$150; amounting in all to \$2,000. With this specific character of goods and wares insured it is claimed was included the powder that, instead of being insured, forfeited the policy if kept and sold. Courts have gone far in protecting the insured against statements made by overzealous and always importunate insurance agents, but we are not disposed, however great the hardship of the case, to remove all safeguards embodied in the contract of insurance for the protection of the company because an interpretation of its meaning has been given by an agent contrary to the plain subject of the language used.

In our opinion the pleadings and special findings entitled the appellant to a judgment. The judgment is reversed and remanded, that such a judgment may be entered.

GRIGSBY, Guardian, etc., v. COCKE'S EX'R.

(Court of Appeals of Kentucky. March 8, 1887.)

1. EXECUTOR—BOND—WILL EXEMPTING FROM.

Under Gen. St. Ky. c. 39, art. 1, § 4, providing that the county court may require bond with surety of an executor, although the will directs otherwise, if from the knowledge of the court, or upon motion of some one interested, "it may appear proper to require the bond," *held*, upon appeal to the circuit court from an order of the county court requiring the bond notwithstanding the provision of the will, it should be presumed, in the absence of evidence to the contrary, that the county court had cause to require the bond, and the order requiring it should not be reversed unless it affirmatively appeared that the court acted capriciously.

2. SAME—BOND REQUIRED.

Under Gen. St. Ky. c. 39, art. 1, § 4, authorizing the county court to require bond with surety of an executor, if it appears to the court proper to do so, notwithstanding the will directs that no bond be required, *held*, it appearing that the estate is a large one; that it consists mostly of personality; that the executor is devisee of one-half, and the applicants for the bond are devisees of the other half; that the executor intends to remove from the state; that he has no estate of his own, and contemplates bringing suit to construe the will so as to give him the entire estate,—the county court

very properly required him to give bond, although the will exempted him from doing so. Evidence of bad faith is not necessary, under the statute, to authorize the court to require the bond.

Appeal from Clark county.

W. M. Beckner and J. T. Tucker, for appellant. *Hunt & Darnall*, for appellee.

BENNETT, J. The appellant, as guardian of two infant legatees of appellee's testatrix, Amanda M. Cocke, moved the Clark county court to require the appellee to execute bond with surety for the faithful performance of his duties as executor of the last will of Amanda M. Cocke; he by the provisions of the will having qualified as executor without executing bond for the faithful discharge of his duties. The county court having required the appellee to execute bond with security for the faithful discharge of his duties as executor, and he having declined to do so, the county court removed him, and appointed the appellant administrator of the estate with the will annexed. From these orders of the county court the appellee appealed to the circuit court, which reversed the orders of the county court, and reinstated the appellee as executor without bond. From that judgment the appellant has appealed to this court.

Section 21 of the act of 1797 (see 1 Litt. Laws, 616) provided: "Where any testator shall leave visible estate more than sufficient to pay all of his debts, and by will shall direct that his executors shall not be obliged to give security, in that case no security shall be required, unless the court shall see cause from its own knowledge, or the suggestions of creditors or legatees, to suspect the executors of fraud, or that the testator's personal estate will not be sufficient to discharge all his debts." By section 4, c. 37, Rev. St., it was provided: "But, when the will directs that an executor shall not give security, the court shall not require it, unless, on the motion of some one interested, or from its own knowledge, it shall appear proper to require it." Article 1, § 4, c. 39, Gen. St., provides: "But surety shall not be required when the will so directs, unless on the motion of some one interested, or from the knowledge of the court, it may appear proper to require it; and when so required, which may be at any time, surety shall be given by the executor, else he shall not be permitted to qualify, or, having qualified, he shall be removed." By the act of 1797 the county court, upon the application of the executor to qualify without giving bond, the will so directing, could not require the executor to give bond unless it should "see cause, from its own knowledge or the suggestion of creditors or legatees, to suspect fraud," etc. By the Revised Statutes the power of the county court was enlarged so as to give it power, upon the application of the executor, to qualify without bond, the will so directing, to require bond, if from its own knowledge, or upon the motion of some one interested, it appeared proper to require it. The General Statutes further enlarges the power of the county court by expressly providing that it may require the executor to give bond, though the will directs otherwise, at any time after the qualification of the executor, if from the knowledge of the court, or upon the motion of some one interested, "it may appear proper to require" the bond.

For the purpose of protecting the interest of creditors or legatees, the county courts are clothed with large discretionary power as to requiring executors to give bond for the faithful performance of their duties, although the will directs that no bond shall be required of them. This discretionary power is not limited to cases of suspected fraud or bad faith on the part of the executors, but reaches out and embraces any fact or circumstance, either personally known by the court or developed by investigation, tending to show that it is proper to require bond. Of course, the county courts cannot require the execution of the bond capriciously, and without any cause. Upon an ap-

peal to the circuit court from an order of the county court, requiring an executor to execute bond, notwithstanding the will directs otherwise, the court should presume, in the absence of satisfactory evidence to the contrary, that the county court had, either from its own knowledge or from proof, cause to require the executor to execute bond; and unless it affirmatively appears that the county court, in requiring the execution of the bond, acted capriciously, and without any cause, the order should not be reversed. The proof, as developed in the record, is that the estate confided to the hands of the appellee as executor is a large one, consisting mostly of personal estate; that under the will he is the devisee of one-half of the estate, and the appellant's wards are the devisees of the other half; that the appellee has no near relations in this state; that his children live in other states; that he contemplates moving from the state as soon as he can wind up his business; that he has no estate of his own except that devised to him by his testator; that, by the terms of the will, no estate is devised directly to appellant's wards, but the appellee is directed to pay them one-half of the net proceeds of the estate. It also appears that he contemplated bringing a suit to have the will construed. For what purpose? Evidently to test the question as to whether he is not entitled to the whole estate.

We think the county court did right in requiring the appellee to give bond, and in removing him as executor upon his failure to do so. The decisions of this court relied on by appellee are not applicable to this case. In those cases the court was called upon to act without reference to the statute authorizing the county courts to require bond of the executor notwithstanding the will provided otherwise. In such cases the court requires that bad faith, or what is equivalent to it, on the part of the executor, must be shown.

The judgment of the circuit court is reversed, and the case is remanded, with directions to certify to the county court to re-enter its order removing appellee as executor, and the appointment of the appellant in his stead as administrator with the will annexed.

PETRY and others v. RANDOLPH and others.

(Court of Appeals of Kentucky. March 10, 1887.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS DIVESTS ASSIGNOR OF TITLE.

A deed of assignment for the benefit of creditors divests the assignor of title, and the Kentucky act of March 8, 1876, requiring the assignor to take an oath and execute bond, does not alter the rule, but is intended only as a security to those interested in the estate.

2. LANDLORD'S LIEN FOR RENT—PRIORITY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Gen. St. Ky. c. 66, art. 2, § 10, providing that a distress warrant for rent may issue within *six months*, but not after, from the time the rent was due, and section 12, that, as against a lien created while the property is on the leased premises, and on property on which the landlord has a superior lien for rent, a distress shall have preference if sued out in *ninety days* from the time the rent was due, and section 13, that a landlord shall have a superior lien upon the produce of the farm or premises rented, and upon other personal property of the tenant owned by him after possession taken, but such lien shall not be for any rent which has been due for more than *one hundred and twenty days*, held, the landlord must, under section 12, to prevail against other liens, assert his rent claim in *ninety days*, and under section 13, to prevail against all other rights or equities of third parties, must assert it in *one hundred and twenty days*. In this case, the distress warrant, not having been issued in 120 days, cannot prevail against an assignee's right under the tenant's assignment for the benefit of creditors. The assignee does not merely stand in the shoes of the tenant, so that the landlord's right to assert his claim against the tenant at any time in six months may be exercised against the assignee. The assignee being a trustee for creditors, the interest of the creditors requires that he should not be limited to such defenses only as the tenant debtor could have made.

Appeal from circuit court, Shelby county.

L. A. Weakley, for appellant. L. C. Willits, for appellee.

HOLT, J. A deed of assignment for the benefit of creditors divests the assignor of title. The qualification required by the statute by the taking of an oath and the execution of a bond by the assignee does not affect it, but is merely for the security of those interested. The single question, therefore, presented by this appeal, is whether a landlord can acquire a superior lien for rent, which has been due less than six but more than four months, by the suing out and levy of a distress warrant upon the tenant's property upon the leased premises, but after the making of a deed of assignment by the tenant for the benefit of his creditors.

Chapter 66, art. 2, Gen. St., provides:

"Sec. 10. A distress warrant may issue, although the lease be not ended, but only for rent then due, and not after the lapse of six months from the time it was due."

"Sec. 12. All valid liens upon the personal property of a lessee, assignee, or under-tenant, created before the property was carried upon the leased premises, shall prevail against a distress warrant or attachment for rent. If such lien be created while the property is on the leased premises, and on property upon which the landlord has a superior lien for his rent, then, to the extent of one year's rent, whether the same accrued before or after the creation of the lien, a distress or attachment shall have preference, and be first satisfied: *provided, the same is sued out in ninety days from the time the rent was due.*

"Sec. 13. A landlord shall have a superior lien on the produce of a farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or under-tenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent, due or to become due, *nor for any rent which has been due for more than one hundred and twenty days.*"

Aside from the statute, the landlord has no lien. At the common law he had no right to distrain after the lease or term had ended. By it he could only seize property for rent then accruing. 3 Bl. Comm. 11. It is a summary proceeding, born of the statute, and should not be extended in scope by construction. The legislature has given the landlord a preference, but has not absolved him from vigilance. To guard against collusion between him and his tenant, and to prevent the latter from obtaining a false credit, it has given him a lien, and a summary mode of enforcing it, provided he does so within a certain period. As between him and the tenant he may distrain within six months; but, where the rights of third parties intervene, the statute has reduced the right to a more narrow limit, and the landlord must comply with it strictly or lose his right. It is perhaps difficult, owing to their languages, to arrive at the reason which led to the enactment of both the twelfth and thirteenth sections, *supra*. It can be urged with some force, in the light of legislation upon the subject, that the first relates to property which the tenant carries with him to the leased premises, while the latter, in imitation of the feudal law, gives to the landlord a superior lien upon that which issues out of the land, or is acquired by the tenant after he goes upon the premises. There is, however, in our opinion, this distinction between the two sections: the first is by its terms applicable only to *liens* of third parties. All *liens* created upon the property of the lessee prior to its removal to the rented premises are declared by it to be superior to the landlord's claim for rent; and, if the *lien* be created after such removal, then the demand of the landlord is declared to be superior to the extent of a year's rent: *provided the proper steps to enforce it are taken within ninety days after the rent becomes due.* It was accordingly held in the case of *Gedge v. Shuenberger*, 83 Ky. Rep. —, which was a contest for priority of lien between the owner of a mortgage given by a tenant upon property at the time upon the rented premises, upon the one hand, and the landlord for rent accruing subsequent to the execution of the mort-

gage upon the other, that the latter must distrain within 90 days from the falling due of his rent or the superiority of his lien was lost.

This section must, in our opinion, as to the rights or claims of third parties, be held to refer to such as fall within the technical legal meaning of the word "lien." The thirteenth section, however, is not so restricted. By it the landlord has a superior lien upon the property named in it for a year's rent, due or to become due: *provided it has not been due more than one hundred and twenty days*. Under the one section he must, as against "a lien," assert his rent claim within the ninety days; and as against all other rights or equities of third parties he must, under the other section, do so within 120 days. This construction is necessary to harmonize and give effect to both sections of the statute.

The fifteenth section of article 2 provides that if, after the commencement of any tenancy, a lien be created upon the property on the leased premises, the lienholder may remove the property by paying to the landlord the rent in arrear, and securing him in that to become due, not exceeding in all, however, a year's rent; and section 16 says that, if the property be taken under execution or attachment, the officer shall, out of the proceeds of the property, pay to the landlord the money rent due, and to become due, for the year in which the levy is made, unless a bond of indemnity be executed; but these two sections must be understood as referring to cases where the landlord has not lost his right, as provided in sections 12 and 13, to enforce the collection of his rent without regard to the rights of third parties.

It is urged, however, that an assignee takes the property *cum onere*; that he merely steps into the shoes of the debtor; and that as the landlord can as against the latter distrain within six months, that, therefore, he can do so as against the trustee. It is true that an assignee for the benefit of creditors takes the assigned property subject to all valid liens and equities. Here, however, the statute says that the landlord may, as between him and his tenant, distrain for the rent at any time within six months after it becomes due; but also provides, in substance, that, whenever the rights of third parties intervene, he can in no case delay longer than four months. This limitation upon his right was not contained in the act of January 31, 1811. It provided only that the property distrained should belong to the party against whom the warrant had issued, or to a subtenant. Nor was the 90-day provision of the twelfth section, *supra*, embraced in the Revised Statutes of 1852.

This right of the landlord is strictly a legal or statutory one, enforceable in a summary way. It can therefore find no support or favor in equity. The period for which the rent is owing having been determined, the leasehold interest does not pass to the assignee under the deed of assignment. If so, he would be the tenant. The legal title to the assignor's property, however, vests in him. He becomes the representative of the creditors. He is entitled to hold it until the debts are paid. Their rights have intervened, and if a landlord wishes to defeat them he must be vigilant, and pursue his statutory remedy within the time fixed by law. This he did not do in this instance. The trustee holds the property for the payment of the debts, and the interest of the creditors requires that he should not be limited as to defenses to distraint, attachment, or execution against it to those only which the debtor could have made. Judgment affirmed.

JETT'S EX'X v. COCKRILL'S EX'X.

(Court of Appeals of Kentucky. March 10, 1887.)

EXECUTOR MAKING PARTIAL PAYMENT BEFORE PROOF OF CLAIM—WAIVER.

Gen. St. Ky. c. 39, art. 2, § 53, providing that no interest accruing after his death shall be allowed or paid on any claim against a decedent's estate, unless the claim be verified as required by law, and demanded of the personal representative within one year after his appointment, held, the mere fact that an executrix, in advance of

the verification of the debt and demand of its payment, makes a payment thereon, does not constitute a waiver of her right under the statute to refuse to pay interest; the claim not having been proved, and payment thereof demanded, within a year after her qualification.

Appeal from circuit court, Estill county.

C. F. & A. R. Burnam, for appellant. *Riddell & Fluty*, for appellee.

BENNETT, J. Chapter 39, art. 2, § 53, Gen. St., provides that "no interest accruing after his death shall be allowed or paid on any claim against a decedent's estate unless the claim be verified and authenticated as required by law, and demanded of the executor, administrator, or curator within one year after his appointment." E. L. Cockrill having died testate in Estill county, his will was admitted to probate by the county court of that county, and the appellee was qualified as executrix thereof on the twenty-first day of November, 1876. Curtis Jett, who was alive at the time of the appellee's qualification as executor, and continued to live several months thereafter, did not verify the note which he held on the appellee's testator as required by law; nor did his executrix, after her qualification, demand the payment of said note, accompanied with the verification required by law, until the twelfth of March, 1878, more than one year from the time of appellee's qualification and appointment. The statute *supra* is peremptory that no interest accruing after the death of a person, upon any claim against his estate, shall be allowed or paid, unless the claim shall be verified and authenticated as required by law, and payment thereof demanded of his executor, administrator, or curator within one year after the appointment of the executor, administrator, or curator. But notwithstanding this provision of the statute, if the executor, administrator, or curator is the only person who will be affected by allowing the prohibited interest, he may waive his right to the protection of the statute by agreeing with the creditor of the estate to pay his debt in full, in consideration of his postponing the collection of his demand, so as to enable him (the representative) to pay the debt without sacrificing the estate by a forced sale. See *Croninger v. Marthen*, 7 Ky. Law Rep. 597, (February 27, 1886.) There is no contention in the case that appellant and appellee ever made any such agreement. Appellee, after she qualified as executrix, and before the note was verified as required by law, paid \$500 on it. If she knew the debt was just, and could be verified as required by law, then she had the right to make the payment on it. And she certainly waived no right to have the claim verified, and the payment of the balance due thereon demanded, within a year from the time of her qualification. The distinction between this case and that of *Croninger v. Marthen*, *supra*, is plain. In that case the creditor postponed taking any steps towards collecting his debt, or perfecting his right to collect interest on it, by the request of the executor, and his express promise that his debt should be paid in full. In view of these facts, together with the further fact that the executor was the only person to be affected by the payment of the interest, this court held that he waived his right to rely upon the statute. But in this case nothing of the kind occurred. The appellee simply, in advance of the verification of the debt and demand of its payment, paid \$500 thereon. This was certainly not a waiver of her right under the statute to refuse to pay interest because the debt was not proved, and payment thereof demanded, within a year after her qualification.

The judgment of the lower court is affirmed.

RIGGS, Adm'r, and another v. RIGGS.

(Court of Appeals of Kentucky. March 17, 1887.)

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LIMITATIONS—WILL—ACQUESCENCE IN CONTRACT FOR TWENTY YEARS.

A husband having instituted suit to set aside a will made by his wife, he subsequently agreed with his son to dismiss the suit in consideration that he should be

allowed the use of the homestead which belonged to the wife and one-half the proceeds of the real estate during his life; the son and daughter to have the other one-half. The father and children having acquiesced in this agreement for over 20 years, held neither the father nor the daughter, who had in the meantime married, could maintain an action to set aside the agreement.

Appeal from circuit court, Greenup county.

I. H. Paynter and B. F. Bennett, for appellants. *L. T. Moore and E. F. Dulin*, for appellee.

LEWIS, J. In 1844, Townley Riggs and Susan Riggs, his wife, attempted to make a post-nuptial contract, in which it was agreed that, in consideration of a contract made between them before their marriage, she was to have and control all the real and personal property as her own that they might purchase, the same having been purchased with her money; and a tract of 26 acres of land, the title of which was in the husband, was particularly mentioned as having been so paid for, and as being conveyed, or attempted to be conveyed, by that contract to her. It was further agreed that at her death her property should, subject to his life-estate, be equally divided between her two children by a former husband and such children as she might have by him. In 1858, Susan Riggs died, leaving two children by Riggs,—appellant E. C. Riggs, a daughter, and appellee R. B. Riggs, a son,—the two by the first husband having died; and a will by which she attempted to devise her estate in equal shares to the two children, subject to the life-estate of her surviving husband, Townley Riggs. But in 1861 the husband instituted an action to set aside that will, which it seems had been admitted to probate, which action, however, he dismissed in pursuance of a compromise agreement in writing entered into between him and his son, R. B. Riggs, then of full age, for himself and on behalf of his sister, E. C. Riggs, then an infant. By that contract Townley Riggs conveyed to his children, R. B. and E. C. Riggs, all his title and right to the real and personal estate mentioned in the will of Susan Riggs; it being recited that the conveyance was made to carry out the marriage contract mentioned, and to perpetuate the will of Susan Riggs, and in consideration of one dollar paid and the natural love he (Townley Riggs) had for his children, the grantees; but it was stipulated that he (Townley Riggs) was to have the use of the dwelling-house and one-half the proceeds of the real estate during his life, and the two children the other half and the use and occupancy with him of the dwelling-house. Under that contract they resided together, the father and son jointly cultivating the land, until 1864, when the latter, having married, removed from there, leaving the father and daughter, who resided on the place until 1872, the latter having in the mean time married.

It appears that at the latter date the father, daughter, and her husband removed from the home place to another, residing together; and thereafter the land was not occupied, but leased from year to year, under the agreement that the father and two children should each receive one-third the rents; and this agreement seems to have been adhered to until 1882, when E. C. Riggs and her husband, John Riggs, instituted this action against R. B. Riggs, her brother. In the petition the post-nuptial contract, the will, and the contract of 1861 are all referred to and filed with the petition as evidence of the title of the plaintiff E. C. Riggs, and her brother, R. B. Riggs, to the land left by their mother, which the court is asked to have partitioned between them subject to the life-estate of their father. It was alleged as an additional cause of action that Susan Riggs, the mother, left at her death a considerable amount of personal property and choses in action which R. B. Riggs appropriated and collected to his own use, and has never accounted for, and for which, together with an undue proportion of rents alleged to have been collected by him, they ask judgment against him. To the petition Townley Riggs, the father, having been made a defendant, filed an answer, and made it a counter-claim

against the plaintiffs, and cross-petition against the defendant, R. B. Riggs; and in it he denies the validity of the post-nuptial contract and will, and though admitting that, through the affection he bore for his children and late wife, was induced to sign the contract, yet he did so without understanding its effect and meaning. He states his willingness for the partition prayed for in the petition between his two children, of the land to which his wife had title, provided they pay to him the whole of the rents therefor, but denies their right to the tract of 26 acres the title to which he holds; and alleges that R. B. Riggs, his son, had collected since 1872 one-third of the rents, amounting to \$666.66 $\frac{2}{3}$, and asks judgment against him therefor.

After a careful examination of this record, we fail to perceive any right in the plaintiffs to recover of the defendant on account of an undue share of either property or money appropriated and used by him. As to the property, it seems to have been disposed of and used for the joint benefit of the father and two children, without any complaint or objection by any of them until this suit was brought; and, even if there had been originally any cause of action by either the father or daughter, it was barred by limitation when this suit was commenced, and the same is the case in respect to alleged misappropriation of money collected, which, however, the proof does not sustain. In the cross-petition of Townley Riggs he seeks to recover for one-third of the rents collected by his son, R. B. Riggs, after the year 1872, but does not allege or seek a recovery for any misappropriation of money or property previous to that date. The proof does not show that R. B. Riggs collected, after 1872, more than one-third the rents, the residue being received by his father and sister. To that amount he was clearly entitled under the written agreement made with his sister and father, and as that agreement was never denied or repudiated, but acquiesced in by all the parties, it cannot be repudiated now.

There is no evidence of fraud on the part of R. B. Riggs in procuring the execution of the contract of 1861, nor of incapacity on the part of Townley Riggs to understand it; and, having acquiesced in and acted under it for more than 20 years, he cannot avoid it now.

By the judgment of the lower court both the petition and cross-petition were properly dismissed. But it appears that, after the order was made, E. C. Riggs and her husband offered to file a supplemental petition, setting up a deed from Townley Riggs, who was then dead, to his daughter, E. C. Riggs, for the tract of 26 acres, which was executed during the pendency of this action, which the court refused to permit filed. We think the court properly overruled their motion for two reasons: (1) In their original petition the plaintiffs set up the post-nuptial contract, the will, and the contract of 1861 as evidence of the title of R. B. & E. C. Riggs to all the land, including the tract of 26 acres, and prayed for a partition between them; and we would not be inclined to decide the lower court abused its discretion in refusing to permit the filing of the supplemental pleading after the order dismissing the petition had been made. (2) The conveyance of 1861 clearly included the tract of 26 acres, and, as Townley Riggs was bound by that contract, he could not afterwards convey that tract to E. C. Riggs, to the exclusion of R. B. Riggs. Judgment affirmed.

DUNN and others v. GERMAN SECURITY BANK.

(Court of Appeals of Kentucky. March 12, 1887.)

1. EXECUTION SALE—REVERSAL OF JUDGMENT.

The reversal of a judgment does not affect the validity of a sale made under it, although the plaintiff in the action was the purchaser, and no deed had been made to him at the time of reversal, the sale having been confirmed, and no appeal taken from the order of confirmation.

2. SAME—JUDGMENT REVERSED ON ACCOUNT OF DEFECTIVE PLEADINGS.

A city charter requiring that ordinances relating to street improvements in the city should be published in at least two city papers having the largest circulation, and that the city engineer should give notice of the time and place for inspecting the improvements, in an action to enforce a claim for street improvements the plaintiff obtained a judgment for the amount of his claim, and for the sale of the property, without averring that the requirements of the charter had been complied with. The judgment was, on appeal, reversed. *Held*, as defendants were properly before the court, the land in the county, and the amount in controversy in the jurisdiction of the court, it had jurisdiction of the parties and subject-matter when it rendered the judgment, and the fact that the judgment was erroneous for want of proper averments in the petition could not affect a sale made under it.

3. RIGHT OF CHANCELLOR TO CONFIRM SALE ORDERED BY VICE-CHANCELLOR.

Before the creation of the Louisville law and equity court, the vice-chancellor having jurisdiction of such matters as the chancellor of the Louisville chancery court submitted to him, *held*, an order of the chancellor, confirming a sale decreed by the vice-chancellor, was not void as *coram non judice*.

Appeal from Louisville law and equity court.

Robert J. Elliott, for appellants. *Lane & Burnett* and *Gibson & Gibson*, for appellee.

HOLT, J. The decretal sale of the land of the appellants under the judgment of October 13, 1879, was made on November 17, 1879, the creditor becoming the purchaser. It was duly reported to court, and on January 9, 1880, was confirmed without objection. More than three years had elapsed before any was made. On May 4, 1884, the appellants moved to set aside the order of confirmation, and vacate the judgment and sale. This motion remained undecided until July 26, 1886. In the mean time the superior court had reversed the judgment under which the sale had been made as erroneous, and it had consequently been set aside in the lower court. No deed has been made to the purchaser at the decretal sale. It is urged that as the judgment has been set aside, and no conveyance made to the purchaser, who was the plaintiff, that the order confirming the sale should be set aside, and it vacated. Beyond doubt the integrity of judicial sales requires that they should stand when a stranger to the decree is the purchaser, although it may subsequently be reversed as erroneous. In such a case, however, if the plaintiff in the judgment be the purchaser, there is room for discussion. In this state, however, the question is not *res nova*, but a closed one; and it has long been the rule that, although the plaintiff be the purchaser, yet the rule will stand although the judgment upon appeal be reversed. A stranger and the party to the decree stand upon the same footing in this respect. The strongest considerations of public policy require that this rule of property, now so well fixed, should not be unsettled, at least by the judiciary, although hard cases may and frequently do arise under it troubling the conscience of the court, and apparently at war with individual justice. The wisdom of any change must be left to legislative judgment.

It matters not in this instance that no deed has been made to the purchaser. The order confirming the sale was a final one. The appellants could have appealed from it. Years before the motion to set it aside was made, the chancellor had lost all power over it. The right to a conveyance, and to have the title passed to him, vested in the purchaser when the sale was confirmed. It is said, however, that the sale was void, and that the action of the court relative thereto was *coram non judice*. The judgment of sale was rendered by the vice-chancellor. The report of it was confirmed by the chancellor. Under the law then existing as to the Louisville chancery court, now the law and equity court, the vice-chancellor disposed of such matters as the chancellor submitted to him; and we know of no reason or rule then in force prohibiting the latter from confirming a sale made under a judgment rendered by the former. Non-existence of jurisdiction is urged mainly upon another ground,

however. The object of the action was to enforce a lien for a street-improvement assessment in the city of Louisville. Its charter requires that the ordinance relating thereto shall be published in at least two of the newspapers of the city having the largest circulation, the one German and the other English; also that the city engineer shall give notice in one of the daily newspapers of the city of the time and place he will inspect the improvement, in order that the property owners may have an opportunity to then show that it has not been properly done. The pleading of the owner of the assessment warrants failed to aver that these requirements had been fulfilled. It therefore failed to state a cause of action, and the superior court properly reversed the judgment of the lower court upon this ground. It is true that it was an action *in rem*, based upon a special statute. The defendants were, however, before the court. The object of the action was to enforce a lien against lands in Jefferson county, and to recover sums of money within the jurisdiction of the court. All this was shown by the pleading. The court had jurisdiction of both the parties and the subject-matter of the action when it rendered the judgment; and the fact that it was erroneous for the want of the proper averments in the petition cannot, therefore, affect a sale made under it while it remained in force and unreversed. Judgment affirmed.

SCHILLINGER v. BOES, etc.

(Court of Appeals of Kentucky. March 12, 1887.)

1. MUTUAL BENEFIT ASSOCIATIONS—CERTIFICATE PAYABLE TO WIFE OF MEMBER—NEW CERTIFICATE PAYABLE TO WIFE IN TRUST FOR HERSELF AND CHILDREN TO EXCLUDE CREDITORS.

A. having certificates of membership in several mutual benefit associations, all payable to his wife, she being empowered to trade as a *feme sole*, and becoming indebted, he in his last illness canceled those certificates, and took out new ones, payable to his wife in trust for herself and children. Held, this was no fraud on the wife's creditors, as she had no fixed or vested rights under the original certificates that the husband could not control; it appearing from the charters of the associations that their chief object was to provide a fund for the families of deceased members, and that the member, after designating on his certificate who should receive the benefit on his death, might surrender that, and obtain a new certificate payable to some other person.

2. SAME—CERTIFICATE PAYABLE TO WIDOW—DEBTS.

A certificate of membership in a mutual benefit association, payable to the widow of the member, is for the benefit of the member's family, and cannot be seized, upon the death of the member, by the widow's creditors; the charter of the association providing that the funds shall be for the relief of the member's family, and shall be exempt from seizure under execution or other legal process to pay any debt of the deceased member.

Appeal from Louisville law and equity court.

Brown, Humphrey & Davie, for appellant. *M. A. & D. A. Sachs*, for appellee.

PRYOR, C. J. The plaintiff below, who is the appellant in this court, instituted this action against the appellee, Catharine Boes, to recover the amount of five notes alleged to have been paid off by him as her surety. The indebtedness was created by the appellee while she was a *feme covert*, but while conducting a grocery store in her own name, she having been empowered to trade as a *feme sole* by the chancellor under the provisions of the statute enacted for such purposes. She denies her liability for any of the debts, and attempts to show that the notes the appellant paid off were the mere renewals of the indebtedness of her husband, for which she was in no manner responsible, created before and after she was authorized to conduct business as an unmarried woman. There is some conflict in the proof, as well as circumstances conducing to show that some of the paper was the evidence of a

former indebtedness by the husband; but, after a review of the testimony, we are disposed to concur with the chancellor that these notes were the obligations of the wife, and for which she was primarily liable.

The appellant, when he instituted the action, obtained an attachment and garnishment, by which he garnished certain funds in the hands of three benevolent or charitable institutions, of which the husband of the appellee was a member, and that, as was alleged, belonged to the wife as the only beneficiary. The husband of the appellee insured his life in three companies, or rather was a member of three associations, with the certificate of membership payable to his wife, *Catharine Boes, the present appellee*. The policy in the Knights of Honor was \$2,000; National Mutual Benefit Association, \$4,000; United Order of Workingmen, \$2,000. The husband of Catharine, during his last illness and just a few days prior to his death, with the consent of his wife, changed the beneficiaries of his policy in the Knights of Honor to his wife, "*in trust for her and his children*." In the United Order of Workingmen the benefit certificate for the wife was never changed. In the National Mutual Benefit Association the benefit certificate was transferred to Catharine Boes *in trust* for the children.

The benefit certificates in each association having been originally payable to the *wife alone*, it is maintained by counsel for the appellant that she became vested with a fixed and certain interest, payable at the death of her husband, and that any transfer made by her consent, or jointly with her husband, of these benefits, to their children, was a fraud on the rights of creditors; *secondly*, that such transfers are against public policy, and void.

It becomes necessary in determining these questions to look to the acts of incorporation creating these several associations, with a view of ascertaining the object to be accomplished, as well as the manner in which benefit certificates are issued, and the mode of transferring or changing the beneficiary by the member, or whether any such right exists by reason of the several charters. These associations are on the mutual plan, with assessments made upon each member that constitutes the fund out of which the insurance or benefits are paid. The charter and by-laws show that the prime object of each is to aid the members, and their families or beneficiaries, and they can only be regarded as benevolent and charitable associations. In March, 1881, a certificate was issued from the Knights of Honor to John Boes, the husband, who was a member, by which the supreme lodge agreed to pay out of the widows' and orphans' fund, at his death, the sum of \$2,000, to his wife, Catharine, under the laws controlling the order: "*provided, that this certificate shall not have been surrendered by said member, or canceled at his request, and another have been issued in accordance with the laws of this order*." It is provided by section 4 of chapter 22 of the laws of this order that "each applicant shall direct in his application to whom he desires his benefit paid, which shall be subject to such further disposal of the benefit as the member may thereafter direct, in accordance with the laws of this order, and such directions shall be entered on the benefit certificate." By section 5 it is provided that a member may at any time, while in good standing, surrender his certificate, and the supreme lodge shall cancel the old certificate and issue a new one in lieu thereof to such member, payable as he shall have directed.

The member as well as the beneficiary acquires his rights under the act of incorporation, and when the law of the association, as well as the certificate of benefit, empowers the member to change the beneficiary, there is no question of public policy involved, and, the change being authorized by an express law or statute of the order, the right to make the change cannot be questioned. This rule is not in conflict with the case of *Basye v. Adams*, reported in 81 Ky. 368. In that case the right to change the beneficiary was not expressly granted by the charter, and no consent obtained to the transfer, nor was it made to one who had an insurable interest in the life of the member. The

National Mutual Benefit Association issued the policy in that case, and if to the wife, unless expressly prohibited by the charter, we see no reason why a change with the consent of the order and the beneficiary might not have been made to the children. This order (the Knights of Honor) had a fund known as the "widows' and orphans' benefit fund," created for and payable to the family of deceased members, (if not otherwise directed,) and this fund has in part been created and sustained by the contribution of the deceased member, and should therefore be applied to the use and benefit of his children by the consent of the order and the original beneficiary. The wife who was named as the beneficiary in the first certificate paid no part of the dues or calls made by the order, but the husband, (the member,) both before and after the change was made, paid the regular dues, and was contributing his means for the purpose of providing for his children at his death. He doubtless saw or knew that his wife was involved, and therefore wished the fund to which she would have been entitled, in part at least, but for the change, paid to the children.

No creditor of the wife was defrauded. He had the right to cancel the certificate, or decline to pay the dues, and thereby forfeit his right to the insurance. If the wife had a vested interest, such as could pass the title, there is no reason why the benefits might not have been garnished prior to the husband's death. If this could be done, it would virtually annul the entire object of the association, and defeat the benevolent intention of the member by appropriating his means used in creating this fund to the payment of the debts of the beneficiary. The change here was from the wife to their children, and at a time when no creditor could have attached the fund either for the debt of the husband, who was the member, or the wife, who was the beneficiary. There is no rule of public policy that would preclude the husband or wife from making their children the beneficiaries of this fund; but, on the contrary, such is the principal or leading feature of all like organizations, to enable the member to provide for his family. Here is no trade made or assignment of benefits to those who had no insurable interest in the life of the member, against or without the consent of the beneficiary, as was the case in *Basye v. Adams, supra*, but a change effected by which the entire family of the insured member were made the recipients of the benefits resulting from these benevolent associations. The same principle should apply to each of these associations, and we see no reason for holding the transfer fraudulent as to any of the creditors of the wife. To hold otherwise would, in effect, greatly impair, if not entirely destroy, the benefits resulting to the public from these benevolent organizations.

It is argued that the certificate in the Order of United Workingmen never having been changed, that the fund belonged to the wife, and was liable for her debts; and the chancellor, adopting that view, gave to the children an equal interest with the mother, and subjected her interests to the payment of appellant's claims. The beneficiary fund in this order is created for the relief of members and their families, and by the organic law of the order, that necessarily enters into and becomes a part of the benefit certificate, the order is required to disburse this beneficiary fund *for the relief of the families of the members*, as well as the member himself. It may be that the member may name a particular member of his family to whom he desires the money paid, and the certificate issued, but when issued to the wife it follows that it is for the benefit of the member's family. Section 5 of the act creating the order provides that this "fund so provided and set apart shall be exempt from execution, and shall, under no circumstances, be liable to be seized, taken, or appropriated by any legal or equitable process to pay any debt of such deceased member." It is evident that this fund, thus set apart for the benevolent purposes contemplated, was to be exempt from execution, and, as against the member, under no circumstances can the creditor reach it. Such was the intention of the order in its organization. The fund was not only for the

member, but for his family, and the fund itself is exempt, whether for a debt against one of the family or against the member. The member of the family becomes interested in the fund, and when created, as it is by the members, for that purpose, there is every reason for sustaining the exemption.

Under the general insurance law of the state, the certificate being for the benefit of a married woman, the fund could not be reached for her debts. This law embraces all descriptions of policies,—the ordinary life policy, where large sums are invested by way of premiums, and often a large surplus to be divided between its members, as well as companies organized for purely benevolent purposes; but the legislature, in its session of 1876, enacted "that all Masonic orders, Odd Fellows, Ancient Order of United Workingmen, as well as all associations incorporated for purposes of mutual protection and relief of its members, and for the payment of stipulated sums of money to their families, are hereby declared not to be life insurance companies, in the meaning of the general insurance laws of the state, and they are and shall forever be exempt from the provisions of said general insurance laws." The law-making power was evidently intended to remove such burdens as were imposed on insurance companies whose object was private or corporate gain, and to place no obstacle in the way of the disinterested benevolence of such relief associations as those whose charters are before us, and may, in enacting the clause exempting such orders from the provisions of the general law, have gone too far; still the liberal construction that should be given all such charters by courts to enable the order to accomplish its benevolent design would suggest the necessity as well as the propriety of making the exempting clauses of the act establishing this order apply to the members of the family as well as to the member.

In *Getger v. McLin*, 78 Ky. 232, it was held that the son of the member had no interest in the institution, and that when the act creating the Kentucky Masonic Mutual Insurance Company was enacted, that provided, "No part of the stock or interest which any member, or his widow or children, may have in said institution, shall be subject to any debt against him or any of them," intended to apply only to the member, or the one having an interest in the institution; and, while this was certainly not a liberal interpretation of the meaning of that act, in that case before us the fund itself is exempt, and it is the plain meaning of the charter that this fund shall be and is set apart for the member and his family, and cannot be subjected to the payment of their debts. This construction harmonizes with the legislative action on the subject, as well as a rule of construction that, when applied to such organizations, requires a liberal construction of their charter in favor of the objects of their bounty, and to prevent the application of their funds to the benefit of those who are strangers to the organization.

The judgment is affirmed on the original and reversed on the cross appeal, with directions to dismiss the proceedings in so far as they seek to subject the fund, or any part of it, to the payment of the debts of appellant.

KING v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 17, 1887.)

CRIMINAL PRACTICE—CONTINUANCE—ABSENT WITNESS—AFFIDAVIT AS TO WHAT HE WOULD PROVE, ADMITTED.

The commonwealth having consented that the affidavit offered by the accused as to what an absent witness would swear to, at least so much of it as was competent, might be read as evidence on the trial, the lower court did not err in overruling the application for a continuance.

Appeal from circuit court, Whitley county.

I. R. Sampson, for appellant. R. D. Hill and P. W. Hardin, for appellee.

BENNETT, J. The appellant, under an indictment for the murder of Edward H. Pilton, was tried and convicted of that crime in the Whitley circuit court, and his punishment fixed at confinement in the state penitentiary for life. His motion for a new trial having been overruled, he has appealed to this court. The appellant having obtained the presence of all the witnesses mentioned in his affidavit for a continuance, for whom he had taken proper steps to procure their attendance, except one, and the commonwealth having consented that the affidavit as to what that witness would swear, at least so much of it as was competent, might be read as evidence on the trial, the lower court did not err in overruling the application for a continuance. The appellant did not except to any of the instructions given by the court. Therefore this court cannot review them.

The appellant got on the train at Flatrock station, and got off at Pineknott station. After getting off the train, he and his traveling companion took hold of the porter of the train, and detained him until requested to turn him loose by the conductor, which they did. Just then, or a little while before, Edward H. Pilton, who was a passenger on the train, came up, and he and the appellant commenced talking to each other, apparently good humoredly, when appellant commenced the difficulty by cutting Pilton with a knife which he held in his hand when he got off the train. After Pilton had been cut with the knife, more than once he struck appellant with his fist, and appellant continued to cut him with the knife. They were separated, and Pilton was taken aboard the train. He died that night from the wounds received. At the time of the difficulty he was unarmed. Several witnesses for the commonwealth proved substantially the foregoing facts. On the other hand, the appellant and two or three other witnesses swore that Pilton struck appellant first, and without cause. If the jury had believed appellant's version of the difficulty, then they should have found him guilty of manslaughter only, and doubtless would. On the other hand, the evidence for the commonwealth made out a clear case of murder, and, as the jury evidently believed it to be the correct version of the difficulty, they found the appellant guilty of murder. We are inclined to the opinion that the jury took the correct view of the evidence.

The judgment of the lower court is affirmed.

HAYS and others v. GRIFFITH.

(Court of Appeals of Kentucky. March 17, 1887.)

EXECUTION SALE—REVERSAL OF JUDGMENT—MEASURE OF DAMAGES—PARTIES LIABLE.

Upon the reversal of a judgment, the title to land and personalty sold under it having in the mean time passed to a purchaser for value, so that the property cannot be recovered *in specie*, the original owner may bring an action to recover damages against those who procured the erroneous judgment; and the measure of damages in such case would be the value of the property *on the day it was sold*, with interest on the proceeds, and the rents that had accrued from the realty in the receiver's hands up to the day of sale, and the ordinary costs expended by the owner in the action, not including his attorney's fees. But only the parties who sought and obtained the erroneous judgment would be liable to damages in such case, and not creditors who had merely proved claims before the commissioner to obtain their share of the distributable proceeds.

Appeal from circuit court, Mason county.

Wadsworth & Son and *Cochran & Son*, for appellants. *A. E. Richards* and *John B. Baskin*, for appellee.

PYROR, C. J. The appellee, Mary Griffith, owned the one-half of a tract of land in the county of Mason, and some personal estate, and while the owner of this property she executed a mortgage on her interest in the land, in conjunction with her brother, who owned the remaining half, to one Riley, to

secure him in the payment of two notes for borrowed money, upon which she was bound either jointly with, or as the surety for, her brother. The present appellants, or some of them, who were the creditors of the brother and also of the appellee, filed a suit in equity against the two, (brother and sister,) alleging that the mortgage executed by them to Riley was in contemplation of insolvency, and with the design to prefer him as a creditor, and therefore their entire estate passed under the statute for the benefit of creditors. The court below so decided, and, upon an appeal to this court, it was held, as to the appellee, Mary Griffith, she was not insolvent, nor was the mortgage executed in contemplation of insolvency, with a view to prefer the particular creditor. The judgment from which she appealed was not superseded, and, when the mandate of reversal was returned to the lower court, her land and personal estate had been sold, and the proceeds distributed, or a portion at least, to creditors. The sale of her estate under the judgment passed the title to the purchaser, although a reversal was had, as has been often decided by this court, and her only remedy was to take the purchase money and interest that had already been paid to creditors for the injury she had sustained by reason of the erroneous judgment below; or she might proceed to recover damages of those who had procured the erroneous judgment, and those damages would be confined to the value of the property, real and personal, at the time it was sold, with interest on the proceeds, and the cost expended by her in the action; that is, the ordinary cost of such a litigation, not including attorney's fees, or the extraordinary cost incurred by her in the defense of the original action.

This is not an action for a malicious prosecution, or a proceeding to recover damages by reason of the wanton or reckless conduct of the appellants, but a claim for restitution and damages against parties who, by obtaining an erroneous judgment, sold the appellee's property when they had no right to have it sold. When money has been collected under an erroneous judgment that has been reversed, the party obtaining it may be required to pay back the money by a rule to do so, or a restitution of the property, if not sold, may be required in the same manner; but the proper remedy where the land or personality of the party has been sold, and a recovery of its value is desired, is to bring an action for damages, alleging such facts as will show that the plaintiff is entitled, by reason of the reversal, to what he has been deprived of by the erroneous judgment. As this court intimated when this case was here on a former appeal, that the appellee might proceed by rule or by a supplemental pleading to recover what she was entitled to, we will treat the proceedings below as an action to recover damages for the wrong, as all the parties are before the court, and seem to have made no question as to the mode of proceeding.

The question of more difficulty than any other in this case is as to the time at which the appellee's land should have been valued in estimating the damages,—whether at the date of the reversal, or when the order of reference was made to the commissioner to take proof of value, or at the time of the sale of the land by the commissioner under the erroneous judgment. It is insisted by counsel for the appellants that the only criterion of recovery is the amount for which the land sold, with the interest, as the error committed was that of the court below, and not the plaintiffs who brought the action. It is plain that one of the two parties must suffer; and the party who asks for and obtains the erroneous judgment under which the property of another is seized and sold when it was not subject to be sold, should make compensation for the loss. It is true he has received only what the land sold for, but at the same time he has been the means of depriving the owner of its real value.

We have been referred to cases where the amount of recovery has been confined to the price the property brought under the judgment, with the interest; but those are cases, or the majority of them, in which the officer has sold prop-

erty under an erroneous judgment that had been reversed when he had not parted with the proceeds. In such cases the officer would only be liable for the amount realized; and in the other cases cited there was no question made as to the right of the injured party to recover more than the purchase money and interest, or, in other words, that, where the property has been sold, restitution may be had in money. That the owner of land thus improperly sold may be restored the money for which it was sold is evident; but can he decline that, and claim its value, and, if so, when is that valuation to be made?

In the case of *Thompson v. Thompson*, 1 N. J. Law, 160, it is said the words used in the judgment are that the defendant "shall be restored to all he has lost by reason of the judgment," and this is, and ought to be, the measure of damages.

Freeman on Judgments, § 482, says: "But the plaintiff on the reversal is liable to an action to recover the damages occasioned by a sale of defendant's property made under the judgment prior to its reversal."

In *South-fork Canal Co. v. Gordon*, 2 Abb. 479, Mr. Justice FIELD states the rule to be "that the defendant or unsuccessful party in the court below is to be restored, by reversal, to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree, and in such case he is to have the right of action for a money equivalent."

In *Sutherland on Damages* (volume 1, p. 881) the rule is stated to be: "But, where the action is against the person who occasioned the injury, recovery may be had for the whole damage the injured party sustained by reason of the erroneous judgments and executions. He may recover the full value of the property sold." See *McJilton v. Love*, 13 Ill. 486; *Reynolds v. Hosmer*, 45 Cal. 616; *Erwin v. Blake*, 8 Pet. 18.

In this state the purchaser of property under a judgment, whether the plaintiff or a stranger, is vested with the title, and the responsibility of those procuring the judgment should be for the value of the property sold; and the fact that the plaintiff may hold what he buys, makes it the more necessary for recognizing such a rule.

When, then, is the property to be valued? Some general rule must be adopted applicable to this class of cases, and it seems to us that the time at which the sale took place should ordinarily be the period at which, where a reversal is had, the valuation should be made. It is then that the owner becomes divested of title by taking his property from him by virtue of an erroneous judgment, and passing the title to another, and, like an action of trover and conversion, the value of the property at the date of the conversion is the true criterion,—not what the property sold for, but its value on that day; for then the plaintiff ceased to be the owner, and the absolute title vested in another.

In the case before us the appellants are required to account for the difference between the value of the land at the time the present judgment was rendered, and the price it sold for to Howard, the purchaser. Having increased in value from Howard's purchase up to the time this judgment was rendered, the difference is given to the appellee in damages, and also the rents. This is erroneous. The value of the land at the date of the sale is the criterion, with the reasonable rents up to the day of sale, or to the time the purchaser obtained possession, it having been placed in the hands of a receiver, and then with interest from that time, subject to a credit by any debts that may have been paid out of the sale money to creditors who had filed their claims, and upon which the appellee was liable. Whether liable or not on any of the claims this court cannot now determine. As to the personalty, all that portion of it to which appellee was entitled, (one-half,) and that was sold under the erroneous judgment, the appellee will recover its value. When giving to the appellee the value of one-half of the land at the date of sale, with rents

and interest as indicated, and one-half of the personalty sold, or its value, with interest, and crediting her claim by the amounts paid out for debts she was liable to pay, she then has restitution, by way of damages, for all that she is entitled to recover save the cost she has incurred. She is not responsible for attorney's fees paid by the appellants, nor are they liable for fees paid to attorneys by the appellee.

There is another question to be determined as to the liability of these appellants, or some of them. The plaintiffs in the original action who sought and obtained the judgment are alone liable in damages. After the judgment was entered determining that the estate of the debtor inured to the benefit of her creditors, many of these appellants did nothing more than file their claims with the commissioner, in order that they might obtain their distributable share of the fund arising from the sale of her property, and in this way only became parties to the action. They have been made jointly liable for the damages sustained when they were in nowise instrumental in procuring the judgment. They may be liable to refund any money improperly paid them, with interest, but to no greater extent; and, if the money received was in satisfaction of a claim justly due them by the appellee, we perceive no reason for requiring restitution from them.

This case should go back to the commissioner, to audit and settle the claim of the appellee and the creditors; her account, when made up, to be credited as of the date of payment, which stops interest, to that extent, of the claims paid out to creditors where her liability existed, and then giving to her the ordinary cost of the litigation incurred, will make a fair and legal adjustment of the controversy.

The judgment below is reversed, and remanded for proceedings consistent with this opinion.

PHILLIPS v. STATE.

(*Supreme Court of Tennessee. March 8, 1887.*)

1. CRIMINAL PRACTICE—FORMER JEOPARDY—LARCENY FROM SAME ROOM—PROPERTY OF DIFFERENT PERSONS.

Two indictments were brought against a defendant,—one for burglariously entering a house, and committing a larceny by taking and carrying away clothing, the property of one person; and the other charging the simple larceny of clothing belonging to another person. It appeared that all the articles were taken from the same room. *Held*, that an acquittal upon the first indictment was no bar to the trial under the second indictment, upon the ground of "former jeopardy," there being two separate and distinct larcenies.¹

2. LARCENY—INDICTMENT—OWNERSHIP OF PROPERTY—CLOTHING BELONGING TO A MINOR.

In an indictment for the larceny of clothing from a room, it is proper to charge the ownership of the clothing in a woman, though a minor, she being 18 years of age, and owning and using the clothing as her own.

SNODGRASS, J., dissents.

Appeal from criminal court, Davidson county.

Indictment for burglary and larceny.

James M. Quarles, for appellant. *The Attorney General*, for the State.

CALDWELL, J. Some one entered the dwelling-house of Mrs. Moore by night, and took therefrom certain clothing belonging to Mrs. Sue K. Seawell, and certain other clothing belonging to her daughter, Miss Roberta Seawell. The goods were taken on the same occasion, and from the same room; but those belonging to the mother were taken from their place on one side of the

¹See *Hilands v. Com.*, (Pa.) 6 Atl. Rep. 267, and note; *State v. Blanut*, (Ark.) 2 S. W. Rep. 190; *State v. Mikesell*, (Iowa,) 30 N. W. Rep. 474.

room, and those belonging to the daughter from their place on the opposite side of the room, so that the two parcels could not have been taken into the possession of the same person at precisely the same moment of time. Two indictments were returned against Grant Phillips,—one of them charging him with burglariously entering the house, and committing a larceny, by taking and carrying away “four dresses, * * * the property of Mrs. Sue K. Seawell;” the other charging him with the simple larceny of the clothing belonging to Miss Roberta Seawell. He was arraigned and tried upon the former of these indictments, and acquitted; and then upon the latter indictment, and thereto “*pleaded not guilty*, and once in jeopardy,” and on the trial he introduced the record in the other case as evidence to sustain his plea of once in jeopardy. This time he was convicted, and his punishment assessed at three years’ imprisonment in the penitentiary. He has appealed in error.

Upon the plea of once in jeopardy, the trial judge said to the jury “that if Mrs. Seawell and Miss Roberta Seawell were the owners of different lots of goods in the same room, and they were feloniously taken and carried away, although it was done on the same evening, and during one continuing trespass, it would be two separate and distinct larcenies, and a former trial of the defendant for the larceny of Mrs. Seawell’s goods would be no bar to a trial under the present indictment for the larceny of Miss Roberta Seawell’s goods.” The learned counsel for the prisoner earnestly insists that this instruction is erroneous; that the acquittal upon the other indictment is a complete bar to the prosecution upon this one,—in other words, that the reverse of the instruction given is the law; and that, for this error, a reversal should be had, and a new trial granted.

The court was right, and counsel is in error. The instruction quoted is correct as applicable to the facts of this case. The goods of the two ladies, though in the same room, were in different parts of that room, and so far apart that the thief could not have taken those belonging to the mother and those belonging to the daughter at the same moment of time, and by the same act. The taking into his possession of the goods on one side of the room, and the removal of them from their place, without the consent of the owner, and with the intent of appropriating them to his own use, and depriving the owner thereof, constitutes a complete larceny; and if the thief had been apprehended in the middle of the room, as he passed from one side to the other with the goods already taken in his possession, the crime would have been perfect,—the *trespass* as to the owner of those particular goods and the *asportation* would have been finished. The thief was then guilty of the larceny of the clothing he had then taken under his dominion, and what he did afterwards was another crime. It was the taking and carrying away of the goods of another person, in a subsequent moment of time, and by different movements of his hands and body, with the necessary felonious intent. The taking of this other person’s goods was without her consent, and was therefore a *trespass* against her; and all the goods were actually carried entirely off the premises, and dropped some distance away. The taking of the goods of the mother was a *trespass against her*, and not against *her daughter*; and the taking of the goods of the daughter was a *trespass against her*, and not against *her mother*.

Then, were there not necessarily two trespasses,—the one as to the mother, and the other as to the daughter? Most certainly so; and the one was completed before the other was commenced. Then, with reference to the *asportation*, the goods first taken into the dominion and possession of the thief were by him carried across the room, to the place of those belonging to the other person, or those last taken were carried to the place where the thief deposited those first taken for the time being. In either event the carrying away was complete in legal contemplation; there was an *asportation* of each lot of goods. Neither of the ladies had the possession of the goods of the

other, or any property rights therein; hence the *trespass* and *asportation* as to the one was no kind of legal offense against the other. The wrong to one of them was no wrong to the other; and, if the wrong as to each was not a complete crime within itself, there was no crime at all, because two acts involving the distinct property and rights of different individuals cannot be coupled in order to constitute one offense against the law. The trespass, as against Mr. Moore, the owner of the house invaded, was continuous so long as the thief remained upon his premises, his presence there being without the consent of such owner; but the trespasses against the ladies were entirely different things. The offenses against them would have been the same if the thief had been rightfully upon the premises.

This court, speaking through Judge TURNER, in *Morton v. State*, said: "There are two counts. The *first* is for stealing the property and money of Sam O'Brien, and also for stealing the property and money of Thomas Corbitt; the *second* is for receiving the property and money of Sam O'Brien, and for receiving the property and money of Thomas Corbitt, knowing them to have been stolen. There was conviction, and motion in arrest of judgment. The judgment should have been arrested. Each count covers two separate and distinct offenses. Every larceny includes a trespass to the person or property of the owner of the thing stolen, as larceny of the property of O'Brien was no trespass to the person or property of Corbitt, and *vice versa*." 1 Lea, 498. The facts of that case are that the defendant, Morton, and O'Brien and Corbitt were all sleeping in the same room one night. The next morning, when O'Brien and Corbitt arose, each discovered that his money, pocket-knife, and perhaps some other property, had been abstracted from the pockets of his clothes during the night. Morton, as well as this property of O'Brien and of Corbitt, had disappeared from the room during the night. He was supposed to be the thief, and was indicted in the manner and with the result stated in the quotation we have made from the opinion in the case. Though it was not there decided that an acquittal upon a distinct indictment for the larceny of O'Brien's goods would not have been a bar to a prosecution of the same defendant upon an indictment for taking the goods of Corbitt, at the same time and from the same room, *it was* there decided, upon facts very similar to those before us, that *two distinct larcenies* were charged, and that the *trespass* against O'Brien was no *trespass* against Corbitt, and *vice versa*.

There is no other case in Tennessee so nearly applicable in its principles to the case at bar. *Bell's Case*, 4 Baxt. 426, has no application whatever. The question there was whether the taking of certain vegetables was a larceny, or a mere trespass; that is, whether the severance and asportation were one continuous act, or two separate acts. If the former, then the offense was only a trespass against the owner of the realty; if the latter, it was larceny, under a familiar rule of the common law.

In *Fiddler's Case*, 7 Humph. 509, a former conviction for running a horse-race was held to be a bar to an indictment against the same person for "*betting*" on the same race; but this was expressly and alone upon the ground that the *running of the race* was "a necessary ingredient of the offense" of *betting on the race*.

The same principle was applied in the *Wilcox Case*, 6 Lea, 571. There the defendants had been convicted of robbery from the person of the prosecutor, and that conviction was successfully pleaded in bar of a prosecution for an assault at the same time with intent to commit murder upon the prosecutor. This was right, because the violence used in the commission of the robbery was the same offense, or a necessary ingredient in the other offense charged. So, every battery includes an assault; and a conviction for the assault is a bar to an indictment for the battery, because it cannot be separated from the assault. *State v. Chaffin*, 2 Swan, 494.

But these cases are not in point here. The taking of Mrs. Seawell's goods

was no part or ingredient of the taking of her daughter's goods, nor was the one larceny included in the other in any sense.

In *Fowler v. State*, 3 Heisk. 154, this court held that an indictment for an assault upon these persons was good, upon the ground that the offense against each of them might have been committed "by one and the same act."

Citing this case and *Womack v. State*, 7 Cold. 508, Judge COOPER says, in *Kannon v. State*, 10 Lea, 390, that "an indictment against a defendant for the murder of two persons would be good upon its face, for the murder may be committed in the same degree, *by one and the same act*;" the controlling idea in each of the cases being that the whole offense charged was committed by a *single act* of the accused. In the opinion of Judge ANDREWS in the *Womack Case*, he says: "Two acts cannot constitute a single offense of murder." 7 Cold. 513. No more can two acts—the taking of one person's goods in one part of a room, and then of another person's goods in another part of the same room, on the same occasion—constitute a single offense of larceny.

In the *Williams' Case*, 10 Humph. 101, it was held that the stealing, at the same time and place, of a horse, saddle, blanket, bridle, and martingale was but a single offense; and likewise, in *Kelly v. State*, 7 Baxt. 323, this court said that the "stealing of a mare and a bridle" was only one crime. But the several pieces of property in each of those cases were charged to have belonged to *one person*.

Such are the Tennessee cases supposed to reflect, in some degree, upon the question under consideration; but none of them are decisive of it, unless such be the result of the holding in the *Morton Case*.

Next we notice a few decisions in other states which are out of harmony with each other, and some of which are in conflict with the views expressed in the first part of this opinion.

In South Carolina the defendant was indicted in three cases for taking the cotton of three persons at the same time. It was held that a conviction in one case was no bar to a conviction in the other two, the court being of the opinion that the larceny of the different parcels of cotton constituted three distinct offenses. *State v. Thurston*, 2 McMul. 382.

The supreme court of Massachusetts went still further, in *Com. v. Andrews*, 2 Mass. 409. Andrews had received stolen goods belonging to A. and B., from the *same person*, at the *same time*, and IN THE SAME PACKAGE. He was convicted upon an indictment for receiving the goods of B., and pleaded that conviction in bar to an indictment for receiving the goods of A. The plea was adjudged to be insufficient, upon the ground that there were two offenses.

In Ohio it was held that the larceny of goods of two different persons at the same time was one transaction, and therefore but one offense. *State v. Hennessey*, 23 Ohio St. 339, 18 Amer. Rep. 253.

Wilson was indicted and convicted for stealing a horse. Subsequently he was put upon trial for stealing other property belonging to a different person. Plea of former conviction was sustained, it appearing that the act in each case was the same; the goods charged in the second indictment to have been stolen being upon the horse when he was taken. *Wilson v. State*, 45 Tex. 76, 23 Amer. Rep. 602.

In section 931 of the ninth edition of his work on Criminal Law, Wharton mentions several instances in which the taking of different things by *one continuous act* has been held to be a *single larceny*; and in doing so he refers to some of the cases cited in notes to the case of *The King v. Ellis*, 2 Heard, Lead. Crim. Cas.—. At the conclusion of this section, treating of the singleness of the transaction, the author says: "But if broken up, as is stated, by extrinsic action, then separate indictments are necessary. *This, perhaps, occurs when articles of different owners are taken by a continuous act.*"

It was proper to charge the ownership of the property in Miss Roberta Seawell, though a minor, she being 18 years of age, and owning and using the clothing as her own. 1 Whart. Crim. Law, (9th Ed.) § 947.

The judgment must be affirmed, with costs.

SNODGRASS, J., dissents.

STAFFORD v. MONTGOMERY and another.

(*Supreme Court of Tennessee.* January 11, 1887.)

EXECUTION—STAY—SURETY—ORDER OF SUBJECTION TO LEVY.

The provision of Code Tenn. (M. & V.) § 3774, to the effect that, as between a judgment debtor who is surety upon the cause of action on which the judgment was rendered, and a stayor, entered at the instance of the principal alone, the stayor is liable to execution before the surety, does not apply as between the judgment creditor and the surety; the surety, as to the creditor, is treated as the principal.

Appeal from circuit court, Jackson county.

John P. Murray & Son, for Stafford, appellant. *R. A. Cox* and *M. G. Butler*, for Montgomery and Butler, appellees.

CALDWELL, J. Montgomery sued W. H. Richmond and J. W. Stafford, before a justice of the peace of Jackson county, on a promissory note joint and several in its form. Judgment was "for the plaintiff, and against the defendants," for the debt, interest, and costs. M. G. Butler was entered as stayor; and, after the expiration of the stay, execution was issued and levied upon the property of Stafford. Thereupon Stafford filed his petition for *certiorari* and *supersedeas*, alleging that he was in fact only the surety of Richmond on the note; that Butler became stayor at the instance of Richmond alone, and not for petitioner, or by his consent; and that Butler thereby became liable for the judgment before petitioner. The prayer is that the order of liability be declared, and the levy on petitioner's property quashed.

Petition was dismissed by the circuit judge on motion, and the commission of referees recommend a reversal. The holding of the commission that the facts alleged make the stayor liable before petitioner, as between themselves, is sound upon principle, and in accordance with our statute. Code, (M. & V.) § 3774. Nor is it necessary to this result, as contended by counsel for Butler and Montgomery, that the judgment should have recited, in the first instance, as provided by Code, § 3744, that Stafford, the present petitioner, was only surety on the note. The fact of suretyship, though not recited in the judgment, may afterwards be established by an independent proceeding against the stayor for that purpose; and in such proceeding the stayor, if entered at the instance of the principal alone, will be adjudged liable before the surety. *Chaffin v. Campbell*, 4 Sneed. 185. But the surety cannot restrain the creditor from collecting his judgment, as is attempted here, because *as to the creditor the surety is to be treated as principal*. Id. 191, 192. And to entitle the surety to relief against the stayor, especially where the suretyship does not appear on the face of the judgment, the surety must first pay the judgment. *Winchester v. Beardin*, 10 Humph. 247; *McNelly v. Cooksey*, 2 Lea, 43.

It follows that this proceeding cannot be maintained at all as to Montgomery, the creditor, and that it is premature as to Butler, the stayor.

The report is disapproved, and the judgment below affirmed.

SHUDER v. NEWBY.

(*Supreme Court of Tennessee.* January 19, 1887.)

VENDOR AND VENDEE—DISAFFIRMANCE OF PAROL CONTRACT—SUIT FOR PURCHASE MONEY—RELEASE—CONSIDERATION.

It is no defense to an action by a vendee of land, under a parol contract of sale, which he has disaffirmed, to recover personal property delivered by him to the

vendor on account of the purchase price, that at the time of disaffirmance he agreed to give the defendant the property sued for in consideration of being released from his contract to buy the land. The contract to buy became a nullity immediately on disaffirmance, and there was no consideration to support the agreement to surrender the property in return for the release.

Appeal from circuit court, Warren county

Smallman & Whitson, for appellant. *Murray & Spurlock*, for appellee.

LURTON, J. The plaintiff entered into a parol agreement for the purchase of land from the defendant, and paid him, as part payment, two horses and a set of harness, and was to execute notes for remainder of purchase money upon execution and delivery of title-bond. Before taking possession, plaintiff disaffirmed the purchase, and refused to receive bond for title, or execute notes for remainder of purchase money. This action is brought to recover the property delivered as part payment, or the value thereof. The defense is that plaintiff, at the time of his disaffirmance of the parol agreement, gave to the defendant the property sued for, in consideration of his being released from his agreement to buy the land.

The circuit judge charged the jury, among other things not excepted to, that such an agreement to give or surrender the purchase price already paid, in consideration of being released from his contract, was a valid and sufficient agreement to give to the defendant a good title to the property sued for. We think this was error. Whether the parol agreement to purchase land be regarded as absolutely void, or only voidable, cannot matter. When the plaintiff elected to disaffirm the contract of sale, it at once became void, and there was no consideration to support his agreement to surrender his property in consideration of being released. The parol agreement never could have been enforced against his consent. He was under no legal obligation, and no suit could have been maintained to compel him to perform his contract, and no defense could have been made to his suit to recover his property paid on his parol agreement of purchase. No liability can be created by a subsequent promise to pay, where no legal obligation ever existed previously, unless supported by a new consideration. *Bates v. Watson*, 1 Sneed. 376. A subsequent agreement to pay will revive a precedent good consideration, but it can give no original right of action, if the obligation on which it is founded never could have been enforced at law. 1 Add. Contr. §§ 6, 13. A mere moral consideration is not a good consideration. To adapt the suggestion of Mr. Addison: "It is better to let such naked agreements rest upon the mere integrity and good faith of the parties than to subject them to the compulsory authority of law."

The report of the commission of referees recommending an affirmance will be set aside, and the judgment of the circuit court reversed. The case will be remanded for a new trial.

WINGFIELD v. McLURE and others.

(*Supreme Court of Arkansas*. February 26, 1887.)

1. GARNISHMENT—JUDGMENT BY DEFAULT AGAINST GARNISHEE.

A judgment by default against a garnishee in an attachment suit, for failure to answer the allegations and interrogatories filed against him, is void, in the absence of proof against him, and a personal judgment against a defaulting garnishee can be had only upon summons and trial.

2. INJUNCTION—REMEDY AT LAW.

A complaint seeking to enjoin an execution on a judgment at law is demurrable, unless it show that complainant has no full and adequate remedy at law, by appeal, certiorari, or application to the court which rendered the judgment.

3. SAME—JUDGMENT VOID—DAMAGES.

Where an injunction is granted enjoining execution upon a void judgment, damages will not be assigned on dissolving the injunction.

Appeal from circuit court, Nevada county.

On June 4, 1884, appellant filed his bill for an injunction against appellees, setting up, in substance, the following facts: That Geyer, Adams & Co. had obtained judgment against William T. Owens, before a justice of the peace for Nevada county, Arkansas, and after the issuance of an execution, and a return thereon *nulla bona*, filed a transcript of such judgment in the circuit clerk's office, which was recorded, etc., as required by law; that afterwards, on the twenty-third day of December, 1883, Geyer, Adams & Co. sued out a writ of garnishment from the circuit court against appellant, commanding him to answer on the first day of the March, 1884, term of said court, which was served on him, etc.; that the allegations and interrogatories were filed on or before the third day, and, on the fourth day after the return-day of said writ, Geyer, Adams & Co. obtained a judgment by default against appellant as such garnishee; that an execution had been sued out, and was about to be levied, upon appellant's property by appellee McLure, the sheriff of Pike county; that he was not indebted to said Owens, and had in his possession no property belonging to him, (Owens,) except a small batch of worthless claims, which he offered to turn over to the court or hold subject to its orders; that on the day prior to the return-day of the writ he was taken sick, and by reason of said sickness was unavoidably prevented from attending and answering said allegations and interrogatories for one week, and until some time after the judgment was rendered against him; that during his sickness the Little Missouri river and creeks near it became overflowed, and prevented the appellant from crossing for an additional period of 10 days, and appellant thought the Nevada circuit court did not last exceeding two weeks; that he had intended to appear and answer, denying his indebtedness, etc. Appellee filed a general demurrer to the complaint, and motion to dissolve the injunction. The court sustained the demurrer, and dissolved the injunction, and assessed the damages sustained by Geyer, Adams & Co. by reason of the injunction, and rendered judgment therefor against plaintiff, and plaintiff appeals.

Atkinson & Tompkins, for appellant. *Smoot, McRae & Hinton*, for appellee.

BATTLE, J. The judgment recovered by appellees Geyer, Adams & Co., against appellant, for \$143, in the Nevada circuit court, at the March term thereof, in 1884, is void. *Giles v. Hicks*, 45 Ark. 271; *St. Louis, I. M. & S. Ry. v. Richter*, 48 Ark. —, 3 S. W. Rep. 56. The appellant fails to show in his complaint that he has not a full and adequate remedy at law. Unless he can show that he has not such a remedy, either by appeal, *certiorari*, application to the court itself which rendered the judgment, or in any other legal and adequate manner, he is not entitled to relief by injunction. The demurrer to the complaint was properly sustained. 1 High, Inj. §§ 229, 230; *Sanders v. Sanders*, 20 Ark. 610; *Bell v. Greenwood*, 21 Ark. 249; *Stillwell v. Oliver*, 35 Ark. 187.

The court erred in assigning damages on the dissolution of the injunction, and rendering judgment therefor against appellant. The judgment enjoined being void, no damages were sustained by the stay of proceedings thereon. The decree of the court below is therefore reversed, and a decree will be entered here in accordance with this opinion.

ISH v. McRAE and others.

(*Supreme Court of Arkansas. March 5, 1887.*)

FORCIBLE ENTRY AND DETAINER—WHEN MAINTAINABLE—VENDOR AND VENDEE.

A. was let into possession of land by B., the then owner, under a written contract for a conveyance. When the contract was executed, he gave his two notes for the payment of the purchase money, due one and two years thereafter, with interest. A deed was to be executed when all the purchase money was paid. The first note

contained a stipulation that, if it was not paid when due, A. should pay to B. "customary rent" for the use of the land. Prior to A.'s contract with B. the latter had mortgaged the land to secure a debt due to C., and the mortgage had been duly recorded when A. acquired his rights. The land was sold under the mortgage, and purchased by C. A. failed to pay his first note, which fell due shortly before C. received his deed, and, after an unsuccessful attempt to agree with him upon the rent he should pay, C. gave him notice to quit. *Held*, that at the time C. became owner of the land the relation of landlord and tenant existed between A. and B.; that C., by his purchase, succeeded to B.'s rights; and that C. could maintain an action of unlawful detainer against A., as his tenant.

Appeal from circuit court, Ouachita county.

B. W. Johnson, for appellant. H. G. Bunn, for appellees.

COCKRILL, C. J. The appellees obtained the possession of lands held by the appellant in an action of unlawful detainer. The only question mooted at the trial that it is necessary to determine, in order to test the correctness of the judgment against the appellant, is, was he at the time the suit was instituted standing in the relation of tenant to the appellees, within the meaning of the unlawful detainer act? The appellant was let into possession of the land by Robert Hampton, the then owner, under a written contract for a conveyance. When this contract was executed he gave his two notes for the payment of this purchase money, one due one and one two years thereafter, with interest. A deed was to be executed when all the purchase money was paid. The first note contained a stipulation that, if it was not paid when due, Ish should pay to Hampton "customary rent" for the use of the land. Prior to Ish's contract with Hampton, the latter had mortgaged the lands to secure a debt due to W. E. McRae & Co., and the mortgage had been duly recorded when Ish acquired his rights. The land was sold under the mortgage, and purchased by the appellees. Ish failed to pay his first note, which fell due shortly before they received their deed; and, after an unsuccessful attempt to agree with him upon the rate he should pay for the occupation of the land, they gave him notice to quit, and brought this action. There was some conflict in the testimony as to whether Ish actually attorned to the appellees, and promised to pay them rent for the premises, and it becomes necessary to test the correctness of the court's charge to the jury, in which they were, in effect, told that, after Ish's failure to pay his first note, he held the land as tenant to Hampton; that such was the effect of the contract between him and Hampton.

The agreement between the parties about the possession must determine the relation between them, and, though it consists of two separate and distinct stipulations, they are to be read together as one contract, (*Ex parte Hodges*, 24 Ark. 197; *Nicks' Heirs v. Rector*, 4 Ark. 251;) and that contract is competent evidence to establish or rebut the relationship of landlord and tenant, (*Mason v. Delancy*, 44 Ark. 444.) If the contract shows that the defendant was in under an agreement to purchase, the idea of a tenancy was rebutted, and neither Hampton, nor those succeeding to his rights, could evict him by the summary process of unlawful detainer, although he had not strictly complied with the contract of purchase, (*Mason v. Delancy, supra*; *Necklace v. West*, 33 Ark. 682; *McCombs v. Wallace*, 66 N. C. 481; *Nightingale v. Barena*, 47 Wis. 389, 2 N. W. Rep. 767; *Chicago, B. & Q. Ry. v. Skupa*, 16 Neb. 341, 20 N. W. Rep. 393;) but if, on the other hand, the meaning of it is that he is to pay rent, or a compensation for the use of the land, then he was a tenant, (*Saunders v. Musgrave*, 6 Barn. & C. 524, 13 E. C. L. 240;) and, as he held over after the expiration of his term, he could be evicted by the remedy here adopted.

The first stipulation of the contract is one of purchase and sale. It binds the vendor to convey to the defendant, but to the terms of this agreement there is annexed the condition that, in case of failure in the performance of the agreement to pay the first installment of purchase money, the intended

vendee shall thereafter pay rent for the use of the land. It was certainly competent for the parties to enter into a binding agreement of this nature. *Wells v. Smith*, 2 Edw. Ch. 78, 7 Paige, 22. The vendor being unwilling to take the hazard of losing both principal and interest of the purchase price, and the rent of the land as well, may make a sale upon condition, and give the vendee an option to hold as purchaser or as tenant after a given day. The vendee here has, in effect, agreed that his right shall depend upon the scrupulous adherence to the engagement he made to pay the purchase price, and that time should be a material consideration in the contract. The contingency thus provided for by the vendor had occurred when the notice to quit was given, and the defendant was then holding possession under his agreement to account to the owner for the rental value of the lands. As was said by the supreme court of Mississippi in a case the facts of which are almost identical with those we are considering, "the vendee, having in this case confessedly failed to pay the purchase money, came under the conditional obligation which he had by his agreement imposed upon himself to pay rent. This, being a valid and legal obligation, was enforceable by distress warrant." *Vick v. Ayres*, 56 Miss. 670. In that case the contract to purchase was in parol, but, in our judgment, that is immaterial, because, in any action which depends upon the existence of the relationship of landlord and tenant between the parties, the contract upon the faith of which the one enters and holds under the other may be proved for the purpose of elucidating that question, whether it is written or in parol. *Mason v. Delancy*, *supra*; *Carpenter v. U. S.*, 17 Wall. 489.

In the case of *Stinson v. Dousman*, 20 How. 461, where there was a covenant to sell land upon condition that the purchase money should be paid in installments, and other acts, such as paying taxes and effecting insurance, should be performed by the covenantee, on failure to perform which rent was to be charged, and the covenantee entered into possession under the contract, but failed to execute his part of it, it was held that he was holding as tenant, and was chargeable with rent. And in *Saunders v. Musgrave*, *supra*, Lord TENTERDEN held that the relation of landlord and tenant existed between the parties to a contract not unlike this. See, too, Tayl. Landl. & T. § 25, and note; *Dunham v. Townsend*, 110 Mass. 440; *Blanchard v. McDougal*, 6 Wis. 167; *Gault v. Stormont*, 51 Mich. 636, 17 N. W. Rep. 214; *Wells v. Smith*, *supra*.

The case of *Walters v. Meyer*, 39 Ark. 560, is not inconsistent with this view, for in that case what was denominated "rent" by the parties was in fact only interest upon the purchase money. There the vendee was to pay a sum, "not for the use of the land, grounded on the estimated value of such use," as was said in *Dakin v. Allen*, 8 Cush. 33, "but as forbearance for payment of a sum of money for which he had given his note."

We must conclude, then, that at the time the appellees became owners of the land, the relation of landlord and tenant subsisted between the defendant and Hampton, the former owner. It is not material to consider what equitable rights the defendant may have had for relief against the non-performance of his engagement at the stipulated time. See *Atkins v. Risson*, 25 Ark. 138. His contract was made subject to the mortgage under which the appellees purchased, and their title relates to the date of its execution; and the defendant did not undertake to do more than rely upon the terms of his agreement with Hampton to rebut the idea of a tenancy. In this he must fail. The appellees, by their purchase, succeeded to Hampton's rights, according to the repeated decisions of this court, and could maintain the action of unlawful detainer against his tenant holding over after the expiration of his term. *Mason v. Delancy*, *supra*; *Johnson v. West*, 41 Ark. 535; *Halliburton v. Sumner*, 27 Ark. 460; *Bradley v. Hume*, 18 Ark. 284; *Frank v. Hedrick*, Id. 304.

The court's charge was not erroneous, and the judgment is affirmed.

KEY v. BRAUN, Adm'x.

(Supreme Court of Texas. February 1, 1887.)

SALE—BILL OF SALE—LIEN—RECORD.

A writing executed by A., purporting "to bargain, sell, and confirm" certain personal property to B., upon condition that if B. pays a certain sum of money the conveyance shall remain in full force, but, in case of default, A. may take the goods and dispose of the same as to him may seem proper, and the conveyance shall be from that time null and void, *held*, the writing constituted a sale, and title passed to B., subject to a lien in favor of A. for his purchase money, coupled with a power of sale; and, the instrument not having been recorded as a chattel mortgage, the vendor, A., could assert no lien as against creditors of the vendee, B.

Appeal from Washington county.

Garrett, Searcy & Bryan, for appellant. *C. R. Breedlove*, for appellee.

STAYTON, J. L. & A. Biesenbach being indebted to the appellant for rent, the latter sued out a distress warrant, on October 30, 1883, which was levied on the property in controversy. After the levy, Emil Braun made claim to the property under the statute, and, on account of the disqualification of the county judge, the proceeding to try the right of the claimant was transferred to the district court, when, Braun having died, the matter was prosecuted to judgment by the appellee, who was appointed administratrix. The property had formerly belonged to Emil Braun, who, prior to the levy, executed to one of the defendants in the action for rent the following instrument:

"The State of Texas, County of Comal: Know all men by these presents, that I, Emil Braun, of the county and state aforesaid, in consideration of the payment to me by Mrs. Louisa Biesenbach, wife of August Biesenbach, of the county of Washington, state of Texas, of the money hereinafter mentioned, and in consideration of the sum of one dollar to me duly paid by the said Louisa Biesenbach, the receipt of which is hereby acknowledged, do bargain, sell, and confirm unto the said Mrs. Louisa Biesenbach all the stock, goods, household furniture, and all other goods and chattels whatsoever, mentioned in the schedule annexed hereto, and which are now in Central House, in the town of Brenham, said Washington, county. Now, the above and foregoing conveyance is made upon the express condition that if the said Mrs. Louisa Biesenbach shall well and truly pay or cause to be paid unto the said Emil Braun, his executors, administrators, or assigns, the sum of twelve hundred dollars, with interest thereon from the date hereof at the rate of 8 per cent. per annum, on or before the expiration of twelve months from the date hereof, then this conveyance shall be and remain in full force and effect; but in case default shall be made in the payment of the said sum of money, or of any part thereof, then it shall and may be lawful; and the said Emil Braun hereby expressly reserves the right and privilege, to enter into said Central House, and such other place or places as the said goods and chattels are or may be placed, and take and carry away the same, and sell and dispose of the same as to him, the said Emil Braun, may seem most fit and proper; and then the above conveyance shall be, from that time and henceforth, null and void, and of no force, virtue, or effect whatever. In testimony whereof I have this day signed this instrument in duplicate, this thirteenth day of July, 1883.

"EMIL BRAUN."

The entire purchase money was \$2,000, of which \$800 was paid in cash, after which Biesenbach and wife went into possession. The judge who tried the cause held that title did not pass by the instrument above copied, and rendered a judgment for the claimant, and upon the correctness of this construction depends the right of the parties. The instrument, upon its face, professes to "bargain, sell, and confirm" the property to Louisa Biesenbach, and, unless the other language used in the instrument restricts the operation

of the words above used, it must be held that title passed by it. That the vendor intended to reserve some character of right is apparent from the language used, and the inquiry is, what right did he reserve? Did he retain the title in himself, or did he only retain a lien? He in effect declared that the conveyance should remain in full force and effect if the balance of the purchase money was paid when due, by which we may understand that, in the event named, the purchaser should hold the property freed from any claim whatever which the vendor, under all the terms of the instrument, would have upon it if the balance of the purchase money was not paid. The instrument does not declare that the conveyance shall cease to be operative if the balance of the purchase be not paid when due; but it places it in the power of the vendor to enforce the payment of the purchase money. The instrument does not empower the vendor to retake and hold in his own right the property in any event, but it does empower him, if the purchase money be not paid, to take possession of it, "and sell and dispose of the same as to him, the said Emil Braun, may seem most fit and proper; and *then* the above conveyance shall be *from that time* and henceforth null and void, and of no force, virtue, or effect whatever."

The manifest purpose of these clauses was to retain an express lien, with power to sell the property, and pay the debt, if the purchaser made default. They recognize the fact that the title had been conveyed by the preceding part of the instrument, and, in effect, declare that it shall so remain unless divested by a sale which the instrument authorized the vendor to make. The title was to be divested just as may be the title of every person who has given a lien on property coupled with a power to sell it; and, as if to emphasize the fact that title was intended to pass and did pass by the instrument, the event is named and the time fixed which, in all such cases, will divest a conveyance of power longer to give title. The instrument never having been recorded or filed as chattel mortgages are required to be, the appellee can assert no right against the creditors of the vendee.

The judgment will be reversed, and cause remanded, with instructions to the district court to enter judgment for the appellant in accordance with this opinion, and the statute regulating such cases, and for all costs in the case. It is so ordered.

RICHARDSON and others v. LEVI and others.

(*Supreme Court of Texas.* February 11, 1887.)

1. APPEAL—ASSIGNMENT OF ERROR.

An assignment of error that the court erred in each and every finding of fact because said findings "are not just and fair conclusions from the evidence in the case," is too general, and will not be regarded.

2. DEED—QUITCLAIM—NOTICE.

A party receiving a quitclaim deed to land cannot be deemed a *bona fide* purchaser without notice of any interest adverse to his grantor. Such a conveyance indicates by its very form that the grantor has doubts of his title, and the grantee takes with notice that he is getting a dubious title, and is put upon inquiry as to the claim which casts doubts upon it. But the language of the deed being that the grantor "grants, bargains, and sells," as well as quitclaims, the grantee has his election in what way to take, and may take what *either* of these words would convey, and is not restricted by the fact that his estate, under one of the words, would be of less value than under another, he may therefore escape being charged with notice under the "quitclaim" by electing to take under the "grant, bargain, and sale."

Appeal from Victoria county.

A. B. *Peticolas*, for appellants. *Stockdale & Proctor* and *Scott & Levi*, for appellees.

WILLIE, C. J. This was an action of trespass to try title to a block of ground in the town of Victoria. It was brought by M. Richardson and her

husband, John W. Richardson, against the appellees, G. A. Levi, A. Lowe, and Marion Wheeler, each of whom set up the following defenses, viz.: Not guilty; limitation of 3, 5, and 10 years; innocent purchaser for value, without any notice of any adverse claim to the land; equitable estoppel; and laches and stale demand. Levi and Lowe pleaded also improvements in good faith, with prayer for judgment for their value. The case was tried by the judge without a jury, who found against the defendants upon all their defenses except that of laches and stale demand. He found, however, in favor of Levi and Lowe upon their suggestion of improvements in good faith.

The plaintiffs and defendants all derived title from Robert H. Bradley. He had exchanged the block in controversy, together with other property in Texas, for some property in Tennessee, which is claimed in this suit to have been the separate property of Mrs. M. M. Richardson. Deeds were passed between the parties, but it was not shown whether the deed from Bradley for the Victoria property was made to Mrs. Richardson or to her husband. It was never recorded; and, so far as the record shows, neither Richardson nor his wife set up any claim to this block for perhaps 30 years after the deed was executed. Some 18 months after the date of the deed, James Park obtained a judgment against John W. Richardson, and an execution issued thereon, was levied upon this block, and at execution sale it was bought in by Park, who credited the purchase money upon the execution, and received from the sheriff a deed for the property. Some four years afterwards Park sold the block to John C. Moody for \$200, and executed to him a deed of which the following is a copy:

"Know all men that I, James Park, of Williamson county, state of Tennessee, for the sum of two hundred dollars, received, to my full satisfaction, of John C. Moody, of Victoria county, in the state of Texas, do by these presents grant, bargain, sell, demise, release, and forever quitclaim unto the said Moody, his heirs and assigns, the following lots of land situated and being in the town of Victoria, county of Victoria, and state of Texas, and known upon the map, and according to the plan of said town, as building lots Nos. 1, 2, 3, and 4, in block 131 and range 9.

"Witness my hand and scroll for seal, this twenty-first day of July, 1858.

[Signed]

"JAMES PARK." [Seal.]

Moody conveyed by quitclaim deed, November 4, 1858, to J. O. Wheeler for the consideration of \$500. Marion Wheeler, one of the defendants, inherited one-third of one of the lots in the block from J. O. Wheeler, and the remainder of the block passed by mesne conveyances, all of which were warranty deeds, to the several defendants in this cause.

Among other conclusions of fact found by the judge was the following: "That all of the purchasers of the premises since the sale under the execution in 1854 purchased without notice of any claim or right of Mrs. Richardson, and that they each and all paid value for the parcels of land by them respectively bought." This conclusion is not questioned here by any proper assignment of error. It is true that there is an assignment that the court erred in each and every finding of fact from fourth to tenth, inclusive, because said findings are not just and fair deductions or conclusions from the evidence in the case to be found in the record. The above-recited conclusion of fact is the ninth, and would therefore be embraced in the assignment; but this general manner of assigning errors has been often held by this court to be insufficient. It does not bring to our attention the particular finding of the court claimed to be unwarranted by the evidence. Moreover, the appellants virtually abandon any objection to the ninth conclusion of fact by specifying in their brief the particular points upon which they take issue with the court below as to its findings of fact, omitting the point embraced in the foregoing conclusion.

As one of his conclusions of law from the foregoing facts, the learned judge below held that, as all of the defendants derived title through a quitclaim deed executed by the purchaser under execution sale, who himself had paid the purchase money by crediting it upon his execution, not one of them could be considered an innocent purchaser. This conclusion presents the question to which we propose to direct our attention. It may now be regarded as the settled law of this state that a party receiving a quitclaim deed to land cannot be deemed a *bona fide* purchaser, without notice, of any greater interest therein than his grantor had at the date of the execution of the deed. This doctrine was first authoritatively announced in *Rodgers v. Burchard*, 84 Tex. 442, and has been adhered to ever since as to all deeds of quitclaim in the strict sense of that term. In the case cited, the deed conveyed "all the right, title, and interest" of the grantors; and in all the authorities relied on to sustain the decision, the deeds under consideration made use of similar language. The extent of the decision of *Rodgers v. Burchard* therefore is that a deed which purports to convey only the right, title, and interest of the grantor will not protect the grantee against prior unregistered instruments. The question as to the rights of purchasers under quitclaim deeds has since been before this court on several occasions, and the decision in *Rodgers v. Burchard* has been limited to the precise case then before the court, and has been held to have gone no further than to establish the principle as above formulated. *Harrison v. Boring*, 44 Tex. 255; *Taylor v. Harrison*, 47 Tex. 460.

In *Harrison v. Boring*, Chief Justice ROBERTS, in delivering the opinion of the court, noticed the distinction between a deed which purports to convey the right, title, and interest of the grantor in the land, and one which purports to convey the land itself. He distinctly recognized the principle announced in *Van Rensselaer v. Kearney*, 11 How. 322, that when the deed contains evidence that the absolute right to the land, and not the title or chance of title is sought to be sold and bought, the grantee may be a *bona fide* purchaser, notwithstanding the deed may have in some respects the qualities of a quitclaim deed in form. The opinion in *Harrison v. Boring* warrants the conclusion that one who has in good faith purchased the absolute right to land, in contradistinction to that of the title or claim of title of the grantor, and by outside proof has shown that he paid a valuable consideration therefor, may claim, as an innocent purchaser, against any adverse title or equities of which he had no notice. This was the construction placed upon the decision by Judge MOORE in *Taylor v. Harrison*, *supra*; and this court in that case approved the decision in *Rodgers v. Burchard* in so far only as it was qualified by the opinion in *Harrison v. Boring*. Judge MOORE said, in effect, that the doctrine that a grantee under a quitclaim deed is not to be treated as a *bona fide* purchaser applies only to quitclaim deeds in the strict sense of that species of conveyance, *i. e.*, when the instrument purports and is intended to convey only the right, title, and interest in the property named in it; and, as to the rights of purchasers in this respect, he drew a distinction between such deeds, and those purporting to convey an absolute title to land without covenants of warranty. The clear deduction from these cases is that in order to charge a purchaser with notice of an unrecorded instrument or secret lien or equity by reason of the character of deed under which he claims, that deed must purport to convey and quitclaim to the purchaser no more than the right, title, or interest of the grantor.

Upon an examination of the decisions of other states where a quitclaim purchaser is subject to the same rule, we find, so far as the cases afford us information, that the decisions were upon deeds purporting to convey only the title or interest of the grantor. *Crapo v. Brown*, 40 Iowa, 489; *Marshall v. Roberts*, 18 Minn. 408, (Gil. 365;) *Smith v. Bank of Mobile*, 21 Ala. 124; *Ridgeway v. Holliday*, 59 Mo. 455. In the case of *Hope v. Stone*, 10 Minn. 141, (Gil.

114.) the court, in holding that the deed before them, which conveyed only the right, title, and interest of the grantor, did not protect the grantee against a previous trust with which the land conveyed was charged, said that if it had been a conveyance of the land, instead of the right, title, and interest of the grantor, it might be necessary to inquire whether the registration or possession of the opposing claimant was notice to the grantee. But they say, as he only took his grantor's right, he took nothing which the latter had previously conveyed. The very terms of the deed were notice to him of all the rights previously conferred upon others by his grantor. This view seems to accord with that intimated in the decisions of our own court to which we have referred, and they doubtless can be rested upon the principles announced in the Minnesota case; viz., in a strictly quitclaim deed the grantee takes no more than the grantor can lawfully convey, and the fact that the deed purports to do no more gives notice of the prior right of third parties.

Strictly speaking, no deed can of itself convey a greater estate than the grantor owns at the time of making it, whether it be a quitclaim of interest, or a deed to the land with or without covenants of warranty. If the title of the grantee is better than that held by his vendor, it is because the owner of an outstanding claim cannot assert it against the purchaser, though he might have done so against his grantor. The latter receives the title of the grantor, accompanied with a right which the former did not possess, viz., to defend against secret outstanding titles of which the grantor was charged with notice, but of which the grantee is in fact ignorant. This is the effect of a deed which purports to convey the property, and not the right of the maker of the instrument. On its face it passes an indefeasible title, and gives no notice that there may be some secret claim which may defeat it. The law makes it what it purports to be,—a conveyance of a good title to the land, so far as such secret claims are concerned, by forbidding their owners to assert such claims against the purchaser, and, as said in *Taylor v. Harrison, supra*, whether the deed has or has not a clause of warranty. This clause forms no part of the conveyance. Where the instrument in which it is contained purports to make a full and perfect conveyance of the land described in it, this clause does not strengthen or enlarge the title conveyed. It is a separate contract by which the grantor agrees to pay damages if the title fails; but it does not make the title itself any better. If it accompanies a deed which conveys only the right and title of the grantor, it evidences a confidence of the grantor in his title to the land, and a want of like confidence on the part of the grantee in such title. But an unrestricted conveyance of the property for a fair consideration shows that the purchaser supposes that he is getting the whole estate, though he takes no separate contract for a return of the purchase money in case he does not. Judge STORY said in the case of *Flagg v. Mann*, 2 Sum. 562, that he was not aware that any covenant of general warranty had ever been held necessary to entitle the vendee to make the defense of innocent purchaser, when he bought the property, and not the interest, of the grantor. If he gives a full price for an unquestioned and unquestionable fee-simple, the absence of covenants of general warranty ought not to take away from him the common protection. This affords proof that he had no suspicion of the title not being perfect, and he has "an equal equity with any person claiming under an outstanding and unknown trust; and, if so, the legal title, combined with the equity, ought not to be disturbed."

If a grantor conveys no more than his title, the presumption is that he had doubts as to his right to the land, and notice of some opposing claim; and he thus expresses that doubt upon the face of the deed. If he conveys the land without restriction as to title, the presumption is that he had and intended to convey as full a title as could be held in the land, and that he had no doubt of his right to do so. The purchaser in each case has notice that he is getting such title as his grantor purports to convey,—in the one case a doubtful title,

and he is put upon inquiry as to the claim which casts the doubt upon it; in the other, a full title, and he need make no inquiry upon the subject.

The deed from Park to Moody does not purport on its face to convey merely the right and title of Park to the land, but the land itself. It is true that it uses the word "quitclaim," in connection with other words by which title may be passed under a deed of conveyance; but we do not think this word restricts the conveyance in any manner whatever. The words used in the ordinary form of quitclaim at common law are "remit, release, and forever quitclaim all the right, title, and interest," of the party making the deed. The use, in addition of other words, such as "give, grant, bargain, and sell," would not change the character of the conveyance if the interest sold was still described as the "right and title" of the grantor. It would still be a conveyance of that interest, and not of the land described in the deed. But each of the words of conveyance found in deeds which purport to convey land, and not the vendor's title, had at common law its own signification and legal effect. The word "give" was used in conveying a fee-tail; the word "grant" to convey an incorporeal hereditament; the term "bargain and sell" evidenced a contract to convey which made the bargainer to hold for the use of the bargainee, and the statute of uses vested the title in the uses. A release was used only when the releasee was in possession, and the releasor conveyed to him his own title. The signification of these terms has been somewhat modified; and, in America at least, the words "grant" or "bargain and sell" may convey full fee-simple title to any species of property. A release may be used to convey a title to one who has no previous right in the land, and is in most states equivalent to the word "quitclaim." It is customary in all or the most of these terms in deeds intended to pass property by fee-simple title, and the law in such cases is that the party receiving the deed has his election in what way to take it. *Hil. Real Prop.* 491, 492. If the words used are "grant, bargain, and sell, release or confirm," he may take whatever estate either of these words would convey. The mere fact that his right under one of the words would be of less value than under another does not limit the deed to what the former would convey. If one grants, bargains, and releases, the grantor takes his title as well by grant, bargain, and sale as by release. It is clear, therefore, that the use of the word "quitclaim" in the present deed did not make it any the less a conveyance of the lot in controversy, or restrict it so as to make it upon its face convey no more than the interest of the grantor in the property.

We think that the court having found that Moody bought without notice of Mrs. Richardson's claim, and paid value for the property, should have been adjudged a *bona fide* purchaser without notice under the deed received by him from Park, and that for this reason the judgment rendered by the court below in favor of the appellees was correct. This relieves from the necessity of inquiring whether the subsequent vendees, claiming through Moody, might not have been treated as *bona fide* purchasers, having taken warranty deeds, notwithstanding their line of title through use of a quitclaim character. Nor need we inquire as to whether the ruling of the court was correct upon the question of laches and stale demand. For the reasons already assigned, the judgment is affirmed.

MOORE v. STEELE and others.

(*Supreme Court of Texas.* February 25, 1887.)

PARTNERSHIP—DISSOLUTION—ASSIGNMENT.

A partner who furnishes the money to purchase cattle for a partnership, which are to be owned in equal shares, and afterwards sells his undivided half interest in the cattle without making any sale of his interest in the partnership or of his claim

against his partner, thereby dissolves the partnership, and loses his lien on the cattle owned by his partner, nor does the transfer by him of his share of the partnership property transfer any equity he might have against his partner.

Appeal from Brazos county.

Suit brought by Jane Callen against A. G. Steele and Tom Moore, and upon their promissory note; Margaret Moore, appellant, and I. Y. Chinski intervening. Judgment for plaintiff. Margaret Moore appeals.

J. D. Thomas, for appellant. *Boone & Cobbs*, for appellees.

GAINES, J. Mrs. Jane Callen brought this suit against Tom Moore and A. G. Steele upon a promissory note executed by them payable to her, and sued out a writ of attachment, which was levied upon a certain stock of cattle which had belonged to the makers as partners, and also upon certain individual property of Tom Moore which had been mortgaged to secure the debt. Appellee Chinski intervened in the suit, and claimed a lien upon one-half of the partnership cattle by virtue of a mortgage executed to him before the levy by one F. M. Steele, who had previously purchased from A. G. Steele. He asked that F. M. Steele be made a party, and that he have judgment against him, and that his mortgage be foreclosed. Appellant also intervened, and set up a purchase of all the property levied on as Tom Moore's, including his interest in the partnership before the levy of the attachment; and sought to have the interest which originally belonged to Steele sold to satisfy the debt before subjecting the property purchased by her to its payment. The court gave judgment against Tom Moore as principal, and A. G. Steele as surety, on the note, and foreclosed the mortgage and attachment lien upon Tom Moore's individual cattle, and a half interest in the partnership cattle; but also gave judgment against F. M. Steele in favor of Steele, and foreclosed his mortgage upon the other half of the partnership cattle.

There is no statement of facts in the record, but the court's findings of the issues of fact appear in the transcript, and are as follows:

(1) Upon an understanding that A. G. Steele would sign the note sued on, of date the twenty-ninth of May, 1888, the plaintiff lent the \$6,000 to Thomas Moore, and took a mortgage on Moore's individual property, 600 head of cattle and 50 head of horses branded 700. Steele signed the note as a surety, and Mrs. Callen accepted him as such. The credit was extended by her to Moore, with the sureties offered.

(2) The \$6,000 were borrowed by Moore with an understanding with Steele, his co-defendant, that it should be used by them in the purchase of cattle, and they contemplated a copartnership in the cattle business at the time the money was borrowed. Mrs. Callen knew nothing of the contemplated partnership at the time she lent the money.

(3) On June 12, 1888, the \$6,000 were deposited in bank in the city of Houston as a partnership fund, in the name of Steele & Moore, and the money was used by them in the purchase of cattle, among which cattle are the cattle levied on by plaintiff's attachment in the "H F L" brand.

(4) Of the cattle mortgaged by Moore to plaintiff, there are now \$4,000 or \$4,500 worth also attached by plaintiff.

(5) Moore also had other cattle in the "H F L" brand, which plaintiff has levied on under her attachment.

(6) On the seventeenth day of April, 1886, Thomas Moore sold to his mother all of his undivided half interest in the said partnership cattle, and all other cattle owned by him, to pay her a debt of \$1,600, she accepting the same with a full knowledge of his business relations with Steele, and of the debt due plaintiff, and she accepting his responsibility in relation to plaintiff's debt. At the same time Moore sold her his interest in the Moore homestead, which interest is worth four or five hundred dollars. This interest has

not been attached. Moore was then about leaving the country, or had fled the country, since which he has returned, and is now in court.

(7) After Moore had sold out and left, but before he returned, A. G. Steele sold out his share of the partnership property to his father, F. M. Steele, for a valuable and adequate consideration, (\$2,650,) as per bill of sale, dated May 12, 1886. The sale by A. G. Steele to his father was made to avoid any liability he might be under to pay the plaintiff's note, whether as surety or partner. F. M. Steele is affected with notice of the existence of the partnership between Moore and Steele, but he did not know of plaintiff's debt, or the intention of A. G. Steele to avoid its payment.

(8) F. M. Steele was owing intervenor, I. Y. Chinski, \$1,648.40, with interest, and \$2,000 borrowed of him with which to buy A. G. Steele's stock, evidenced by notes; and to secure Chinski he executed to him the instrument in evidence purporting to be a bill of sale of the stock for \$3,800, dated twenty-fourth day of May, 1886, though it was intended to be a mortgage to secure said amount, and 12 per cent. interest from its date, now amounting to \$3,969.60. Chinski had no actual knowledge of the partnership between Moore and A. G. Steele, but is affected with notice of it by the recitals of the bill of sale to F. M. Steele and himself. Chinski had no actual or constructive knowledge of plaintiff's debt, or the manner in which the loan was obtained from Mrs. Callen, or of the partnership in contemplation at the time of the loan.

(9) The interest of A. G. Steele obtained in the \$6,000 (one-half of it) remains unsettled between him and Thomas Moore.

(10) Both Thomas Moore and A. G. Steele are insolvent.

Now, it is claimed that the court erred in refusing to subject A. G. Steele's half of the partnership cattle to the payment of plaintiff's judgment before directing a sale of the property transferred by Tom Moore to appellant. In support of the assignments, it is contended by appellant's counsel that, for the payment of the claim against A. G. Steele growing out of the transaction between them, Tom Moore had a lien on the partnership cattle, which passed to appellant by the sale to her, and that, before a settlement of account between them, Steele could not assign his interest in the cattle.

The interest of a partner in the property belonging to a firm is only his proportion of what is left after paying the partnership debts, and it is the right of every member of the firm to have the partnership indebtedness satisfied from its assets before any division can be had. It is held that a partner who has paid the debts of a firm has a lien upon the partnership property for his reimbursement, (*Hill v. Beach*, 12 N. J. Eq. 31,) and also one who has advanced money to the firm beyond his share of the capital is entitled to retain the amount due him before the other partners are entitled to recover any of the assets, (*Uhler v. Semple*, 20 N. J. Eq. 238.) The findings of the court do not make clear the exact nature of the transaction between A. G. Steele and Tom Moore, nor do we think it important that this should be determined. When the latter sold to appellant he sold, not his interest in the partnership, nor his claim against his partner, Steele. He sold simply one-half, undivided, of the cattle. In this disposition of the property Steele evidently acquiesced, for he subsequently sold to F. M. Steele his undivided half interest in the same. The effect of Moore's sale was to dissolve the partnership, (Pars. Partn. [3d Ed.] pp. 433, 434;) and we think it had the further effect to take from the property the character of firm assets, and to make the purchaser and A. G. Steele merely joint owners in the cattle. Having elected to treat the property as if all equities were settled between the partners, and to appropriate to himself what would have been his share if all claims against the firm or between the partners had been settled, we think he was estopped to set up that he had any claim against his partner's half of the property to reimburse him for any advancement made to the firm, or any liability incurred

by him on that account. But, if he had such claim, we do not see that a mere sale of an interest in the property would transfer this equity to the purchaser. The court found that the note sued on was not a partnership debt. If Tom Moore had any equity on account of the transaction, it was only to be reimbursed for money advanced for the firm; and it follows from what we have said that, after the sale to appellant, neither he nor she was in a position to assert this equity.

We find no error in the judgment, and it is affirmed.

VOGELSANG v. NULL and others.

(*Supreme Court of Texas. March 4, 1887.*)

1. INFANCY—AVOIDING DEED—ACKNOWLEDGMENT—ESTOPPEL.

An officer, in taking the acknowledgment of an infant to a deed, inquired if she was of age, and one of the other grantors answered, ahead of her, that she was, and the infant remained silent, and signed the deed, which was afterwards delivered to the grantee. The grantee was not present when the acknowledgment was taken, and received the deed in ignorance of what had then been said to the officer, and without making any inquiry as to the age of the infant. *Held*, that the infant might avoid the deed, and recover the property, as the grantee could not be regarded as taking the property upon the implied representation that she was of age; nor could the officer be regarded as his agent, so as to charge him with notice of grantor's minority from what occurred at the acknowledgment.

2. SAME—PRINCIPAL AND AGENT.

In an action by one to set aside a deed made while she was an infant, and to recover the property conveyed, it appearing that the grantee had paid the purchase money to the infant's agent, but the agent had never paid it over to her, *held*, that the infant was not bound to restore the purchase money before rescinding the deed, as her appointment of the agent was not binding on her, but voidable, and her act, in bringing suit to recover the property, was an avoidance of the appointment.

Appeal from district court, Fayette county.

Brown & Dunn, for appellant.

WILLIE, C. J. Appellees brought this suit against Vogelsang to recover an undivided one-sixth interest in two tracts of land lying in Fayette county. Defendant pleaded a general denial, claimed that he was sole owner of both tracts, and asked that he be quieted in the title and possession of the same. Judgment was rendered for the appellees for one-eighth of one of the tracts, and commissioners were appointed to partition it. From this judgment the present appeal was taken. The cause was submitted to the judge, who found that the plaintiffs had no interest in one of the tracts mentioned in the petition; and as to the other tract found substantially as follows: That it had been the community property of Levi Hart and his wife; that Mrs. Hart died leaving four children to inherit her community half of the land, of which children Mrs. Null was one; that on the second October, 1883, Mary Null, then Mary Hart, being unmarried, and only 19 years of age, signed and acknowledged a deed conveying the land to F. A. Edwards, for the consideration of \$1,280 cash, and notes for \$380. This deed had previously been signed by her father, her step-mother, her sisters, and their husbands. Previous to acknowledging the deed, she had been urged by some of the grantees of the instrument to declare to the officer who should take her acknowledgment that she was 21 years of age. This she refused to do, but, when the officer asked her age, one of these grantors spoke ahead of her, and said that she was over 21 years old. She made no reply, but remained silent, and signed the deed. On the eleventh of October, 1883, she signed and acknowledged another deed for the same lands, in company with the grantors of the former instrument and the husband of one of her sisters who had not signed the former deed. This last conveyance was acknowledged by her without anything being said as to her age, by herself or any one else. Her father and brother-

in-law delivered these deeds to Edwards, and received from him the consideration for the land; but no part of it was ever paid to Mrs. Null, or reached her in any way. The appellant holds the land under Edwards.

We cannot regard this as a case where an infant has induced another person to receive a deed upon a false representation made by her that she was of full age at the time of executing the instrument. Granting that we are to treat as her own the undisputed statement made in her presence by another that she was 21 years of age, there is nothing in the record to show that Edwards, the grantee, was misled by her conduct, and induced thereby to receive the deed, and pay the purchase money of the land. He does not seem to have asked any questions about the matter. The two deeds, with the signature of Mrs. Null attached to them, were tendered to Edwards by Mrs. Null's father and brother-in-law, and he seems to have accepted them without a question, and to have paid the purchase money to the party from whom he received the deeds. He was not present when they were signed, and does not appear to have directed any inquiry to be made as to the capacity of Mrs. Null to make a valid conveyance. The officer put the question to her as to how old she was, but it does not appear that in so doing he was acting on behalf of the grantee in the deed. The law did not of itself constitute him agent of the grantee, and the finding of the court does not show that he had been requested by anybody to make the inquiry. He doubtless asked the question because he conceived it to be his duty as an officer not to take the acknowledgment of a minor to a conveyance of land. For these reasons we must regard the deed as one executed by the minor without any false representations made to the grantee in reference to her age, and received by him without making any inquiry whatever upon the subject.

Under the decisions of this court, the deed was voidable at the instance of the minor upon attaining her majority. *Cummings v. Powell*, 8 Tex. 81; *Stuart v. Baker*, 17 Tex. 417; *Bingham v. Barley*, 55 Tex. 281. According to these decisions, it was necessary, however, for her to tender to the appellant any purchase money she may have received for her interest in the land. The district judge's finding is that no part of the purchase money ever reached Mrs. Null, either by payment or otherwise. The appellant, however, contends that by returning the deeds to her brother-in-law, to be handed to Edwards, she made him her agent to receive her portion of the consideration, and the case must be treated as if it actually came to her hands. But this proposition necessarily involves the principle that an infant may bind himself by the acts of an agent so that they cannot be disaffirmed upon his reaching full age, which is contrary to the settled law upon this subject. He cannot make an agent to perform an act to his own injury; he may constitute one to do an act for his benefit. Story, Ag. § 9; 2 Kent, Comm. 236.

Whether the act be beneficial or injurious is left to the discretion of the infant when he arrives at full age, for then he is considered in law as capable of exercising a proper judgment upon the question. He must then elect to affirm or avoid it, as he may do in reference to other acts done in infancy which are voidable in their nature. *Whitney v. Dutch*, 14 Mass. 457. The law disables infants from making binding contracts in order to save them from imposition. This object would not be attained if they could place their property in the hands of agents, who could dispose of it in a manner not permitted to the infants themselves. The selection of a proper agent requires the exercise of as much discretion as the making of a contract. To bind an infant by the act of an agent, when he would not be bound if the act were done by himself, is to allow him to be overreached indirectly, and so do away with the safeguards provided by law for his protection. Here the agent received Mrs. Null's share of the purchase money of the land, but did not pay it over to her. The purchaser of the land placed it in the power of the agent to do her this injury, and ran the risk of her receiving the money, or of her disaffirming the agency

altogether. She disaffirmed both the sale of the land, and the authority of the agent to receive the money for her, by commencing this suit, and in our opinion the court did not err in allowing her to recover the judgment rendered in her favor, and the judgment is affirmed.

SMITH v. HARDEN and others.

(*Supreme Court of Texas.* March 8, 1887.)

JUDGE—DISQUALIFICATION—JURISDICTION.

The Texas constitution not forbidding suits in which the county judge is disqualified to be brought in the county court, but giving the district court jurisdiction of such cases, when such an action is brought in the county court it should be transferred to the district court, and it is not necessary to dismiss it, and begin anew in the district court.

Appeal from district court, Brazoria county.

Hickey & Ballowe, for appellants.

WILLIE, C. J. There is nothing in the constitution forbidding the suit in which the county judge may be disqualified to be brought in the county court. It gives the district court original jurisdiction of such causes, but does not take jurisdiction from the county court, for it provides for their transfer in case they should have been instituted in that court. This is the proper direction for such suits to take, if brought in the county court when its judge is disqualified. When this is done, the original jurisdiction of the district court attaches immediately, and the cause proceeds as if originally instituted there. Even if this suit had been improperly begun in the county court, it reached its proper forum when transferred to the district court; and there was no necessity to dismiss from the latter, for the sole purpose of beginning it anew therein, and placing it in the same condition it was in at the date of dismissal. The case is different from that where a suit reaches a court by appeal from another tribunal. There the jurisdiction depends upon the power of the lower court to hear and determine the cause. But the district court was the only court that could hear and determine this suit. The jurisdiction exercised was original, and not appellate. The county court could receive, but not retain, the cause. The only order it could make was to transfer it, and this was done, and the original jurisdiction of the district court brought into exercise, by one of the means provided by the constitution. We think the cause might have been tried upon the original petition, and that there was no necessity for the amendment. But had the court no right to proceed with the cause upon the transfer from the county court it certainly could do so upon the amended petition. This set up everything necessary to bring the case within the jurisdiction of the district court, and, from the date of its filing, that court had undoubted jurisdiction under that provision of the constitution by which this is directly conferred where the county judge is disqualified. It mattered not that the petition claimed to have been filed by leave of the court. Such a recital as this or any other was unnecessary, and could not vitiate. The petition showed on its face that it was a proper proceeding, in a proper court. Legal process issued upon it, which was properly served, and everything necessary in the way of pleading and parties was before the court, and it rightly proceeded to determine the cause. The appellant briefly says that, by reason of the manner in which jurisdiction was claimed, he was deprived of his right to plead as indorsee that the suit was not brought to the first term of the court after the cause of action accrued. But it seems that the amended petition was filed to the proper term; and, if not, the note was duly protested, and this did away with the necessity of a suit to the first term to fix the liability of the indorsee.

There is no error in the judgment, and it is affirmed, but without damages for delay.

ASHE v. YOUNGST and another.

(Supreme Court of Texas. March 8, 1887.)

Costs—LIABILITY FOR—GUARDIAN AND WARD.

Under Rev. St. Texas, art. 2427, providing that "each party to a suit shall be liable for all costs incurred by him, and, in case the costs cannot be collected of the party against whom the same have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more," where an action is brought against infants, and a guardian *ad litem* is appointed to defend for them, the plaintiff, although successful in the suit, is liable for a reasonable fee to the guardian *ad litem*, where execution issued for the fee, against the infants, is returned unsatisfied. Such fee is to be regarded as costs "incurred" by the plaintiff within the meaning of the statute, and the infants being unable to pay, the plaintiff is liable.

Appeal from district court, Harris county.

C. Anson Jones, for appellant. E. P. Hamblen, for appellees.

STAYTON, J. The appellant, being in possession of and claiming certain real estate, brought this action against the appellees, who are minors, to remove cloud from his title. The district court, as required by the statute to do, appointed a guardian *ad litem* for the minors, who set up a claim for the minors to the property, and defended the action in the district court, and in this court on a former appeal. On the last trial a judgment was rendered in favor of the appellant, and the court fixed and allowed the guardian *ad litem* a fee of \$115 for his services. The judgment provided that execution should issue against the appellees for this sum, as a part of the taxed costs, and that in the event that execution against them be returned *nulla bona*, that then execution should issue against the appellant for that sum. There was a motion to retax the costs as to this item, which was overruled, and on that motion it was made to appear that the appellees were insolvent, and that the costs could not be collected from them. The only question presented by the assignments of error is as to the correctness of the ruling making the appellant liable for the costs taxed for the services of the guardian *ad litem*.

The statute provides that "in all cases where a minor may be a defendant to a suit, and it shall be shown to the court that such minor has no guardian within the state, it shall be the duty of the court to appoint a guardian *ad litem* for such minor, for the purpose of defending such suit, and to allow him a reasonable compensation for his services, to be taxed as part of the costs of the suit." Rev. St. art. 1211. While a judgment rendered against minors not having a guardian, without the appointment of a guardian *ad litem* to represent them, would not be void if the court had acquired jurisdiction over the persons of the minors, yet the due administration of justice requires the appointment in such cases, and a failure in this respect will require a reversal on appeal. *Taylor v. Rowland*, 26 Tex. 295. If a judgment be rendered against minors represented by a guardian *ad litem*, it is proper that the costs taxed for services of the guardian, as other costs, should be taxed against the minors, and collected out of their estates, unless there be some equitable consideration which would authorize the court to impose the costs upon the successful party. Rev. St. arts. 1421, 1434. That was done in this cause, and it is only in the event that the costs cannot be collected out of the minors' estates that execution is awarded against the appellant. The petition alleged that the defendants were minors without guardian. The cause could not legally be tried unless they were represented by guardian *ad litem*. The trial was sought for the benefit of the appellant, and, under this state of facts, it would seem that the filing of the petition was, in effect, a request that the court should appoint a guardian *ad litem* for the defendants, as much as was it a request to the clerk to issue proper citations, and that thus the compensation to be paid to the attorney appointed for services in the case, authorized to be taxed as

part of the costs of the suit, are to be deemed costs incurred by the appellant.

The statute provides that "each party to a suit shall be liable for all costs incurred by him, and, in case the costs cannot be collected of the party against whom the same have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more." Rev. St. art. 2427. The word "incurred," as here used, means "brought on," "occasioned," or "caused." As the cause, without reference to whether there was any defense, could not legally have been tried without the appointment of a guardian *ad litem*, and the exercise by him of the duties imposed by the appointment, the acts of the appellant may well be said to have brought on, occasioned, or caused the costs taxed as compensation to the guardian. Such costs were the known, necessary, and contemplated result, as much as was the issuance and service of all necessary process requisite to properly bring the defendants before the court. Expenses which may or not be necessary for a minor defendant to incur to present and protect its rights, such as fees to clerks, sheriffs, and other ministerial officers, witness fees, and other like things, though remotely induced by the fact that a suit is brought, cannot, however, be said to have been incurred by a plaintiff. The compensation fixed by the court is, by the statute, made a part of the taxable cost; and it has been held by courts of equity, in the absence of such a statute, that compensation to a guardian *ad litem* may be allowed and charged, in some cases, against the successful party as taxable costs, (*Yourie v. Nelson*, 1 Tenn. Ch. 617; *Carter v. Montgomery*, 2 Tenn. Ch. 455; *Sutphen v. Fowler*, 9 Paige, 282;) but this class of cases are not applicable to the one before us.

For the reasons before given, we are of the opinion that the appellant is responsible for the item of cost taxed by the court for the services of the guardian *ad litem*. The judgment will be affirmed.

GULF, C. & S. F. RY. CO. v. WHEAT.

(Supreme Court of Texas. March 11, 1887.)

1. CONTINUANCE—DILIGENCE.

An action was set for trial for October 7th; subpoenas for the witnesses were issued on September 24th, and were returned September 27th "not found," and no others were issued before the case was called for hearing. *Held*, this did not constitute sufficient diligence to entitle the party to a continuance on account of the absence of the witnesses.

2. SAME—DEPOSITIONS.

Interrogatories were filed on September 27th to take the depositions of witnesses residing in other counties, commissions to take the depositions issued October 1st, and it appeared that they had been placed in the hands of proper officers, but it did not appear when this had been done. The case was set for trial for October 7th. *Held* not sufficient diligence to entitle the party to a continuance, because the depositions had not been received.

3. SAME—ABSENCE OF WITNESS.

The fact that a witness resident in another county went home on the day of trial, on account of sickness in his family, and expecting to return the next day in time to testify, but was unable to do so, does not entitle a party to a continuance. The law provides how the evidence of a witness living in another county may be obtained, and a party failing to use those means to preserve the evidence of such a witness cannot be said to have used due diligence.

4. TENANCY IN COMMON—RIGHTS AGAINST THIRD PARTIES—PARTITION.

If, by agreement between tenants in common, one is permitted to have the exclusive use and possession of a tract of the land which they together own, while the other has such use and possession of other lands so owned, then each may recover for any injury done to that tract which he has the right exclusively to use or possess.¹

Appeal from district court, Fort Bend county.

Jones & Garnett, for appellant. *Pearson & McCamly*, for appellee.

¹See *Kites v. Church*, (Mass.) 8 N. E. Rep. 743, and note.

STAYTON, J. The fall term of the district court for Fort Bend county is required by law to commence on the first Monday after the third Monday in September. This action was filed to that term, and the citation commanded the officer to summon the defendant to appear on that Monday without giving the day of the month on which that would fall, and it commanded the officer "to have the writ then and there," with an indorsement thereon showing how he had executed the writ. A motion was made to quash the citation on the ground that it was not "made returnable to the first day of the next term of the court after the issuance thereof," and because the particular day to which the writ was returnable was not specified. The writ required the defendant to be summoned to appear at the next regular term of the court, to be held at the court-house in the town of Richmond on the Monday fixed by law, was issued on August 31st, and returned on September 8th, and was in every respect sufficient. *Cave v. City of Houston*, 65 Tex. 621. The court began on September 27th, and this cause was set for trial on October 7th, and when called an application for continuance was filed based on the absence of witness and depositions. The citation was served August 31st, and not until September 24th were subpoenas issued for any witnesses, and the subpoenas were returned on the first day of the court showing that the witnesses could not be found. No subpoena was afterwards issued, though the case was set for trial on October 7th. The court held that sufficient diligence had not been shown. It was made to appear that one of the witnesses left the county temporarily on the twenty-second September, and that he had not returned. Interrogatories were filed to take the depositions of witnesses living in other counties, but this was not done until September 27th. The application showed that commissions issued on October 1st, and that they had been placed in hands of proper officers to take the depositions, but it did not state when the commissions were placed in the hands of officers to take the depositions.

The court held that the diligence shown in this respect was not sufficient, and we cannot say that the court erred in overruling the application for a continuance. The trial commenced on October 7th, and on that day the defendant had present as a witness one Riley, its master mechanic, who resided in Galveston county. This witness, on the evening of the seventh October, went to his home in Galveston, on account of the sickness of some member of his family, expecting to return and testify in the case on the next day, but was unable to do so. No steps had been taken to take the deposition of the witness. On the eighth October an application was made to continue the case on account of the absence of this witness, and it was overruled, and we think there was no error in this. The law provides how the evidence of witnesses not residents of the county in which the trial is to take place may be obtained, and one who fails to avail himself of the means which the law furnishes to preserve evidence cannot be said to have used due diligence.

The charge given at request of the plaintiff was not subject to the objections now made to it, and, taken in connection with the charges given at the request of the defendant, fairly submitted the case to the jury. The evidence is conflicting as to the origin of the fire which burnt the grass in the plaintiff's pasture, but the only witness who professed to know how it originated leaves no doubt upon that question. It was for the jury to pass upon the credibility of the witnesses, and to determine the weight to be given to their testimony; and the evidence offered by the plaintiff being sufficient to show that the fire was caused by the escape of fire from the defendant's train, and that its railway was in such condition as to cause the fire to spread and extend to the plaintiff's land, we cannot reverse the judgment on this ground.

This action was brought by the appellee, as the survivor of the community of herself and her deceased husband, qualified under the statute to administer the community estate, to recover for an injury done to the community estate. The entire pasture, a part of which was burned over, embraced over 3,700

acres. The estate and one Pentecost, together owned several tracts of land, and one of these tracts containing over 2,000 acres, was in the pasture burned, and in this tract Pentecost had an undivided interest of about 272 acres. Pentecost was in possession of other lands in which the estate had an interest, and was using that as was the appellee using the tract embraced in the pasture. Prior to the death of the husband of appellee, he and Pentecost had an agreement for the partition of the land which they held as tenants in common, under which the former was to have the interest of Pentecost in the lands in the pasture burned, and the latter was to have lands outside. After the death of the husband of appellee, the partition was affected in accordance with the prior understanding. The fire having passed over the tract in which Pentecost formerly had an undivided interest of about 272 acres, it was urged in the district court that the appellee ought not to be permitted to recover for injury done to so much of the land. There was no foundation for this objection. The fact that the partition with Pentecost may have been made after the death of the husband of the appellee does not affect the character of title to the land. Whether the actual partition was made before or after the death of the husband of appellee, the interest in any land embraced in the pasture, and acquired for Pentecost, would be community property. If the partition had not been made until after the destruction of the grass by fire, under the facts shown the rights of the parties would be the same. If by agreement between tenants in common one is permitted to have the exclusive use and possession of a part of the land which they together own, while the other has such use and possession of other lands so owned, then either may recover for any injury done to that which he has right exclusively to use or possess.

No objection was made, nor is now urged, as to the admissibility of the evidence introduced to show the extent of the injury or amount of damages, and we are of opinion that it was sufficient to sustain the verdict. We do not see that the remarks of counsel for appellee, in reply to the argument of counsel for the appellant, could have influenced the verdict. What has been said renders it unnecessary to consider *seriatim* the assignments of error further.

There is no error in the judgment, and it will be affirmed.

CENTRAL & M. R. Co. v. MORRIS and another.

(*Supreme Court of Texas.* March 8, 1887.)

1. WRITS—RETURN—PRINCIPAL AND AGENT.

Two separate citations having been issued against one person as the agent of two different corporations, the return of the officer upon each citation that he had delivered a copy of "this writ" does not admit of the construction that he delivered but one copy to the agent, the writs being different in wording. It is to be presumed from the return that one was delivered for each of the corporations.

2. SAME—COSTS.

Where a statute provides that one citation shall issue for all the defendants living in the same county, if a plaintiff issues more than one citation, he becomes responsible for the additional costs, but such issuance does not render the service of the citations void.

3. SAME—DEFECT IN FORM.

Process issued against a railway company, when the petition is filed against a railroad company, is not on that account defective.

4. APPEARANCE—EFFECT OF—CONSTITUTIONAL LAW.

Under Rev. St. Tex. art. 1243, providing that, if the citation or service is quashed upon motion of the defendant, he shall be deemed to have entered his appearance to the succeeding term of the court, whenever a defendant appears and moves to quash the service he is considered as having appeared to the merits at the next term, whether his motion be sustained or overruled. He having the option in such a case to move to set aside the service, or to appeal from any judgment rendered against him, it is not an unconstitutional act on the part of the legislature to declare that his appearance to quash the service shall be deemed a good appearance for the next term.

5. RAILROAD COMPANIES—CHARTER FRANCHISES.

A railroad company cannot transfer or lease the right to operate its road so as to absolve itself from its duties to the public, without legislative authority; nor will a lease duly authorized by law release the company from liability for a failure to discharge its charter obligations, unless the law giving the power to lease contains also a proviso to that effect.

6. SAME—COMPETING LINES.

Const. Tex. art. 10, § 5, providing that no railroad, nor the lessees thereof, shall consolidate with any other having a parallel or competing line, is a restriction upon the power of railroads, and is not to be construed as an implied grant of the right of a railroad to lease its line to another road.

7. CARRIERS—REFUSAL OF TRANSPORTATION—PLEADING.

In an action against a railroad to recover damages for its refusal to transport plaintiff's lumber, it is not necessary to allege what place the lumber was tendered for transportation to, or its market value at such place, had it been transported by the railroad, the action being, not for failure to carry one specific lot of lumber, but plaintiff's lumber generally.

8. JURY—RIGHT TO JURY TRIAL—JUDGMENT BY DEFAULT.

Under Rev. St. Tex. arts. 1284-1286, providing for a jury for defendants in case judgment is rendered by default, but not expressly giving the same right to plaintiff, *held* that, as at common law, plaintiff was entitled to a jury to assess damages when judgment was entered by default; that the cause of action was not liquidated; and that, as the bill of rights, § 15, preserves to all parties the common-law right of trial by jury, it is immaterial that the sections above do not expressly confer the right on plaintiff.

Error to district court, Montgomery county.

Ballinger, Mott & Terry, for plaintiff in error. *Hutcheson, Carrington & Sears*, for defendants in error.

GAINES, J. This suit was brought in the first instance by Morris & Crawford against the Central & Montgomery Railroad Company and the Gulf, Colorado & Santa Fe Railway Company, to recover damages for a failure by the defendants to transport the lumber of plaintiffs, upon demand. The original petition was filed January 9, 1883. At the first term of the court the cause was continued by operation of law; at the second, as upon "affidavit of defendant," (but which defendant the record does not disclose); and at the third term the suit was dismissed as to the Gulf, Colorado & Santa Fe Railway Company, and judgment by default taken against the Central & Montgomery Company for want of an answer. That company now brings the case to this court by a writ of error.

We shall discuss only the controlling questions in the case, and in doing so shall not observe the order of the assignments laid down in the brief for plaintiff in error.

The eighth assignment is that "the court erred in rendering judgment against this defendant, because the record shows no legal service of citation or process on this defendant." At the first term of the court there was a motion to quash the citation by each of the defendant companies. That of the Gulf, Colorado & Santa Fe Company was sustained. The motion of the other company was overruled, and an exception taken by it, and noted on the record. The cause was thereupon continued by operation of law. On the fifth of May, 1883, two *alias* citations were issued, which are copies of each other, except that in one the sheriff is commanded to deliver to the defendant the Central & Montgomery Railroad Company, or their local agent at Montgomery, one R. A. Messick, a true copy of this citation; in the other, in the corresponding part of the writ, the name of the other defendant company is used. The sheriff's return is the same upon each citation, and is to the effect that he executed it "by delivery to R. A. Messick at his office, during office-hours, in the town of Montgomery, as local agent in Montgomery, Montgomery county, Texas, of the within named defendants, in person, a true copy of

this writ." The petition alleged that Messick was the agent of both companies, and it would seem to us in such case that, although the citations may be exactly the same, a copy for each of the defendants should be left with such agent. It is reasonable to presume that the law contemplated that the agent should transmit the copy served upon him to his superiors, and therefore a writ for each would be necessary for the purpose. Now, if the *alias* citations which were issued had been identical in language throughout, the sheriff's return would have admitted of the construction that he had delivered but one copy, because a copy of the one would have been a copy of the other. But in this case there is a distinctive difference between the two citations actually issued; so that by the return indorsed upon each, that a copy of "this writ" had been delivered to the agent, we know that a copy of the citation for each defendant was served upon the agent. This would seem to be sufficient. The fact that one citation issued for each defendant, when the statute directed that one should issue for all the defendants living in the same county, might render plaintiff responsible for the additional costs, but would not render the service void. See *Thompson v. Griffith*, 19 Tex. 115. The *alias* citation directed the sheriff to serve Messick as agent of defendant the Central & Montgomery Company. The return describes him as agent of both defendants. The agency having been averred in the petition, and the agent to be served being expressly named in the citation, we do not see that anything more was necessary to appear in the return than that the sheriff had delivered a copy of the writ to the person whom he was directed to serve. It is also urged that the citation is defective because it commands the sheriff to summon the Central & Montgomery Railway Company, whereas the petition is filed against the Central & Montgomery Railroad Company. It has been decided by this court that such a variance is immaterial. *Galveston, H. & S. A. Ry. Co. v. Donahoe*, 56 Tex. 162.

But let it be conceded, for the sake of the argument, that the *alias* citation and service upon the alleged agent were not good. At the first term of the court the plaintiff in error moved to quash the service upon it, and its motion was overruled. The statute merely provides that, if the citation or service is quashed upon motion of the defendant, he shall be deemed to have entered his appearance to the succeeding term of the court. Rev. St. art. 1243. The result of this rule is that, whenever he appears and moves to quash the service, he is considered as having appeared to the merits at the next term, whether his motion be sustained or overruled. If properly overruled, he is in court from the time of the service. If improperly overruled, and the cause be continued, he is not prejudiced by the action of the court, for the reason that the continuance is the only advantage he would have obtained if his motion had been granted. The error in such case is immaterial, and is not a ground for the reversal of the judgment. It is the option of a defendant who thinks he is not duly served with process either to move to set it aside, or to appeal from the judgment should one be rendered against him. There is no compulsion upon him to pursue the former course. Should he see proper to do so, it is not seen that the legislature has infringed any of his constitutional rights by declaring, in effect, that his appearance to quash the writ or service shall at all events be deemed a good appearance for the next term, should the cause be continued. The statute is a salutary one. It tends to the speedy disposition of causes, to the saving of costs, is conservative of the rights of the parties, and should be liberally construed and applied. We are of opinion, therefore, that plaintiff in error was properly in court, so far as the original petition was concerned.

But after the cause was continued at the first term, and after the issuance and service of the *alias* citation, an amended original petition was filed. It is not contended that the amendment was such as required notice to defendant before judgment by default could be rendered upon it. It is especially urged

that the original petition showed no cause of action against plaintiff in error, and that when such is the case the defendant should be served with notice of any amendment which makes the petition good. When no cause of action is set up, it would seem that the defendant might well conclude the court would not render judgment upon the petition, and therefore gave himself no further concern about the case. Hence it is to be inferred that he might not be required to take notice of any amendments to it, but that new process should issue. But we do not feel called upon to decide that question, because we are of opinion that the original petition in this case did show a cause of action. It alleged that both of the defendant companies were corporations, organized under the laws of the state, and were common carriers; that the Gulf, Colorado & Santa Fe Company, about January, 1882, took control of the road and property of the Central & Montgomery Company under a purchase, or claim of purchase, and had since operated the road; that during the season plaintiffs had delivered large quantities of lumber at the depot, and demanded transportation, which had been refused; and closed with very specific allegations of damages. It is urged, among other things, that the points to which the lumber was to be carried, and a tender of the freight upon it, should have been averred. In an ordinary case, it might be that these allegations are proper and necessary. But here the complaint is not of damage, by reason of a failure to carry any specific lot of lumber; but it is for the continued withholding and refusal of facilities for shipping lumber to any place, whereby almost the entire product of plaintiffs' mills were kept from market and sale. Plaintiffs, under the circumstances, could make no contracts to deliver, because they could not get the necessary transportation, and hence could not have averred the points to which it was to have been carried. The reason for the refusal of transportation is alleged to be that the Gulf, Colorado & Santa Fe Company desired that the lumber should accumulate until they completed a junction between their road and the other defendant, so that it would earn the profit on the transportation beyond the proposed point of connection. This shows that the refusal to carry was not on account of the non-payment of freights, and we think, therefore, that a tender was not necessary to be alleged.

A more serious question is whether the allegations of the petition do not show that whatever liability accrued was that of the Gulf, Colorado & Santa Fe Company only. In order to set forth a cause of action against both defendants, the original petition avers that the Gulf, Colorado & Santa Fe Railway Company and its officers and agents, "have, or claim to have, purchased, and to own and operate and control, the defendant Central & Montgomery Railroad, and have taken charge of, and are exercising ownership over, all its property and effects, and undertaken to perform its functions and operate its franchises." It is well established that a railroad company cannot transfer or lease the right to operate its road, so as to absolve itself from the duties to the public, without legislative authority; nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, unless the law giving the power contain a proviso to this effect. *Abbott v. Horse-car Co.*, 80 N. Y. 27; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623; *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355; *Railroad Co. v. Brown*, 17 Wall. 445; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90; 1 Rorer, R. R. 605 *et seq.*; 1 Redf. Rys. c. 22, pp. 587, 616; Pierce, Rys. 283, 496.

We have not found any law in this state which confers upon a railroad company the power even to lease its road. Section 5 of article 10 of the constitution provides that no railroad corporation, nor the lessees of such corporation, shall consolidate with any other having a parallel or competing line. This is, however, a restriction upon the power of such corporations, and is not to be construed as a grant of authority to lease. A similar provision in a

statute of New York was held by the court of appeals of that state not to authorize a lease. *Abbott v. Horse-car Co.*, 80 N. Y. 27.

But a purchase of the property and franchises of a railroad company may take place under judicial process, or the power given in a deed of trust, which we have no doubt would work a transfer to the purchaser of its statutory and common-law obligations to the public. Rev. St. art. 4260 *et seq.* The words just quoted from the original petition, "have, or claim to have, purchased," are consistent with the idea of such a transfer, and it is probable that, if the clause in which they appear stood alone, we would be bound to give them a construction least favorable to the pleader. But the rules of practice laid down by this court for the government of the district courts provide that, in passing upon a general exception, every reasonable intendment arising upon the pleading excepted to shall be indulged in favor of its sufficiency. 47 Tex. 619, rule 17. Taking all the allegations together, and especially those averring the continued existence of the Central & Montgomery Company as a common carrier, we think the reasonable intendment is that the pleader sought to exclude the idea that any such sale as the statutes contemplate has taken place. We are of opinion, therefore, that the original petition sets forth a cause of action good upon general demurrer.

The amended petition sets up substantially the same facts as originally pleaded by the plaintiffs. The allegations of damages are admitted by counsel for plaintiff in error to be almost identical in language, and the same in substance, in both pleadings. The averments of the latter are more specific, but no new ground of action is alleged. It was not necessary, therefore, that defendant should have notice of the filing of the amended petition in order to authorize the court, upon demand of plaintiffs, to proceed to judgment.

The fourth assignment is that "the court erred in rendering judgment against this defendant because plaintiff's first amended original petition does not state any legal or intelligent basis for estimating the damages. It does not allege to what place or places the lumber was tendered for transportation, or the market value of the lumber at such place or places at the time when the lumber would have arrived had defendant transported the same when tendered, and does not allege the market value of the lumber at Montgomery at the time same was tendered for transportation." It seems to us that the damages are properly alleged. The action was brought not on account of any one specific failure to transport any one lot of lumber. In such a case the difference between the price of the lumber at the point of departure and the price at the place of destination, less the freight, is the proper measure. But here was a case of a continuous failure to carry the lumber as demanded. Plaintiffs could not have contracted to deliver at any point for the want of facilities of transportation. What could have been realized upon the lumber if transportation had been furnished, and the loss which occurred by reason of its having to be stacked at a place where it could not be sold, and all the incidental expenses, are very specifically stated.

The fifth assignment is that "the court erred in rendering judgment for the plaintiffs, because its charge to the jury contains no intelligible rule for measuring the damages." The court erred in charging the jury that "the measure of damages was the difference in value of such lumber so offered at such places at the time of such offer for shipment and the fair and reasonable market value thereof at the time and place from which it reasonably ought to have transported it, because such charge is insensible, and gave the jury no intelligent rule." This charge is clearly erroneous by reason of some clerical misprision, as must be presumed. This, however, is an error to the prejudice of plaintiffs, and not of defendant; and hence the latter cannot complain. Taking the whole of the instructions together, they were altogether favorable to the railroad company. If not full, defendant should have been present by counsel, and asked special instructions. It can claim no immunity from these

rules of practice by reason of its failure to appear and make defense to the action. Without a statement of facts, we cannot say there is any error in the charge by which the defendant was prejudiced.

The seventh and ninth assignments of error raise the same question. We copy the latter: "The judgment is erroneous and illegal because rendered on the verdict of a jury assessing plaintiffs' damages, when, under the law, the court was required to assess the damages, and because the damages were never assessed by the court." Rev. St. arts. 1284-1286, provide for a jury for defendants in case judgment is rendered by default, but do not expressly give this privilege to the plaintiff. These enactments are certainly peculiar. After default the defendant may demand a trial by jury, even upon a liquidated demand, though we are at a loss to determine what function the jury can be called upon to perform in such case. We are of the opinion, however, that, under the course of procedure at common law, when a judgment was rendered by default, and the cause of action was not liquidated, a jury was always called to assess the damages. If this be so, the right is preserved by the fifteenth section of our bill of rights, and cannot be infringed by any act of the legislature. In a very numerous class of cases, the amount of damages is the important question to be determined, and the one in which plaintiffs have the most interest in a trial by jury. The plaintiffs in this case had, at a term before that at which the judgment was rendered, demanded a jury, and paid the fee therefor. We think they were entitled to have the damages assessed by a jury, and that the court did not err in extending to them this privilege. We are of the further opinion that the court did not err in dismissing as to the Gulf, Colorado & Santa Fe Railway Company. The petition did not allege any joint obligation to plaintiffs on part of the two defendants. It claimed that by reason of the facts, and the relations between the defendants, it had a claim against both. If the facts stated in the petition are true, they had the right to proceed against either in separate actions.

There is no error in the judgment, and it is affirmed.

LATHAM, Adm'r, v. HOUSTON FLOUR-MILLS and others.

(*Supreme Court of Texas.* March 11, 1887.)

1. PROMISSORY NOTES—CONSTRUCTION—CORPORATION.

A promissory note providing that "we promise to pay," etc., and signed "HOUSTON FLOUR-MILLS Co., D. P. SHEPHERD, President," is the separate obligation of the corporation, and not the joint promise of it and the individual who signed as president.¹

2. SAME—INDORSERS—PAROL CONTRACT.

Blank indorsers of a promissory note cannot, by a parol agreement between themselves and the maker, alter the liability of the latter as fixed by the language of the note.

Appeal from district court, Harris county.

Jones & Garnett, for appellant. *E. P. Hamblen*, for appellee.

WILLIE, C. J. In the view we take of this case, it will not be necessary for us to determine whether or not the rule of the common law that, where a contract is joint only, the estate of a surety is discharged by his death, has been in force in this state since the adoption of the Revised Statutes. The note upon which the suit is brought is as follows:

"HOUSTON, TEXAS, August 20, 1885.

"One year (with privilege of two) after date we promise to pay to the order of Dr. D. F. Stuart five thousand dollars, (\$5,000,) at our office in Hous-

¹See *Robinson v. Kanawha Val. Bank*, (Ohio,) 8 N. E. Rep. 586, and note; *Heffner v. Brownell*, (Iowa,) 31 N. W. Rep. 947.

ton, Texas, with interest at rate of ten (10) per centum per annum from date until paid, interest payable semi-annually."

It is signed "HOUSTON FLOUR-MILLS Co., D. P. SHEPHERD, President." This manner of signing the obligations of a corporate body has been frequently recognized to be the same as if the word "by" was inserted between the name of the corporation and the name of the officer signing the contract. It is the separate obligation of the corporation, and not the joint promise of the corporation and the individual, who has evidently signed his name as an officer authorized so to do. The signature of the corporation has to be made by some one of its officers or agents, and the fact that the office of the individual signing next to the corporate name is stated shows that he is the officer by whom the signatures were made for the corporation, and that he did not intend to become personally bound for the payment of the note. *Atkins v. Brown*, 59 Me. 90; *Castle v. Belfast Foundry Co.*, 72 Me. 167; *Draper v. Massachusetts Steam-heating Co.*, 5 Allen, 388.

That this is the character of the note in suit is made the more clearly to appear by the use of the words "at our office" in designating the place of payment. In the connection in which these words are used, they must mean, and do not peremptorily include, both that and the private office of Shepherd,—the office of the company. They show, further, that the person executing the note treated the corporation as being of the plural number. If the instrument had been the note of a natural person, signed by him alone, the use of "we" instead of "I" would not have rendered it anything else but the separate contract of the maker. The instrument would have been the same in every respect as if the pronoun "I" had been used. *Whitmore v. Nickerson*, 125 Mass. 496; *Holmes v. Sinclair*, 19 Ill. 71. As the separate and sole contract of the corporation, the note must be construed as if it read: "We, the Houston Flour-Mills Company, promise to pay at our office," etc., and was signed "HOUSTON FLOUR-MILLS Co., by D. P. SHEPHERD, President." This being the nature of the contract between the payee and the corporation, the question is, what was the character of the obligation assumed by Shepherd and Latham when they placed their names upon the back of the note? This was done before delivery, and their names appear before that of the payee upon the back of the instrument. In such cases the obligation assumed is considered open to explanation by parol evidence, and may be proved to be of any character consistent with the nature of the transaction. *Cook v. Southwick*, 9 Tex. 615; *Motes v. Bird*, 11 Mass. 431. When the proof is not otherwise, our decisions seem to treat such indorsers as original promissors or sureties, entitled to the same rights, and subject to the same liabilities. *Cook v. Southwick*, *supra*; *Carr v. Rowland*, 14 Tex. 275. The proof in this case shows that Shepherd and Latham did intend, in indorsing the note, to become sureties for its payment by the corporation. We have, then, the case of the note of one individual indorsed by two sureties, and the question for determination is what is the liability of these parties to the payee? If the note were the obligation of a natural person, and the promise were made in the singular number, and the names of two sureties were signed to it along with the principal, it would be the joint and several note of the three makers. 1 Daniel, Neg. Inst. § 94. If the note purported on its face to be what the law construes it to mean, *i. e.*, the individual contract of the Houston Flour-mills Company, and the names of Shepherd and Latham were signed to it as sureties, a like construction would be given the instrument, for in this respect there can be no distinction drawn between natural and artificial persons.

With the present reading of the note, were the names of other parties, whether sureties or principals, signed to it in addition to that of the corporation, the note might be construed as joint only. But while the indorsement of a note by a stranger may subject the indorsers to as great a liability as if

their names were written at the foot of it, such an indorsement does not change or modify the obligation assumed by the principal on the face of the instrument. His contract is evidenced by the language of the note. The contract of the irregular indorsers is what may be written above their names consistently with the transaction. What may be there written is that which the law implies from the indorsement, or which the parties have agreed on as to the liability of the indorsers. This cannot affect the individual liability of the maker, for what he has agreed to do is written in the note itself, and is not inferred to be different by reason of any contract, either express or implied, made between others, and contained in another writing, or resting in parol. It is on the ground that the contract of the indorsers is not to be found in the note alone that it is held subject to proof by extrinsic evidence. If parol testimony is admissible to show that, by reason of the indorsement of the sureties, the maker is not liable to the same extent, in the same manner, or in the same capacity as the note fixes his liability, then his written contract is varied by parol evidence, which is against a cardinal principle of law. If two or more parties make a joint and several note, and two others indorse it with an agreement, either verbal or written, that the makers shall be only jointly bound with them for its payment, this would not affect the several character of the note. If one party makes a note, and another indorses it, they in law become jointly and severally liable for its payment. *Good v. Martin*, 95 U. S. 91; *Story, Prom. Notes*, § 68.

But, suppose the indorsers should contract that their liability should be joint only, we think this would not release the maker from his several liability. It is perfectly plain that this could not be done by parol or by implication in either of the supposed instances, which is sufficient for the purposes of this case. The present note, being the individual contract of the corporation, was not changed by the indorsement of Shepherd and Latham into a joint contract of these parties and the corporation. The pronoun "we," which by the terms of the note—these being the terms of the contract between the company and the payee—meant the company alone, cannot have a different meaning given to it by reason of any obligation assumed by the sureties alone. It must still be referred to the party signing the note, and not to it as well as to others whose contract it does not fully establish. But there was parol evidence admitted which tended strongly to show that the true state of the contract of the indorsers was in accordance with our construction. Shepherd himself, testifying for the defendants, said that they were sureties for the payment of the note, and that "we" in the note referred to the corporation alone. Without attempting to pass upon the effect of the evidence as to the corporation, it certainly tended to show what contract the indorsers intended to make with the payee of the note. They did not intend to be embraced within the term "we," but to bind themselves as in case of irregular indorsers upon the note of a single individual. They did not propose to vary the obligation of the principal, had it been in their power to do so, from an individual note to that of one made jointly with another, but their intention was to become severally as well as jointly bound with the principal, as certainly as if such had been the agreement written above their names. We think that this was the effect of the contract. Latham's estate was not relieved from that obligation by reason of his death.

The court below was correct in finding for the plaintiff against all the defendants, and the judgment is affirmed.

WOOTTERS and others v. KAUFFMAN and others.

(Supreme Court of Texas. March 11, 1887.)

1. CUSTOM AND USAGE—EVIDENCE.

Where there is the testimony of only one witness in proof of a custom, and he is contradicted by other witnesses, the custom cannot be considered as proved.

2. SAME—SUFFICIENCY—PRINCIPAL AND AGENT.

Evidence of a usage adopted by cotton factors, during the existence of a panic, of shipping cotton to Europe without the consent of the owner of the cotton, is not admissible to prove the existence of such a custom binding on the owner, it appearing that such shipments had been resorted to only temporarily during the existence of the panic, and that the owner had expressly refused to allow his cotton to be so shipped. Factors cannot, because of commercial depression, adopt a usage of trade which extends their authority over the property confided to their care, unless a knowledge of such a change in their way of doing business be brought directly home to their principals.

3. JUDGMENT—RENDITION AND ENTRY.

Under the Texas statutes providing that there shall be but one final judgment in any case, although there may be several defendants to an action, no final judgment can be rendered against one of them until it is rendered against all, however independent of each other their respective defenses may be; so, where the court declined to enter judgment as to one defendant, and continued the case as to him, this made the judgment entered against the other defendant void.

Appeal from district court, Galveston county.

Geo. Mason and D. A. Nunn, for appellants. *Waul & Walker*, for appellees.

GAINES, J. J. C. Wootters & Co. brought this action to recover of Duble & Wootters and Julius Kauffman the value of certain cotton alleged to have been consigned to Duble & Wootters, as cotton factors, in the city of Galveston, for sale, and to have been delivered to Kauffman for shipment to Liverpool, and sale in that market. Plaintiffs claim that the delivery of the cotton to Kauffman was without their authority, and was therefore illegal, and seek to hold the defendants responsible for the alleged conversion. The judgment and verdict were in their favor against J. H. Wootters, as surviving partner of Duble & Wootters; but against them in favor of the other defendants, who had been made parties as the widow and heirs of Julius Kauffman, who died since the institution of the suit. That a cotton factor in Galveston, to whom cotton has been conveyed for sale, has no right, in the absence of direct authority from the consignor, to ship it to a foreign market for disposition, and that one who receives it from the factor for that purpose is responsible to the owner for its value, are propositions that are settled by the decision of this court in the case of *Kauffman v. Beasley*, 54 Tex. 563. To avoid the effect of these rules of law, on the trial in the court below, the widow and heirs of Kauffman sought to show that during the season in which the cotton was shipped, a custom existed in the city among factors to receive advances upon cotton consigned to them, and to send it to foreign markets for sale. The one person offered to prove this was the witness Runge, whose testimony was admitted over the objections of the plaintiffs. This ruling of the court was excepted to, and is now assigned as error.

Of the insufficiency of the evidence upon this point, taking it all together, there can be no question. It has been held by courts of high authority that a custom cannot be established by the testimony of a single witness. *Wood v. Hickok*, 2 Wend. 501; *Halverson v. Cole*, 1 Speers, 321; *Barclay v. Kennedy*, 3 Wash. C. C. 350. But to this line of decision the latter cases seem not to have adhered. It is admitted by these more recent authorities that from the nature of the case, if a general custom exist, more than one witness can always be found to establish it; yet it is urged that this is not of itself a sufficient reason for making an exception to the general rule that a

fact in issue may be proved by the oath of one person alone. *Robinson v. U. S.*, 13 Wall. 363; *Vail v. Rice*, 5 N. Y. 155; *Jones v. Hoey*, 128 Mass. 585; *Partridge v. Forsyth*, 29 Ala. 200. These cases just cited would seem to lay down the better doctrine. But all the courts agree that, if the testimony of the one witness in support of a custom be contradicted by others, the custom cannot be held established. It is reasonable to presume that if such general usage exist as is essential to show a custom in a particular branch of business, that every one engaged in such business should know it; and hence, if the fact be called in question, more than one witness could be brought to support it. See Lawson, Usages, p. 98, § 54, and cases there cited. In this case three cotton factors of the city testified that no such custom existed, and no witness was called by defendants to support the testimony of Runge upon this point. The evidence was therefore insufficient.

But whether it be admissible or not is another question. We give the interrogatory and the answer of the witness which were objected to: "Was it generally understood by those engaged in the cotton business in Galveston, and those dealing with them in the country, and sending consignments of cotton, that this panic prevailed, was affecting trade, and that factors, for want of market at home, were shipping cotton abroad, and taking advances on consignments? Answer. Yes, the panic was generally known, and the adverse influences it had on cotton and trade generally; and people in business knew that large consignments were going forward, either because parties could not sell, or because they wanted to speculate for higher prices. The shipping was done for the purpose of getting cash advances." In answer to a question by the court, witness said: "That was the general usage of those engaged in cotton business at that time, to-wit, time of panic."

A custom, in order to affect the ordinary rules of law applicable to contracts in a particular business, must not be temporary, but must be general as to the particular trade, and so well established that every one dealing in that trade is presumed to know it: Lawson, Usages, 40, 44. The witness says the panic was generally known, and the adverse influence it had upon cotton, and that people in business knew that large consignments were going forward, and that was the general usage of those engaged in cotton business during the time of panic. He does not say that the factors had adopted a rule of shipping cotton abroad, that their customers knew this and had acquiesced in it, nor does he testify to any facts from which it must be presumed that the consignors of cotton knew that such a rule prevailed. His testimony is consistent with the theory that the factors were pressed for money, and when so pressed used their customers' cotton or their own in order to obtain it. Such a course of business, brought about by extraordinary circumstances, such as a commercial panic, ought not to be held sufficient to make transactions good which are otherwise contrary to law. Can factors, brokers, and other classes of agents, dealing in the property and credits of others, because of a commercial depression, adopt by express or implied consent a usage of trade, so as to extend their authority over the property confided to their care? Certainly not, unless a knowledge of the change in their way of doing business be brought directly home to their principals. In a recent case the supreme court of the United States say: "* * * The finding of the circuit court that the transactions between the factors and the plaintiffs were according to the general usage of trade between banks and cotton factors in St. Louis cannot aid the plaintiff, because the usage attempted to be set up was not shown to have been known to the defendants, or to other owners of cotton, and because it was contrary to law in that it undertook to alter the nature of the contract between the factors and their principals, which authorizes them to sell, but not to pledge," etc. *Allen v. St Louis Nat. Bank*, 7 Sup. Ct. Rep. 460. In the case before us, plaintiffs had been consigning cotton to Duble & Wootters long before the panic prevailed, and had expressly refused

to allow their cotton to be sent to Europe for sale. The testimony of the witness certainly fails to show any knowledge on their part of the alleged custom. For these reasons we think the testimony objected to was inadmissible, and that the court erred in not excluding it. It follows from what we have said that the court also erred in charging the jury upon the effect of the alleged custom. There being no sufficient legal evidence to warrant any instruction upon the point, the charge complained of in the tenth assignment was calculated to mislead the jury to the prejudice of plaintiffs, and should not have been given.

The eleventh assignment of error is: The court erred in charging the jury as follows: "If you believe from the evidence that J. C. Wootters, the plaintiff, gave any express or *implied* authority to the firm of Duble & Wootters to deal with the cotton as their own, or get advances on it from shippers to foreign markets, then the plaintiff cannot recover from the defendants Clara Kauffman or Julius Kauffman, but would have to look alone to the defendant John H. Wootters, as surviving partner of Duble & Wootters." This assignment is also well taken. The court should have instructed the jury what was meant by "implied authority," or from what fact, or state of facts, authority to Duble & Wootters to ship the cotton would be implied. We are of opinion that if Duble & Wootters had in their hands belonging to plaintiffs, or owed plaintiffs, a sufficient sum of money to cover the freight and charges paid by the former upon the cotton, then plaintiffs were entitled to recover the full value of the cotton, without any deduction for such freight and charges. The court should have so charged; and therefore the seventh and eighth assignments of error are well taken.

The charge complained of in the sixth assignment is correct as far as it goes, and is not obnoxious to the objections urged against it. We do not think the court erred in rejecting the evidence of the agreement of counsel on the former trial to the effect that it was admitted by defendants that Julius Kauffman, deceased, received the cotton sued for by plaintiffs. The agreement was oral, and, although it was unsupported in the statement of facts which was signed by the counsel for the purpose of appealing from the former judgment, it cannot be deemed a written agreement, as required by the rules of practice prescribed by this court. Standing as a mere parol admission of a fact made during the introduction of testimony, and notice of its withdrawal having been given before the second trial, it was not binding upon defendants. 1 Phil. Ev. (Cow. & H. and Edw. notes,) 436. Not being in writing, it cannot be enforced as an agreement. The statement of facts is not made up for the purpose of a new trial, and cannot be used as evidence, except, possibly, in cases where no other evidence can be produced.

It is insisted on behalf of appellees that the judgment should be affirmed without reference to the errors complained of by appellants, and in support of that position it is urged (1) that Clara Kauffman, the widow of Julius Kauffman, has never been properly brought before the court, and (2) that the judgment on the former trial in favor of Julius Kauffman is conclusive of the case as against his representatives. We do not see that a failure to have due service of citation made upon Mrs. Kauffman would be any reason for affirming the judgment. By her appearance to quash the service, she was in court to the next term for all purposes. Besides, it is shown by the record that she appeared and filed an answer to the merits. Upon the former trial there was a verdict and judgment in favor of the original defendant, Julius Kauffman, against plaintiffs; but the court in effect set aside the verdict, and continued the cause as to the other defendants, upon the ground that the finding of the jury as to them was too uncertain to form the basis of a judgment. This was held not to be a final judgment upon the former appeal in this case. *Wootters v. Kauffman*, Galveston term, 1381. As we take it, the effect of this decision is to hold that but one final judgment can be rendered in a case, and

that since the court had declined to enter a judgment as to Duble & Wootters, and had continued the cause as to them, this made the judgment as to Kauffman a nullity. To hold that judgment, upon the present appeal, conclusive of the rights of plaintiffs as against Kauffman's heirs, would be to overrule the decision upon the former appeal, and to deprive appellants of all relief for any errors that may have been committed by the court below upon either trial. Our statutes provide that there shall be but one final judgment in any case. It follows from this that, if there be several defendants to a suit, no final judgment can be rendered against one until it is rendered against all, however independent of each other their respective defenses may be. Hence a new trial as to one is a new trial as to all, as has been decided by this court in *Long v. Garnett*, 45 Tex. 400; and a continuance as to one defendant is a continuance as to the others, although the court may attempt to render final judgment against the latter. *Martin v. Crow*, 28 Tex. 614.

In *Hulme v. Jones*, 6 Tex. 242, suit was brought against three defendants. Judgment by default was rendered against two who had accepted service, but no disposition of the case was made as to the third, who was not served. Chief Justice HEMPHILL, in delivering the opinion, said: "The judgment is void as against Burtridge, and, as it is inadmissible in its nature, it is necessarily void as to the other defendants." The same may be said as to the former judgment in favor of Kauffman in this case. See, also, *Whitaker v. Gee*, 61 Tex. 217; *Linn v. Arambould*, 55 Tex. 611.

We are cited to no case in conflict with this doctrine. The syllabus in the case of *Roberts v. Heffner*, 19 Tex. 130, says, broadly, that a new trial may be granted as to one defendant in an action of trespass and not as to the others. An examination of the opinion, however, shows that the point was neither raised nor decided.

• In *Saffold v. Navarro*, 15 Tex. 76, it is held that where there are several defendants, and one of them is not served, but judgment final is rendered against all, the judgment may be reformed in the supreme court, dismissing as to the one not served, and affirmed as to the others.

In *Burton v. Varnell*, 5 Tex. 139, judgment by confession was taken against one of two defendants, but no disposition of the case was made as to the other, who was not served. The court say there was no error, but finally decided that if there was it could not be taken advantage of by the defendant who had confessed judgment.

If the judgment in favor of Kauffman, the defendant on the former trial, were still in force, we might affirm the judgment now appealed from on the ground that no other could legally be rendered as to his representatives. But we are of opinion that is not a valid and subsisting judgment, and that the court did not err in excluding it, upon the objection of plaintiffs.

It is not necessary, in view of the disposition we shall make of the case, to consider the errors assigned by appellant John H. Wootters, the surviving partner of Duble & Wootters. The questions not considered will probably not arise upon another trial.

For the errors pointed out, the judgment is reversed, and the case remanded.

ORMAN v. STATE.¹

(Court of Appeals of Texas. December 17, 1886.)

1. CRIMINAL PRACTICE—EVIDENCE—ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.

Privileged communications in criminal cases are subject to two rules: (1) To be privileged, they must pass between the client and his attorney in professional con-

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

fidence, and in the legitimate course of the latter's legitimate employment. (2) If the communications are made by the client to the attorney before the commission of the crime, and for the purpose of being guided or helped in the commission, they are not privileged, and this second rule is not affected by the fact that the attorney was wholly without blame.¹

2. MANSLAUGHTER—SELF-DEFENSE—INSTRUCTIONS.

See the opinion *in extenso* for charges upon manslaughter and self-defense held erroneous, but with respect to manslaughter immaterial, because corrected by a subsequent charge.

Appeal from district court, McLennan county.

Under an indictment charging him with the murder of William F. Houghston, in McLennan county, Texas, on the eighth day of September, 1885, the appellant was convicted of murder in the second degree, and his punishment was assessed at a term of 14 years in the state penitentiary.

The proof for the state showed that the deceased was shot from his seat on a carriage-box by the defendant, on one of the streets of the city of Waco, on the day alleged in the indictment. Defendant, *en route* up the street, met the deceased driving down the street, stepped from the pavement to a point near the carriage, stopped it, and demanded of deceased to retract a statement made on that morning. Upon the deceased refusing, the defendant raised his hands and fired two shots with a pistol, and deceased fell to the ground, and soon expired. No arms were found about the person of deceased.

The testimony for both the state and defense concurred to the effect that on the morning of, but before, the shooting, the deceased, somewhat under the influence of whisky, called twice at defendant's saloon, and asked for defendant, denouncing him in the most violent terms, and iterating and reiterating his determination to kill defendant before noon on that day. Among other things, he said on both visits that defendant had accused him of cohabiting with a negress; that the negress was in every way the equal of defendant's mother and sisters, who had provided defendant with all he possessed by means of the revenues they derived from their prostitution with negro men. All of these facts were brought to the defendant's knowledge prior to the shooting. It was further proved that before the shooting, and immediately after he was informed of the deceased's visits, threats, and charges against his mother and sisters, the defendant went to the office of an attorney, stated the facts to him, and asked what penalty he would subject himself to if he killed deceased. The attorney read him the statute relating to homicide because of insulting language to a female relative, and advised him to avoid a difficulty with deceased.

Independent defensive testimony was to the effect that, when he left defendant's saloon the last time, deceased drove slowly along the street in front of defendant's house, his right side being towards the house. At that time he held a pistol in his right hand, on his seat, close to his person. After a time he drove back over the same street, his left side being exposed to the house. His right hand was held in the position in which it was held when he passed up, but was invisible to the witnesses. The meeting occurred further down the street, a few minutes later. The witnesses could not hear the words that passed, but saw deceased throw out his right hand as though to present a weapon, at which moment the defendant fired.

T. A. Blair and Herring & Kelly, for appellant.

The trial court erred in requiring the witness Herring to testify to the conference between himself and defendant shortly before the shooting. The

¹ As to what are privileged communications between attorney and client, see *French v. Hall*, 7 Sup. Ct. Rep. 170; *Kaut v. Kessler*, (Pa.) 7 Atl. Rep. 586; *Todd v. Munson*, (Conn.) 4 Atl. Rep. 99; *Hanlon v. Doherty*, (Ind.) 9 N. E. Rep. 782; *People v. Barker*, (Mich.) 27 N. W. Rep. 539; *Brigham v. McDowell*, (Neb.) Id. 384, and note; *Romberg v. Hughes*, (Neb.) 26 N. W. Rep. 351, and note.

statements then made to the said Herring, who was an attorney at law, were privileged communications, and therefore not admissible. The evidence disclosed a case of justifiable homicide, and therefore was against the verdict.

Asst. Atty. Gen. Burts, for the State.

HURT, J. Appellant was convicted of murder of the second degree, and sentenced to the penitentiary for 14 years, for the killing of W. F. Houghston, in the city of Waco, on the eighth day of September, 1885. We will here insert such facts as will present in a clear light the first error assigned by counsel for appellant:

Appellant was a man of family, having a wife, mother, and sister. He was a saloon keeper, and his residence was about the distance of one block from his saloon. Deceased was a hack driver, and it appears was living with a negro woman. Appellant and deceased were upon friendly terms, and were heard to joke each other a short while before the day of the killing.

Early in the morning, between 5 or 6 and 9 o'clock of the day of the killing, the deceased went to the saloon of appellant two or three times, looking for appellant, and stated openly, boldly, loudly, and repeatedly, so that the persons doing business near appellant's saloon heard him, that appellant had accused him of lying up with a negro woman; that appellant was a d—d son of a b—h, and that he intended to kill appellant before 12 o'clock that day; that said negro woman was as good as appellant's mother or sister; and that appellant's mother and sister were negro f—k—ng bitches, and that they had in this way accumulated and made all the property that appellant had. Deceased had a pistol with which he said he was going to do appellant up. He said: "We hack drivers are hell when we get started, and we'll do what we say we will."

On one of the occasions spoken of, deceased drove up to appellant's saloon with two negroes in his hack, and said those negroes had had sexual intercourse with appellant's mother and sister, and that he was going to make them tell appellant so. Deceased drove by appellant's residence, and drove near the house, and looked in, and appeared to be mad, and was holding his lines in his left hand, with a pistol in his right hand by the side of his right leg. He passed by, and was soon seen by another witness, still having the pistol down by the side of his leg. He soon returned, and as he was passing by appellant's residence, holding his reins in his left hand, with his right hand down by his side, on the opposite side from appellant, he met appellant, who was going from his saloon to his residence, and appellant asked deceased if he would take back what he had said about his mother and sister. Deceased said, "No," and at that moment appellant was seen to throw up his left hand, and then the shooting occurred. Deceased received two shots, from which he instantly died. The horse ran away with the hack of deceased. There was a woman in the hack.

After deceased went to appellant's saloon, as before stated, in appellant's absence, appellant went from his home to the saloon,—about 9 o'clock,—and ordered his breakfast. (There was a restaurant in connection with the saloon.) He sat down to eat his breakfast, and just as he sat down he was told that the deceased had been there looking for him, and was also told that deceased said his (appellant's) mother and sister were negro f—k—ng bitches, and that they had made in that way all the property appellant had. Appellant got up without eating his breakfast, and said: "No man can say that about my mother and sister and live." He sat down behind the counter, with his face in his hands, and appeared to be crying and in trouble. He then went out, and a while afterwards came back, and got his pistol, and put it in his pocket. After appellant was informed of what deceased had said about his mother and sister, he went to consult his attorney (M. D. Herring) about the matter, concerning what the punishment would be for killing in such cases.

He appeared to be intensely excited; more so than the attorney had ever seen him before, and he had known him from his childhood. He told his attorney what Houghston had said about his mother and sister, as before stated, and asked him what the law was if he killed Houghston. The attorney read him the statute concerning killing, upon the use of insulting words towards a female relative, and advised him to have no trouble with Houghston. He said that was all he wanted to know, and started away, with his eyes filled with tears. The killing occurred soon afterwards. Appellant went to the courthouse, and surrendered himself, immediately after the killing.

M. D. Herring was called as a witness for the state, while he was conducting the defense on the trial of the case, and, over objections of defendant, testified, in substance, as follows: "Appellant came to my office on the morning of the killing, and said he wanted to consult me privately, and requested my law partner, Mr. Kelley, to step into the other room of our office, which he did. Appellant appeared to be intensely excited; more so than I ever seen him before. I had known him from his childhood. He told me that he had just heard that deceased, Houghston, had been to his (appellant's) saloon, and said that his (appellant's) mother and sister were whores, and that they had been cohabiting (he used a vulgar phrase) with negroes, and that they made in that way all appellant had, and asked me what the law was if he killed Houghston. I then read him the statute of the state concerning killing upon the use of insulting words towards a female relative, and I advised him not to have any trouble with Houghston; that he was a trifling, worthless fellow. Appellant then got up to leave, saying that was all he wanted to know, and, as he started off, I noticed that his eyes were filled with tears, and I again, and then again, advised him to have no trouble with Houghston; that he (appellant) had had trouble enough; but he paid no attention to me, but went away. Soon after I started out to pay some dues at the T. B. A. office, and while on the street saw a runaway carriage and horses, and immediately thereafter learned that appellant had killed Houghston."

This evidence was objected to because the consultation with witness, and his advice thereon, was privileged; because appellant consulted witness as his attorney and confidential adviser. Was the evidence of M. D. Herring, under the surrounding facts, privileged communications, and hence not competent?

"Communications from clients to attorneys are privileged on the ground of public policy, with a view to the safe and proper administration of justice. The protection is not qualified by any reference to proceedings pending or in contemplation. It is adopted out of regard to the interest of justice, and from the necessity of free, unrestrained intercourse between counsel and client. It is better, in our judgment, to adhere to the rule in a broad and liberal sense than to weaken its force by exceptions." *Crisler v. Garland*, 11 Smedes & M. 136.

After a very careful examination of all the authorities accessible to us, we are led to the conclusion that the above rule applies alone to civil cases. What, therefore, is the rule in criminal cases? In *Queen v. Cox*, decided on December 20, 1884, (5 Amer. Crim. Rep. 140,) most, if not all, the English cases bearing upon the question at issue were cited and commented upon by the court. In that case Judge STEVENS wrote a very lengthy opinion, very carefully comparing the decisions which had before been made upon this subject. In a great many cases he gives a concise statement of the facts under which the question was presented, and from his opinion, and the cases therein cited, we state the following as the rules: (1) To be privileged, the communications must pass between the client and his attorney in professional confidence, and in the legitimate course of professional employment of the attorney. (2) If the communications are by the client, made to the attorney before the commission of the crime, and for the purpose of being guided or helped in its commission, they are not privileged. (3) Nor does the fact that the attorney

was wholly without blame in any particular whatever affect the second rule. We are aware that this third rule is in conflict with quite a number of able opinions, but it is supported by the above case, and, we believe, by the weight of authority.

Now, let us concede (it being, in fact, absolutely true) that M. D. Herring, the attorney, was wholly without blame, no party in any respect to the homicide, yet was it not the object of appellant, in his communication with his attorney, to obtain information with respect to a contemplated crime? And did he not obtain such information as would induce rather than prevent him from the commission of the crime? It is true that the advice of the attorney was strongly calculated to prevent the crime, but from the conduct of appellant it clearly appears that he was seeking law, and not advice as to what he would do. This, it seems to us, was very firmly settled in his mind, and especially if the law should be to his liking; for, after the statute had been read to him by which he was informed that the killing would be reduced from murder to manslaughter, he seems to have been satisfied, and was willing to kill Houghston, and risk such punishment. Let us suppose that Herring had informed him that he would be guilty of murder of the first or of the second degree, stating to him the punishment for each offense, would it have been as probable that he would have killed Houghston as under the law as truly given to him by Herring? Under the facts surrounding the interview between appellant and Herring, we unhesitatingly answer that it would not. Then, under the circumstances attending this interview, it is evident that its effect was to induce (though not so intended by Herring) the appellant to kill Houghston, and risk being convicted of manslaughter. This being the effect, the communications between Herring and appellant were not privileged. *Queen v. Coz*, 5 Amer. Crim. Rep. 140, and cases therein cited.

Appellant relied upon insulting language towards female relatives (his mother and sister) to reduce the homicide from murder to manslaughter. Upon this subject the learned judge, when applying the law directly to the case, submitted to the jury the following instruction: "If you believe from the evidence, beyond a reasonable doubt, that the defendant did unlawfully kill William Houghston by shooting him with a pistol, and that the same was done under the immediate influence of *sudden* passion, (as hereinbefore defined,) arising from an adequate cause, such as insulting words or conduct of the said Houghston towards female relatives of defendant, you will find defendant guilty of manslaughter."

The objection to the charge urged by appellant is that it requires the killing to take place under the immediate influence of *sudden* passion. If this be error, it is not cured in any other part of the charge, but, on the contrary, it also occurs in the definition referred to in this part of the charge. Under the facts of this case, or, in other words, under the grounds relied upon by the defendant to reduce the killing to manslaughter, is it error to instruct the jury that the killing must take place under the immediate influence of *sudden* passion? If the defendant hears of or witnesses the insulting language or conduct, he must act at once; in which case the passion would be sudden,—springing at once from the cause of provocation. But let us suppose, as was the fact in this case, that the defendant was not present, did not hear the insulting language, nor witness the insulting conduct: most evidently his passion could not suddenly arise from the provocation,—provoking cause. Now, the provocation—the adequate cause—must produce the passion, and for the passion to be sudden it must spring directly and instantly from the provocation. How could this be the case when defendant may not have been informed of the provocation for several days, weeks, or months after the giving of the provocation? Again, must the passion suddenly, instantly, arise in the mind of the defendant upon being informed of the insulting language or conduct, and remain up to the time of the homicide? Owing to the peculiar nature of this

provocation, and when the question is viewed in the light of article 597, Pen. Code, we are of the opinion that the last question must be answered in the negative. The language used by Houghston towards the mother and sister of appellant was calculated to arouse the passion of any human being, save a complete moral wreck; and while with some persons, upon being informed of such language, the passion would spring at once into existence, with another the more he reflected, the higher, the greater, would be the passion; for upon reflection the insult, with all its blighting consequences, (not only the immediate, but for all time to come,) would be comprehended. Hence there may be cases, owing to the provocation and disposition of the party offended, in which the passion may not suddenly arise upon being informed of the insulting language or conduct, but after reflection, and before the killing, he may be completely under the control of the passion produced by such provocation; and especially would this be the case upon meeting with the party giving such an insult.

Now, let us briefly notice article 599. Insulting words or conduct towards a female relative of the party killing is deemed an adequate cause,—cause to produce the passion. The cause is the words or conduct. There must be passion produced by the cause. When must the passion arise? If the defendant is not present, does not hear the words, or witness the conduct, we answer, before the killing. Article 599 provides that when it is sought to reduce the homicide to manslaughter by reason of this character of provocation or cause, it must appear that the killing took place, if the defendant hears the words or witnesses the conduct, immediately upon the happening of the conduct or the utterance of the language; but if defendant was not present, did not hear the words, or witness the conduct, so soon thereafter as the defendant may meet the person killed, after being informed of such insults. We are of the opinion that in a case in which defendant was not present, did not hear the words, or witness the conduct, to reduce the homicide to manslaughter, it must appear that the party killed used insulting words or conduct towards a female relative; that before the homicide defendant was informed of such insults; that he killed by reason of the passion produced by the insult, the words, or conduct, and from no other cause.

But it may be contended that, if error is conceded in the charge just mentioned, this is cured by another part of the charge, to-wit: "By the expression, 'under the immediate influence of passion,' is meant the act must be directly caused by the passion arising out of the provocation, which may have been given at the time or before the killing. It is not enough that the mind is merely agitated by the passion arising from some other provocation, or a provocation given by some other person than the party killed." To my mind the evident object of this part of the charge was for the purpose of instructing the jury that the killing must be caused directly by the provocation, (whether given at the time or not;) that, though the mind may be agitated by passion, yet, unless agitated by passion arising from a certain provocation, and that said provocation must have been given by the party killed, the law would not reduce the crime to manslaughter. In this part of the charge there is no attempt on the part of the learned judge to convey the idea that the passion may arise at any time before the killing. This was not the subject nor object of the charge under discussion. The writer is of the opinion that there is reversible error in this part of the charge just discussed. My brethren do not agree to this.

There was evidence calling for a charge upon the law of self-defense, and, among other things, the learned judge submitted the following: "Homicide is justifiable in the protection of the person against any unlawful and violent attack; but in such case all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." The learned judge begins the law of self-defense with this general proposition, and it will

be seen that it is unconditional, and does not refer to any other clause of the charge upon this subject. The true rule upon this subject is this: If, to protect the person against an unlawful and violent attack, and such unlawful and violent attack is not *mutual*, or is not such as is described in article 568, Pen. Code, then the party must resort to all other means to prevent the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack. Referring to the evidence bearing upon this subject, it is seen that this charge was not called for, and should not have been given at all,—not even if correctly given. For, if deceased made an attack upon the person of defendant, it was a murderous attack, coming clearly within the provisions of article 568, and, in order to protect himself from such attack, he is not required to resort to other means to prevent the threatened injury, nor to kill his adversary while in the *very* act of making such attack, but may kill at once. While it is true that the law of self-defense in preventing murder is correctly stated in the twentieth paragraph of the charge by simply giving in charge to the jury the statute, still there is no qualification made to the obnoxious charge contained in the sixteenth paragraph except by inference. The jury may have made the proper inference, and engrafted upon the sixteenth paragraph the proper limitations and qualifications, but this never should be required of a jury. As the sixteenth paragraph of the charge heads the law of self-defense, and is general and without qualification, it is highly probable that the jury qualified all subsequent paragraphs of the charge upon self-defense with the instructions contained in the sixteenth paragraph. This view is strongly supported by the fact that there could be no controversy as to the nature of the attack, if any, made by deceased upon defendant, it being nothing less than a felonious attack, or with intent to murder, and nothing short of this. Again, if the evidence tended to show an attack of less magnitude than to murder, then a majority of this court holds that the court should have instructed the jury that if the attack produced in the mind of defendant a reasonable expectation or fear of death, or some serious bodily injury, then the defendant would not be required to resort to other means to prevent the threatened injury, nor kill while his adversary was in the very act of making the attack, but might kill instantly. There is no such charge as this submitted to the jury. We are of the opinion that notwithstanding the charge of the court of which we have been treating was not at the time excepted to, nor instructions requested, yet, when viewed with reference to the whole record, there is strong probability of injury to defendant.

The judgment is reversed, and the cause is remanded.

ELSNER v. STATE.¹

(Court of Appeals of Texas. January 22, 1887.)

1. LARCENY—PAROL EVIDENCE—RECORD OF BRAND.

On a trial for the larceny of a horse, the state, over objection, was permitted to make parol proof the fact that the brand of the alleged owner was recorded. *Held* error, the record of the brand, or an authenticated copy of the record, being the primary evidence of the same.

2. SAME—EVIDENCE—RECORDS.

Records are proved in this state either by their own production in court or by exemplified, certified, or sworn copies of the same.

3. SAME—BRAND OF ANIMAL.

Inasmuch as the statute declares that the brand of a horse shall be duly recorded before it can be received as evidence of title, there was error in permitting parol proof of the record, although the fact so proved was merely the fact that the brand

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

was recorded. Parol proof of the record of the brand, if it could be made without proving the brand itself, would be no proof of title. Legal proof of the brand would have sufficed in this case, upon the question of ownership, but parol proof of the record was reversible error.

Appeal from district court, Travis county.

This conviction was for the larceny of a horse, and the penalty assessed was a term of five years in the penitentiary. The one question involved in this appeal was the manner of proof to support the allegation of ownership. Having proved the brand on the stolen horse, the state was permitted to prove by a witness on the stand that that brand was recorded as the brand of the alleged owner.

D. H. Hewlett, for appellant, assigned the error discussed by the court.
Asst. Atty. Gen. Burts, for the State.

HURT, J. The indictment alleges the ownership of the stolen horse to have been in H. B. Shafer. The only evidence in the record tending to prove this allegation of ownership is the brand upon the animal. The state undertook to prove by parol evidence that the brand on the horse was a recorded brand. To this character of proof the defendant objected, for the reason that the record of the brand, or a certified copy, furnished the best evidence. Notwithstanding the objection, the testimony was admitted, and this ruling is assigned as error. Article 4556 of the Revised Statutes provides that every owner of cattle, hogs, sheep, or goats shall select an ear-mark or brand and that the same shall be recorded. Article 4560 requires the clerks of the county courts to keep a well-bound book, in which they shall record the marks or brands of each person who may apply to them for that purpose, noting in every instance the date on which the brand or mark is recorded, which record shall be subject to the examination of every citizen of the county, at all reasonable office hours, free of charge for such examination. Article 4561 provides that "no brands, except such as are recorded by the officers named in this chapter, shall be recognized in law as any evidence of ownership of the cattle, horses, or mules upon which the same may be used."

It will be observed that none of these provisions requires the owner of horses to have his horse brand recorded. But the law does make provisions for and require county clerks to record *all* brands when applied to for that purpose. Though the owner is not required to have the brands used on his horses recorded, still it is made essential that they be recorded before the brand is admissible as evidence of ownership. This being the case, we are of opinion that the objection of the defendant was a proper one, and should have been sustained. 1 Greenl. Ev. §§ 82-86.

As to the proof of records. This is done either by the mere production of the record, without more, or by a copy. Copies of records are exemplifications; copies made by an authorized officer; sworn copies. 1 Greenl. Ev. § 501. Under the law of this state, certified copies will suffice. With Greenleaf is also found, on this question, Wharton in his work on Evidence, § 63.

It may be contended that as the fact proved was simply that the brand was recorded, and not the contents or specific details of the brand, the rule above does not apply. To this it is answered that the law requires that the brand used on the horse shall be recorded before the brand itself is put in evidence to establish title. Proof that a brand was recorded would certainly be no evidence of title. It would therefore be impossible to simply introduce the record of the brand, without at the same time making proof of the contents or description of the brand. If even this could be done, the evidence would not then be sufficient, for it would not establish that the brand on the horse (the means by which ownership is sought to be established) was recorded; and unless this be done the brand "shall not," says the statute, be recognized as any evidence of ownership.

The allegation of ownership in H. B. Shafer being a material averment of the indictment, and there being no other evidence that the horse alleged to have been stolen was in fact the property of the said Shafer, the state was driven to rely upon the brand for a conviction. This was permissible if the brand was recorded as required by the statute, and this it was proposed to show, and was shown, by parol testimony. This was error requiring a reversal of the judgment.

It is not intimated that this parol evidence would have been competent, even though there had been other testimony to support the allegation of ownership. Neither, on the other hand, is it said that this error would in all cases be an injury demanding a reversal. There might be cases in which the other proof of ownership was so overwhelming as to render the error harmless.

For the error indicated, the judgment is reversed, and the cause is remanded.

POOLE v. STATE.¹

(Court of Appeals of Texas. January 22, 1887.)

DISTRICT AND PROSECUTING ATTORNEYS—EXTORTION—INDICTMENT.

Indictment in this case charges, in effect, that the defendant, while county attorney of Newton county, received a fee to dismiss a certain prosecution pending in the justice's court, which fee was paid on behalf of the party accused. If the indictment attempts to charge the offense under article 352 of the Penal Code, it is defective in that it fails to charge the acceptance of a fee *in excess of that allowed by law*. If it attempts to charge the offense under the act of February, 1883, it is defective in that it does not charge directly that the defendant received a fee when he was *entitled to none* for the service.

Appeal from district court, Newton county.

This conviction was for extortion, and the penalty imposed was a fine of \$25.

No appearance for the appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. This case was a conviction for extortion. From the indictment it is doubtful whether it was drawn under article 352 of the Penal Code, or under the act of February, 1883. If it was meant to charge the offense under article 352, it was defective in not charging that appellant received higher fees than are allowed by law. If it was intended to charge a violation of the act of 1883, it was equally defective in that it does not allege that he received fees when by law he was entitled to none for the service performed. From the statement of facts, it appears that appellant held the office of county attorney for Newton county, and that a prosecution was pending before the justice of the peace of precinct No. 1, against one Louis Starke, for the offense of threats to kill. It was in evidence that W. H. Starke paid appellant five dollars to dismiss said prosecution; that the amount was received by him as a fee; and that he thereupon dismissed the case. The indictment formally charges these facts, except there is no added allegation that appellant received the money as fees when he was entitled to none for such service. This is necessary to the indictment's sufficiency. Willson, Crim. Forms, No. 156, p. 85.

The judgment is reversed, and this prosecution under this indictment is dismissed.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

TERRY v. STATE.¹

(Court of Appeals of Texas. January 22, 1887.)

1. BREACH OF THE PEACE—CHARGE OF THE COURT.

The private character of a residence is not even temporarily affected by the assemblage of a large number of invited guests to witness a marriage ceremony. See the statement of the case for a special requested instruction, upon a trial for disturbing the peace by cursing in a private house, *held* to have been properly refused.

2. CRIMINAL PRACTICE—APPEAL—RECORD—VENUE—EVIDENCE.

Venue of the offense is an issue indispensable to the legality of a conviction, and must affirmatively appear by the record on appeal to have been proved.

Appeal from district court, Trinity county.

This was a conviction for disturbing the peace by cursing and swearing, and by displaying a knife in an angry and threatening manner, in a private house. A fine of one dollar was the penalty assessed. The proof showed that the defendant cursed in a loud and boisterous manner, and displayed a knife, in the private residence of one Gibson, during the progress of a marriage ceremony. Under this state of case, the defense asked the court to instruct the jury as follows: "Under an indictment charging a disturbance of the peace to have been committed in a private house, a defendant cannot be convicted for disturbing the peace in a public place. When a private residence is thrown open to invited guests, upon an occasion of a wedding, and a crowd is gathered at such private residence, during the time such crowd is assembled said residence is a public place."

J. P. Stephenson and *Earl Adams*, for the appellant, urged as error the refusal of the special instruction.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. It was not error for the court to refuse the special instruction requested by defendant. The fact that the private residence where the disturbance occurred was at the time a place where numerous persons had, upon the invitation of the owner of the house, assembled on the occasion of a wedding, did not divest the residence of its private character, and deprive it of the protection afforded by the statute under which this conviction was obtained. There is no error in the charge of the court. In the statement of facts before us there is no evidence, either direct or circumstantial, that the offense was committed in the county of the prosecution, and, for the want of proof of venue, the judgment must be reversed, and the cause remanded.

HARRIS v. STATE.¹

(Court of Appeals of Texas. January 22, 1887.)

CARRYING WEAPONS—BRASS KNUCKLES.

"Brass knuckles" is the designation applied to a certain weapon enumerated in the statute denouncing a penalty for carrying deadly weapons. The substance of which such weapon is manufactured is immaterial.

Appeal from county court, Freestone county.

The opinion discloses the case. The penalty assessed was a fine of \$25.

Gardner & Etheridge, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. This is a conviction under article 318 of the Penal Code for carrying on the person *brass knuckles*. The information charges the offense properly, and describes the arm unlawfully carried as brass knuckles, which is one of the arms specifically named in the statute creating the offense. It

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

appeared in evidence that the arm carried by defendant was made of *steel*, and was not in fact made of *brass*. The said weapon, however, was the same as that commonly known as "brass knuckles," in shape, size, use, etc. The only question in the case is, are knuckles made of steel, or any other material except *brass*, within the meaning of the term "brass knuckles," used in the statute? The trial judge held that brass knuckles meant steel or any other metal knuckles. In this view we concur. We understand the words "brass knuckles," as used in the statute, to signify a certain weapon used for offense and defense, worn upon the hand to strike with, as if striking with the fist. This weapon, when first known and used, was commonly made of *brass*, but is now made of steel, platinum, or other heavy metal, as well as brass, but is still known and called "brass knuckles," no matter what metal it is made of. "Brass knuckles" is the *name* of the *particular* weapon, as "slung-shot," "sword-cane," "bowie-knife," are names of certain other weapons. The word "brass" is used to designate the weapon, not to specify the metal of which it must be made. It is the evident intention and spirit of the statute to suppress the carrying of this dangerous and deadly weapon, and this spirit and intent of the law would be largely, if not entirely, defeated by holding that the weapon must be made of brass, because the same weapon can be and is manufactured more cheaply of other metals, while at the same time it is just as dangerous and as deadly as if made of brass.

We find no error in the conviction, and the judgment is affirmed.

JONES v. STATE.¹

(Court of Appeals of Texas. January 22, 1887.)

1. FALSE PRETENSES—FALSE PACKING—CHARGE OF THE COURT.

The false packing of a bale of cotton, with intent to defraud the purchaser, is one of the methods of swindling denounced by article 470 of the Penal Code. Whether the false substance was placed in the cotton before or after it was ginned and baled is immaterial. See the opinion for a charge of the court on the subject held correct in the abstract, but erroneous as being upon the weight of evidence.

2. SAME—INSTRUCTIONS.

The charge of the court should be limited to the case as made by the indictment and the evidence. The charge in this case recited article 470, Penal Code, in its entirety. That article defines two separate and distinct offenses, with but one of which the defendant was charged in the indictment, or inculpated by the evidence, wherefore the charge was erroneous.

3. CRIMINAL PRACTICE—MODIFY REQUESTS FOR CHARGE.

Trial courts are specially empowered to modify requested instructions before giving them to the jury.

Appeal from county court, Freestone county.

This conviction was for false packing by putting sand in a bale of cotton with intent to defraud the purchaser. The penalty assessed was a fine of \$15.

The evidence disclosed conclusively that when he deposited the cotton at the gin to have it ginned and baled, the defendant deliberately threw a quantity of sand in it. The ginner testified that, while the process of ginning would remove much of the sand, a large percentage of it would remain in the bale, and to that extent increase its weight. It was further shown that defendant afterwards admitted that he put the sand in the cotton, remarking that as P., the man to whom it was to be sold, charged him three prices for goods, he thought it right to "get even with him." It was proved for the defense that, in purchasing cotton, P. would pay no more for clean than for dirty cotton.

No appearance for appellant. *Asst. Atty. Gen. Burts*, for the State.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WILLSON, J. This conviction is under article 470 of the Penal Code. It is charged in the indictment that the defendant, with intent to defraud, put into a bale containing cotton, a commodity usually sold by weight, sand and dirt, mixed with the said cotton, the same being an article of less value than the said cotton, with which the said bale was apparently packed. It is shown very conclusively by the evidence that defendant did put sand into said cotton, but he did so while the cotton was in the seed, before it had been ginned; and it is also sufficiently shown by the evidence that in doing the act his intention was to increase the weight of the cotton, and thereby defraud the purchaser of said cotton.

In his charge to the jury the trial judge, among other instructions, gave the following: "It matters not at what time the sand or dirt was put into the cotton, provided it was done by the defendant, and so done for the purpose and with the intent to defraud, and in a manner calculated to accomplish such purpose at the time." We believe this to be a correct statement of the law. It is not necessary, to constitute the offense, that the defendant should have been present at the time of packing and baling the cotton, and at that very time should have put the sand into the bale. The sand was mingled with the cotton by him, and went into the bale by his act as effectually as if he had put it into the bale when the cotton was packed. By putting the sand into the seed cotton, he put it into the bale of cotton. Such we hold to be the meaning of the law. But we are of opinion that this paragraph of the charge is upon the weight of evidence. It assumes as a fact that the sand or dirt was put into the cotton. This was a primary and most material fact to be proved by the state. It was a fact to be found by the jury, and not to be assumed by the court. "The charge must not comment upon the weight of evidence, or assume facts which it is the province of the jury to find, or lead the jury to infer what is the opinion of the judge on the facts." *Lester v. State*, 2 Tex. App. 440; *Stephenson v. State*, 4 Tex. App. 591; *Webb v. State*, 8 Tex. App. 115. This instruction was promptly and specifically excepted to, and the error is presented to us by bill of exception. We must hold, therefore, that this error, whether in judgment material or immaterial, must have the effect to set aside the conviction. Code Crim. Proc. art. 685; 21 Tex. App. 436.

There is still another error in the charge which is also presented by proper bill of exception. The charge copies the whole of article 470 of the Penal Code, which article defines two separate and distinct offenses, (*Holden's Case*, 18 Tex. App. 91,) with but one of which offenses the defendant was charged. The charge of the court should have been limited to the *law of the case*,—the case as made by the indictment and the evidence. *Tooney v. State*, 5 Tex. App. 163.

It was not error for the court to modify the special charge requested by defendant before giving the same to the jury. This power is expressly conferred upon the trial judge, and in this instance was exercised in the manner prescribed by the statute. Code Crim. Proc. art. 679.

Because of the errors in the charge above mentioned, the judgment is reversed, and the cause is remanded.

HARRELL, *alias* PRYOR v. STATE.¹

(Court of Appeals of Texas. January 26, 1887.)

BAIL—SCIRE FACIAS—INDICTMENT.

All process and proceedings, including a bail-bond, (and the subsequent forfeiture thereof,) based upon a void indictment, are themselves void.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

Appeal from district court, Freestone county.

This appeal is prosecuted from a judgment upon the forfeited appearance bond of W. T. Harrell, *alias* Sam Pryor, bailed under a pretended indictment charging him with the larceny of cattle. The amount of the bond and judgment was \$200.

A. G. Anderson, for appellant.

The alleged indictment was found by a grand jury composed of more than 12 persons. It was therefore void, and will not support proceedings of any character. *Lott's Case*, 18 Tex. App. 627.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. This appeal is from a judgment final upon a forfeited bail-bond. The bail-bond was executed under a pretended indictment, which had been presented by a body of 14 persons assuming to act as a grand jury. Such pretended indictment was a nullity, and all process and proceedings thereunder were void. *Lott v. State*, 18 Tex. App. 627; *McNeese v. State*, 19 Tex. App. 48; *Ex parte Swain*, Id. 323; *Williams v. State*, Id. 265.

The judgment is reversed, and the proceeding upon the bail-bond is dismissed.

KENNEDY v. STATE.¹

(Court of Appeals of Texas. January 26, 1887.)

CRIMINAL PRACTICE—INFORMATION—TIME.

An indispensable prerequisite to the sufficiency is that it charges the offense to have been committed anterior to the filing of the same. The complaint cannot be resorted to to supply such an omission.

Appeal from county court, Walker county.

This conviction was for a misdemeanor larceny, and the penalty imposed was a fine of \$50.

Abercrombie & Randolph, for appellant, assailed the sufficiency of the information.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. It is alleged in the information that the offense was committed on the fifteenth day of November, 1884, and the information was presented and filed on said day. There is no allegation that the offense was committed *anterior* to the filing of the information. One of the statutory requisites of an information is "that the *time* of the commission of the offense be some date *anterior* to the filing of the information. This requisite must be apparent from the information itself, and the complaint upon which the information is founded cannot be resorted to to supply it. We must hold the information to be fatally defective, notwithstanding the complaint shows that it was filed subsequent to the commission of the offense. Code Crim. Proc. art. 430; *Williams v. State*, 12 Tex. App. 226; *Goddard v. State*, 14 Tex. App. 566; *Wilson v. State*, 15 Tex. App. 150.

The judgment is reversed, and the prosecution is dismissed.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WARD v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri. February 28, 1887.)

RAILROADS—FENCES—KILLING CATTLE—PLEADING.

In an action against a railroad company under the Missouri double damage act for the killing of cattle, a statement of plaintiff's cause of action that fails to allege that the cattle got on the tract at a point where the company was by law required to fence, or where the track passed through or along or adjoining inclosed or cultivated fields or uninclosed lands, where by law it was required to fence, is fatally defective.¹

Appeal from circuit court, Scott county.

T. J. Portis, for appellant.

RAY, J. This was a suit for damages, under section 809, Rev. St. 1879, for the killing of two steers and a sow, the property of plaintiff, by the locomotives and cars of the defendant. Suit was commenced before a justice of the peace in Scott county, where plaintiff had judgment by default for double the value of stock killed. Afterwards, in due time, defendant filed its motion to set aside said judgment, which the justice overruled, and the defendant appealed to the circuit court. At the return term of the circuit court, when the case was reached, the defendant was called, and, not appearing to prosecute said appeal, the plaintiff, by the judgment of the circuit court, had judgment against the defendant and its securities in the appeal-bond for the amount appearing to have been found and assessed by the justice of the peace, whereupon the defendant filed its motions for new trial and in arrest, which being overruled by the court, the defendant appealed to this court.

The material part of plaintiff's statement of cause of action filed before the justice is as follows: "Plaintiff further states that the places on the railroad track of defendant where the alleged injuries were received, and the damage done, were on the lower portion of section 93, in said township and county, on the track of defendant, where no fences, as the law requires, were erected, maintained, and kept up sufficient to prevent stock and cattle from getting on the railroad track of defendant, and that, in many places at and near where the damage complained of was done, the fencing was down, and in many places there was no fence, and the railroad track unguarded, with nothing to keep off or prevent stock from getting on the track of defendant."

It will be perceived that this statement speaks only of the places where the alleged injuries were received, and the damage done; but nowhere alleges that the stock in question got on defendant's railway track at a point where the company was by law required to erect and maintain fences; nor does it allege that plaintiff's stock got on defendant's railroad track where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands, where, by law, it is required to fence; and, under all the decisions of this court on that question, the statement, in the absence of such allegation, must be held fatally defective and insufficient. *Asher v. St. Louis, I. M. & S. Ry. Co.*, 79 Mo. 432; *Manz v. Same*, 87 Mo. 278; *Morrow v. Missouri Pac. Ry. Co.*, 82 Mo. 169; *Schulte v. Railroad Co.*, 76 Mo. 324; *Hudgens v. Hannibal & St. Joseph R. R.*, 79 Mo. 418; *Nance v. Same*, 79 Mo. 196; *Davis v. Missouri, K. & T. R. R.*, 65 Mo. 441; *Cecil v. Pacific R. Co.*, 47 Mo. 246.

When the case goes back for new trial, as it must, this defect in the statement, if the facts justify, can be cured by a proper amendment of the statement in this regard. For these reasons the judgment is reversed, and the cause remanded.

(All concur.)

¹See *Mayfield v. St. Louis & S. F. R. Co.*, *ante*, 201, and note.

REYBURN v. WALLACE and others.

(Supreme Court of Missouri. February 28, 1887.)

ESTATES—LIFE-TENANT BOUND FOR STREET ASSESSMENTS—INFANT REMAINDER-MAN.

A life-tenant is bound to pay assessments for a granite pavement laid on an asphalt foundation, in front of the property, and cannot have a portion of the property sold by order of court to pay them, when the remainder-man is an infant only eight years of age, as such improvements as to him cannot be considered permanent; and it is only when the improvements are of a permanent nature, and do not require renewal from time to time, that contribution for the payment thereof can be compelled from the remainder-man.

Appeal from St. Louis circuit court.

Herman & Reyburn, for appellant. *Bakewell & B. & J. L. Hornsby*, for respondent.

BLACK, J. This case is here on an appeal from the judgment of the circuit court sustaining a demurrer to the petition. The petition, which is a bill in equity, in substance states that Mrs. Reyburn, the wife of the plaintiff, died in 1879, seized of a large real estate situate in St. Louis; that she left surviving her one child 5 years old and her husband, the plaintiff, who is 28 years of age; that by her will she devised her real estate to her husband for life, in case he should remain unmarried, but, in case of his marriage, then to her heirs, and, if she had no heirs at his death, then to her sisters and their children in case of the death of any of them; that the property is to a large extent unproductive, and the improvements not adapted to the neighborhood in which they are situated; that the annual rents received are some \$5,800, and the repairs, insurance, and general taxes reduce this amount to about \$3,000. The petition then shows that four of the streets upon which the property abuts have been and are being reconstructed by taking up the old pavement, renewing and readjusting the curbing, and paving the roadway with granite blocks laid on a concrete foundation; and that two other streets have been and are being reconstructed in like manner, save that the roadway is paved with asphalt on concrete foundations. For the work thus done tax-bills are issued, which are a lien upon the property abutting upon the street. Plaintiff has paid the tax-bills issued, amounting to \$3,700, and others will be issued to the amount of \$3,500. It is alleged that the property is and will be greatly enhanced by the improvements. The plaintiff and his deceased wife, and all other persons having a contingent interest in the property, are made defendants. The prayer of the petition is that a portion of the unproductive property be sold to pay the unpaid tax-bills, and to refund to plaintiff the amount he has paid in excess of 27 per centum.

The whole question is whether plaintiff, as owner of the life-estate, should pay the whole of these taxes, or whether they should be apportioned between him and those entitled to the same in remainder. The tenant for life is bound to pay the interest on incumbrances on the property out of the rents and profits; but, if he pay off the incumbrance, it is said that he is *prima facie* a creditor of the estate for the amount paid, deducting the interest he would have had to pay as life-tenant during his life. 4 Kent, Comm. 74; 1 Washb. Real Prop. (3d Ed.) 110. He must pay all ordinary taxes; certainly so if the income is sufficient to enable him to pay them. *Johnson v. Smith*, 5 Bush, 102; *Cairns v. Chabert*, 3 Edw. Ch. 312; *Pike v. Wassell*, 94 U. S. 714; *Varney v. Stevens*, 22 Me. 334. And, generally, he must also pay the expenses of managing the estate. *Peirce v. Burroughs*, 58 N. H. 307; *Perry, Trusts*, § 554; *Prettyman v. Walston*, 94 Ill. 192. This author also says: "If, however, an assessment is made against the estate for something in the nature of permanent improvement or betterment of the whole estate, the assessment may be rateably and equitably divided between the tenant for life and the remainder-man;" citing *Plympton v. Boston Dispensary*, 106 Mass. 546,

which was a case of an assessment of benefits for opening a highway in the vicinity of the property. In the case of *Cairns v. Chabert*, *supra*, it was intimated that this rule requiring the life-tenant to pay the taxes ought not to apply to those extraordinary taxes levied for municipal improvements, and permanently beneficial to the land, known as assessments; and accordingly it has been held in the various courts of the state of New York that the remainder-man must contribute to the payment of assessments for municipal improvements. *Gunning v. Carman*, 3 Redf. 69; *Fleet v. Dorland*, 11 How. Pr. 489; *Estate of Miller*, 1 Tuck. 846; *Stillwell v. Doughty*, 2 Bradf. (Surr.) 311; *Peck v. Sherwood*, 56 N. Y. 615. In some of these cases it does not appear what the improvements were. In one the assessment was for a sewer, in another for opening a street, but in the case last cited the assessment was for flagging a sidewalk. The rulings in those cases were probably not controlled by the statute cited in *Fleet v. Dorland*, but it is quite likely the statute had an influence upon the result reached. The supreme court of Pennsylvania, in *Hitner v. Ege*, 23 Pa. St. 305, held that the cost of a brick sidewalk should be charged to the tenant for life, and not to the remainder-man, and on the ground that it was not a permanent improvement; and so a doweress must pay the cost of a foot pavement in front of a lot occupied by her as a residence. *Whyte v. Mayor, etc., of Nashville*, 2 Swan, 364.

In this case the question arises between the life-tenant and remainder-man, and we are considering it in no other aspect. It cannot be affirmed that contribution must be made in all local assessments. Many of them are of a temporary character, such as board and brick sidewalks. The rule, it is believed, to be extracted from the authorities, is that contributions must be confined to cases of assessments for improvements which in their nature are permanent, and do not require renewals from time to time. This rule will include benefits for opening and widening streets, and assessments for grading streets, and the construction of permanent sewers. But in the present case the tax-bills were and will be issued for improving the surface of the streets,—that part of them which are subject to constant wear and tear; and in the nature of things the pavements must require repairs and renewals. Doubtless the granite pavement is more lasting than the asphalt, but we do not think either comes within the rule before stated. In this particular case it is conceded the plaintiff is only 8 years of age, and, according to the tables adopted in the life insurance law of this state, his expectation of life is 36 years and over. It can hardly be hoped that these pavements will last that long without renewal. It is true the taxes are large, but we cannot make the amount of them the criterion.

The demurrer was properly sustained, and the judgment is affirmed.
(All concur.)

LEWIS, Adm'r, etc., v. CARSON and others.

(*Supreme Court of Missouri*. February 28, 1887.)

EXECUTORS—SALE OF LAND—ACCOUNT—ADVANCES—DEBTS.

A., during his life-time, owned three-fourths of two and one-half acres of land in St. Louis, Missouri. After his death, B., who had been appointed administrator of A. with the will annexed, purchased the other one-fourth, paid off the mortgage thereon of \$6,000, and he and his sister, who were the residuary devisees, then sold the tract for \$17,750. A., in his account, credited himself with \$5,700 paid for the one-fourth interest, \$6,000 paid the special legatees, \$5,900 paid his sister, and \$7,500 paid himself as residuary legatees. Under the will, B. had power to sell real estate if necessary, to pay the special legacies, but he did not act under such power, or by order of the probate court. *Held*, that B. and his bondsmen were accountable for the proper application of the proceeds of the sale of the land.

Appeal from St. Louis court of appeals.

H. A. Haeussler and L. Wilcox, for appellant. F. T. Farish and Collins & Jameson, for respondents.

BLACK, J. This is a statutory proceeding, commenced in the probate court, against a removed administrator and his surety, to ascertain the amount of money and property in his hands. The probate court gave judgment for the plaintiff for the sum of \$8,752.55. A like judgment was rendered in the circuit court on an appeal prosecuted by the defendants. That judgment was reversed in the court of appeals, and the plaintiff appealed. John B. Carson died in 1866. By his will he gave to two step-daughters \$2,500 each, and to a nephew \$1,000. The residue of his property, real and personal, he devised and bequeathed to his brother, James O. Carson, and sister, Mrs. Postlewait. Ferguson, the nominated executor, declined to act, and letters of administration with the will annexed were granted to James O. Carson, one of the residuary devisees. He made two settlements, one in 1868 and the other 1869. The last was a final settlement, and at which time the administrator was by the probate court discharged. Ten years later, and at the suit of Mr. Glover, who then held a debt due from the estate to Mr. Ferguson, the final settlement was set aside in order that that demand might be allowed and classed. In 1883 the letters of administration to Carson were revoked for failure to give a new bond, as previously ordered by the probate court, and the plaintiff, public administrator, took charge of the estate.

The Ferguson demand, held by Glover, arose as follows: At the death of John B. Carson there was a suit pending against him by Ober and others, which was revived against the administrator. The suit was prosecuted through the state courts, and by the administrator appealed to the supreme court of the United States, resulting in a final judgment for Ober and others. Ferguson, who was a surety on the appeal-bond, paid a balance due on the judgment, and took an assignment of it to Mr. Glover, in whose name it was allowed by the probate court on the twenty-first March, 1879, in the sum of \$5,114.92. This is the only unpaid debt of the Carson estate, and is held by Ferguson, who is a surety on the administrator's bond, and he is a defendant in this proceeding.

The deceased left a large personal and real estate. James O. Carson had administered upon all the personal property of any value at the date of his second settlement, and, as we understand the record, the devisees have sold all the real estate. By the two settlements the late administrator stands charged with over \$30,000, and is credited with a larger amount, so that there appears from them to be due to him \$5,636.12. The deceased owned three-fourths of two and one-half acres of land on Grand avenue, in St. Louis, which was incumbered by a mortgage. James O. Carson, the administrator, purchased the other one-fourth, paid off the incumbrance, and he and his sister, the residuary devisees, then sold the whole of that parcel for \$17,750. The sale was not made under any power in the will, nor by order of the probate court. Still the administrator charged himself in his second settlement with the proceeds. Among other items he is credited with the following amounts: \$5,700 paid for the one-fourth interest in the two and one-half acres, and the incumbrance thereon; \$6,000 paid the special legatees; and \$5,900 paid to Mrs. Postlewait, and \$7,500 paid to himself, as residuary legatees. There are other credits for taxes paid on real estate, and the discharge of a mortgage on another parcel of land.

The principal question is whether the removed administrator must stand charged in this suit with the \$17,750, proceeds of the two and one-half acres, and the next relates to the matters of credit.

That the personal property constitutes the primary fund out of which the debts are to be paid is well settled. The principle runs through the whole administration law. But in case of a deficiency of personal assets, the real

estate must be resorted to, and the heir or devisee takes subject to the payment of the debts. The law makes it the duty of the executor to inventory all the real as well as the personal property. Under the order of the probate court, he may lease the real estate, collect the rents, prosecute actions for the recovery of the possession, discharge mortgages and other liens, and deliver the property to those entitled thereto when not needed for the payment of debts. Rev. St. §§ 70, 129, 130, 143. Although the administrator or executor takes possession of real estate, and collects the rents arising therefrom without an order of the probate court, he and his sureties on his bond must account therefor. This is no longer a debatable question in this state. *Gamble v. Gibson*, 59 Mo. 592; *Dix v. Morris*, 66 Mo. 514.

In the previous case of *State v. Scholl*, 47 Mo. 84, the administratrix, without any order of the probate court, sold a leasehold, the fixtures and goodwill of a saloon, and left the state without accounting for the proceeds, and it was held that, as she assumed control of the property, her unlawful acts could not be interposed to shield the sureties, and they were required to make good the loss to the estate. Now, in this case, the administrator took control of all of the real estate, and collected the rents. Assume that his accounts are correct except as to the charge for the proceeds of the two and one-half acres of land, and the credits for the one-fourth interest, and the amounts paid to the residuary devisees, still the estate would be indebted to him. The will provides that the three special legacies shall be paid as soon as practicable by the executor, and, if necessary, he is authorized to sell real estate to pay the same. The administrator did not sell under this power, as he might have done, nor did he procure an order of the court; but he and his sister, who were the residuary legatees and devisees, made the deed in their individual names, and then the administrator carried the proceeds into his accounts as administrator. This constituted in part the fund from which the mortgages and special legacies were paid. It must be taken that the purpose was to create a fund to be thus used by the administrator, for nothing to the contrary appears. If heirs of a deceased person were to raise money, and place it in the hands of the administrator, in order to pay debts of the estate, and thereby save a resort to the real estate, we cannot see why the administrator and his sureties would not be answerable for the proper application of the money. Although the money was not raised by virtue of his office as administrator, still the administrator received and applied it in his official capacity. He disregarded his duty in not settling under the will or by order of the court, but he received the proceeds, and disbursed them, under color of his office. Under the principle of the cases before cited, and that of *State v. Purdy*, 67 Mo. 94, we hold that the administrator and his sureties are accountable for the proper application of the proceeds of the sale of the two and one-half acres. It is immaterial whether he is charged with the whole of the proceeds, and credited with amount paid for the one-fourth, or charged simply with the net proceeds. The result is the same.

That it was the duty of the administrator to reserve enough money to pay the debts before making payments to the residuary devisees is clear. We do not understand the proposition to be denied. These payments to James O. Carson and Mrs. Postlewait, and the commissions on them, must be excluded from the credits. The administrator appears to have paid \$400 on account of his own notes given in payment of interest on an incumbrance on the Locust-street property. This was done when he would have had money in his hands but for the wrongful payments to himself and the other residuary legatees. These items must also be excluded.

The result of this is that the late administrator stands chargeable with an amount equal to that found by the circuit court, from which no appeal was taken by the plaintiff. It is therefore unnecessary to examine the other disputed items of the accounts. While this result is reached upon different

grounds from those taken by the probate and circuit courts, still the facts are not disputed, and there is no need of a new trial.

The judgment of the court of appeals is reversed, and the cause remanded to that court, with directions to affirm the judgment of the circuit court.

(All concur.)

CAKE v. WHITE.

(*Supreme Court of Missouri.* February 23, 1887.)

RECORDER'S COURT OF HANNIBAL, MISSOURI—JURISDICTION—REPLEVIN.

The recorder's court of the city of Hannibal, Missouri, was not abolished by the Missouri constitution of 1875; and by the act of March 8, 1873, to consolidate the acts relating to the charter of the city, express power is given to the recorder to hear and determine all actions for the recovery of personal property, where the amount in controversy does not exceed \$100.

Appeal from Hannibal common pleas court.

Action before the recorder of Hannibal city, Missouri, to recover personal property.

Fasley, Eby & Russell, for respondent. *W. P. Harrison*, for appellant.

BLACK, J. By the act of March 8, 1873, entitled "An act to consolidate into one act the various acts in relation to the charter of the city of Hannibal," express power is given to the recorder to hear and determine all actions for the recovery of personal property where the amount in controversy does not exceed \$100. Acts 1873, p. 249. The recorder's court was not abolished by the constitution of 1875, for section 1 of article 6 in express terms provides for the continued existence of municipal corporation courts, and hence the recorder's court did not cease to exist by force of section 42 of the same article. That court continued with its former jurisdiction, and the motion to dismiss the suit for want of jurisdiction was therefore properly overruled.

Judgment affirmed.

(All concur.)

BAKER v. KANSAS CITY, S. J. & C. B. R. Co.

(*Supreme Court of Missouri.* February 28, 1887.)

1. CONTRACT—MEETING OF MINDS—MUTUAL PROMISES—FURNISHING CARS TO TRANSPORT STOCK.

In an action against a railroad company to recover damages for failure to provide transportation for plaintiff's cattle, as agreed, plaintiff testified that he met S., the general freight agent, on May 27th, and told him he wanted 23 cars on May 30th, 8 at Mound City, and 15 at Maitland, for Chicago, and asked him if he could get them ready. S. said he could, and called the clerk to take down the order, and asked plaintiff if he would have the cattle there, and was told he would, and that he wanted the cars on Monday, so he could bed them. S. told him he could have the cars, and to see the agent at Mound City and Maitland, which plaintiff did. Held, that the evidence proved a valid contract, the consideration of which was the mutual promises of the parties.

2. PRINCIPAL AND AGENT—RAILROAD HOLDING OUT PERSON AS GENERAL FREIGHT AGENT.

Where a railroad company allows a person to hold himself out and act as its general freight agent for a year or more, it will be bound by his contract to furnish cars for transportation of the live stock of a party who deals with him as the agent of the company.

Appeal from circuit court, Holt county.

Crosby & Rusk and Peper, Rea & Son, for appellant. *Strong & Mosman*, for respondent.

BRACE, J. This action was brought to recover damages for the failure of defendant to furnish a certain number of cars, at certain stations, on a specified day. The petition alleges "that at the times hereinafter mentioned the

defendant was, and that it still is, a corporation organized and existing under and by virtue of the laws of the state of Missouri, and engaged in the business of transporting goods and chattels as a common carrier for hire; that on or about the twenty-seventh day of May, 1881, in consideration of the promise then and there made by plaintiff that he would drive to defendant's stations in the towns of Mound City and Maitland, Missouri, and have there on the thirty-first day of May, 1881, ready for shipment, and to be shipped, over defendant's railroad to Chicago, Illinois, cattle and hogs sufficient to fill 23 cars, the defendant undertook and agreed to provide, furnish, and have at its said stations of Mound City and Maitland, on the thirtieth day of May, 1881, 23 cars in readiness to receive and transport plaintiff's said cattle and hogs as aforesaid; that plaintiff, relying on said undertaking and agreement, drove his said cattle and hogs to said stations, and on said thirty-first day of May, 1881, had at said stations, ready for shipment and to be shipped over defendant's said railroad to Chicago, Illinois, cattle and hogs sufficient to fill 23 cars. Plaintiff further states that the defendant, disregarding its said undertaking and agreement, failed to provide, furnish, or have in readiness, at its said stations or either of them, on said thirtieth day of May, 1881, any cars in which to receive and transport plaintiff's cattle as aforesaid, and did not furnish or provide such cars until the third day of June, 1881, by reason of which said failure of defendant to provide said cars, at the time and places agreed upon as aforesaid, plaintiff's said cattle were detained at said stations, and were not and could not be shipped therefrom on their way to Chicago until the fourth day of June, 1881, to plaintiff's damage in the sum of \$3,000; and then specifies the particulars of the losses and damages by reason of defendant's failure. Defendant's answer was, in effect, a denial that defendant ever entered into the contract set out in the petition. After the testimony was all in, the court instructed the jury to find for the defendant. Thereupon plaintiff took a nonsuit, with leave, and afterwards moved to set the same aside, which motion being overruled he brings the case here by appeal, and assigns for error the action of the court in instructing the jury to find for the defendant.

The only question presented for our consideration on the record is, was there evidence introduced upon the trial tending to prove that defendant entered into the contract with plaintiff set out in the petition? It is claimed by the plaintiff that the contract was made with James F. Smith, the defendant's general freight agent; and unless there was evidence tending to prove that such contract was made with said general freight agent, and that he had authority to make the contract, there was no error committed by the trial court. The evidence of plaintiff is relied upon to show that the contract was made. He states, substantially, as follows, in chief: "On May twenty-seventh I came from home up to Holt county, and stopped in St. Joe. I met Mr. Smith. Mr. Smith was general freight agent of the K. C. & C. B. road. I told him I wanted twenty-three cars on the 30th, eight at Mound City, and fifteen at Maitland, for Chicago. I asked him if he could get the cars, and he said he could, and called a clerk to take down the order, and asked me: 'Would I have the cattle there?' I said I would, and wanted the cars on Monday, so that I could bed them. I told him I wanted the cars. He asked me if I could have the cattle there. I said I would. He then said I could have the cars, and called the clerk to take the order, and then told me to see the agent at Mound City and Maitland. I went to Mound City and Maitland, and spoke to them as Smith had requested me to do. I made the arrangements with Mr. Smith. I did not see any other party." And on cross-examination: "I told him (Smith) I wanted twenty-three cars at Mound City and Maitland,—eight at Mound City and fifteen at Maitland. Asked if I could have the cars. He said I could, and asked me if I would bring the cattle in. I said I would, and he called the clerk, and gave him the order. I told him I wanted the cars

May 30th, and that, if I had the assurance of cars, the stock would be there. He then said he would have the cars there. I am sure he made that expression. He then called the clerk to take down the number of cars. I suppose the clerk did take it down. Saw him write at Smith's dictation. Nothing further occurred at the time."

We think this evidence tends to prove the contract between plaintiff and Smith. It shows a concurrence of the minds of both parties at the same time, in a mutual undertaking having the same object in view, *i. e.*, the shipment of plaintiff's cattle to Chicago in defendant's cars; and, interpreted in the light of common sense and ordinary good faith, mutual and reciprocal promises from each to the other,—the promise of Smith being to furnish the cars at the stations named at the time stated, and the promise of plaintiff being to have his cattle at the stations named at the time stated, the promise of each being a good consideration for the promise of the other, and upon which each had a right to rely and act.

The inquiry remains, did the evidence tend to show that Smith had authority to make the contract? It appears unequivocally from the evidence that during the months of May and June, 1881, Smith was, and for a year and more prior to that date had been, defendant's general freight agent; that his office, as such, was at St. Joseph; that the city of Chicago is beyond the terminus of defendant's line of railroad; that its freight was carried to that city from Burlington Junction, Missouri, by the Chicago, Burlington & Quincy Railroad, by virtue of a traffic arrangement existing between these companies; that Maitland and Mound City are stations on defendant's railroad at some distance from St. Joseph, and from each other; that defendant had station agents at each of said stations; and tended to prove that the contract was made between plaintiff and Smith at the office of the general freight agent at St. Joseph; that on a previous occasion plaintiff's cattle had been shipped from Kansas City over defendant's road upon a contract made with Smith, and on a previous occasion plaintiff had applied by mail for cars to the office of the general freight agent. The foregoing is all the evidence relied upon in this case to show that Smith had authority to make the contract sued on. It may be conceded that there is nothing in the evidence tending to show that authority to make the contract sued on had been expressly conferred upon the agent Smith, or that, according to the general usage and custom of defendant's railroad, the making of such contract was within the apparent scope of his usual and ordinary duties; and if he had such authority it is because the defendant held him out, or permitted Smith to hold himself out, to plaintiff and the world as having such power. The contract itself shows that Smith held himself out to plaintiff as having the power to make the contract, and also that plaintiff believed that Smith did have such power. Was he justified in entertaining that belief, and acting upon it by reason of the apparent authority with which the defendant had clothed him? At the time this contract was made the defendant was holding Smith out to plaintiff and the world as its general freight agent, as it had been doing for more than a year immediately preceding that date. It had conferred upon him the title, and placed him in that position, in that department of its business, devoted to the transportation of freight from one place to another for hire, and in that particular line of its business it held Smith out to the plaintiff and the world as its general agent, as one authorized to transact all defendant's business in that particular line or department. In that line of defendant's business Smith was held out, not merely as having authority, but as having general authority; "and in such cases good faith requires that the principal should be held bound within the scope of the agent's general authority." Story, Ag. § 127.

When the principal puts the agent forward as a general agent, or places him in a position where others are justified in the belief that his powers are general, the restrictions that may be imposed privately on the agent will be

immaterial, except as between him and the principal, and can have no effect on the rights or remedies of third persons who have no knowledge of the restrictions or limitations upon his apparent authority, (*Graftus v. Land Co.*, 3 Phila. 447,) and there is no reason, and can be no legal principle, that will put the agent of a corporation on any different footing than the agent of an individual in regard to the same business, (*Adams M. Co. v. Senter*, 26 Mich. 78.) HENRY, J., in *Grover & Baker S. M. Co. v. Missouri Pac. Ry. Co.*, 70 Mo. 672, in distinguishing the powers of a special from those of a general freight agent, approved the doctrine laid down by SUTHERLAND, J., in *Burtis v. Buffalo & S. L. R. Co.*, 24 N. Y. 274, "that if the defendant had the power to make, or authorize the making of, such a contract, then the person acting as the general freight agent should be deemed to have been clothed with all the power to make contracts for freight, or in respect to the carrying and delivering of freight that the principal had." There is no question as to the power of the defendant to make the contract in this case, and it was a contract for freight,—a contract having for its object the shipment of plaintiff's stock over defendant's road for him, on a certain day, from two of its stations to Chicago. The leaving the cars and the cattle at those stations on that day was not the end and object of the contract, but means by which that object was to be accomplished. "A grant of general authority includes within it all the necessary and usual means of executing it with effect, and all the mediate powers necessary to the end,—an incident to the primary power,—although not expressly given." Story, Ag. § 58.

From the foregoing it appears that the defendant, having put Smith before the world as its general freight agent, clothed him with the apparent power to make all necessary contracts in the line of business committed to his general control. A necessity of that line of business being that shippers shall have furnished them at particular stations, at certain dates, cars for the shipment of their freight, (*Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 528,) he was clothed with apparent authority to make the contract sued on; and when plaintiff, having freight which he desired to ship on defendant's road from two of its stations on the same day, to a point beyond the terminus of defendant's line of road, needed cars for its transportation at such stations on that day, he had a right to assume that such general freight agent had authority to make the contract. On a former occasion, when plaintiff desired to ship this same stock on defendant's road, on application to Smith it was shipped. The evidence fails to show that any other officer or agent was held out as authorized to make the contract. Plaintiff had no right to assume that either of defendant's station agents could make a contract for cars at the station of the other, or that either or both of them had such authority as would enable them to have the cars at both stations at the same time; so that on the face of the transaction Smith not only had apparent authority to make the contract, but there was no ground for an assumption on the part of plaintiff that any other officer or agent of defendant had that authority. It follows that, if the defendant had imposed any limitations upon this apparent authority of its general freight agent, such limitations could not affect the plaintiff unless brought to his knowledge, and this was a question of fact to be submitted to the jury; and the evidence in the case tending to show that Smith, the general freight agent, had authority to make the contract, and that he did enter into such contract with plaintiff, and the failure of defendant to furnish the cars for the shipment of plaintiff's stock, to his damage, having been satisfactorily shown, we think the court committed error in taking the case from the jury; for which cause the judgment is reversed, and the case remanded for new trial.

BECKNER v. RULE.

(Supreme Court of Missouri. February 28, 1887.)

HOMESTEAD—INCREASE IN VALUE—REASSIGNMENT.

Where a homestead has been set aside to a debtor, and, in course of time, it increases in value so as to be worth more than the statutory limit, it may be reassigned and the excess applied to the payment of his debts.

Appeal from circuit court, Pike county.

W. H. Biggs, for plaintiff in error. *Smith & Cook*, for defendant in error.

BLACK, J. The plaintiff is a judgment creditor of the defendant, and the defendant owns a homestead in the city of Louisiana, consisting of a house and one lot. This is a suit under section 2698, Rev. St., to subject the property to sale because it exceeds the value of \$1,500, and a severance of the homestead would greatly depreciate the value of the property. In 1879 the defendant made a voluntary assignment for the benefit of his creditors, reserving his exemptions and homestead rights. The property in question was then set off to him as a homestead by proper proceedings in the circuit court. Since then, by natural increase, the property has come to be worth at least \$2,500. Plaintiff obtained his judgment in 1882, but it does not appear when the debt was created. The defendant contends, and the circuit court held, that, as the property was set off for a homestead in 1879, no part of it could be thereafter reached by creditors, though its value now greatly exceeds that fixed by law; and this ruling presents the only question in the case. The statute exempts the homestead of every housekeeper or head of a family from attachment or execution, except that it shall not exceed a designated quantity of land or \$1,500 in value. In case the property is levied upon, the sheriff is required to appoint appraisers to fix the location and boundaries. In case a severance would depreciate the value of the property, various provisions are made, and among them the court is authorized to order a sale of the whole premises, and to make an apportionment of the proceeds. There is not a provision in the statute which looks to the conclusion that, when a homestead is once set off, it cannot be revalued. Under the ruling of the circuit, a homestead once assigned might grow to be of three or four times the amount fixed by law, and yet the whole be out of the reach of the creditors. The law does not contemplate such results. The debtor may have a homestead, but he must take and hold it subject to the fluctuations in value. If, in course of time, it should increase in value so as to be worth more than the statutory limit, it may be assigned again, and the excess applied to the payment of his debts. If the assigned homestead should depreciate in value, he may add to it, and claim a revaluation himself. A debtor, being unable to pay his debts, has a right to a homestead not to exceed a designated value; and, as said in *Stubblefield v. Graves*, 50 Ill. 103, by securing one to him of that value his rights are satisfied, and the requirements of the law fulfilled.

The judgment is reversed, and the cause remanded.

(All concur.)

STATE and another v. WHARTON and others. SAME v. DE MOVILLE and others. SAME v. GRIENER and others. SAME v. YOUNGLOVE. SAME v. CAMBELL and others.

(Supreme Court of Tennessee. February 21, 1887.)

1. INTOXICATING LIQUORS—SALE BY DRUGGISTS—COMMUNION AND MEDICINAL PURPOSES—TENNESSEE ACT OF 1870, (CODE TENN. § 696.)

Under the provisions of the Tennessee act of 1870, (Code Tenn. § 696,) no druggist could sell vinous or alcoholic liquors without taking out a license therefor, except for communion purposes, or for medicinal purposes upon a physician's prescription.

2. SAME—TENNESSEE REVENUE ACT OF 1883.

The Tennessee revenue act of 1883, providing that the "provisions of the act should apply to all druggists," did not subject a druggist to the payment of the tax imposed upon retail liquor dealers unless he sold liquors, contrary to the provisions of the act of 1870, for other than communion purposes, or for medicinal purposes upon a physician's prescription.

3. SAME—TENNESSEE ACT OF 1885.

Under the Tennessee act of 1885 it is not lawful for a druggist to sell spirituous or vinous liquors without a license, for any purpose whatever, "except wine for sacramental purposes."

4. SAME—PENALTIES FOR SALE WITHOUT LICENSE—CIVIL LIABILITY.

The failure to take out a license by a druggist selling vinous or spirituous liquors, contrary to the acts of Tennessee of 1870 and 1885, subjects him to the payment of the tax at the suit of the state, as well as to an indictment for each sale.

5. SAME—SUIT BY STATE IN EQUITY—DISTRESS.

The right to this penalty can only be enforced by strict pursuance of the statutory remedy given for its collection; and where the state has elected to sue for the tax imposed by law upon a retail liquor dealer, as a debt in the chancery court, it cannot recover the penalties which might have been recovered by pursuing the statutory remedy of distress.

6. WITNESS—CRIMINATING HIMSELF—PROSECUTION BARRED BY LIMITATION.

In a suit by the state against a druggist to collect a tax imposed by law upon retail liquor dealers, the sale of liquors without a license being a misdemeanor, the defendant cannot refuse to testify as to the sales made by him on the ground that he would criminate himself, when the prosecution for the misdemeanor involved in such sale is barred by the statute of limitations.

7. SAME—EXEMPTION, HOW AVAILABLE.

In order to be available, a witness must, at the time he is examined, claim his exemption upon the ground that his answer would criminate himself. Where only a general objection is made, and the witness is not shown to have answered only because he was compelled, his answer cannot afterwards be suppressed.

Appeal from chancery court, Davidson county.

Demoss & Malone and *East & Fogg*, for appellants. *The Attorney General* and *J. B. Daniels*, for the State.

LURTON, J. These five separate causes, inasmuch as they all turn upon the same legal questions, have been heard together. The defendants are retail druggists doing business in the city of Nashville. The bills are filed by the state and the county of Davidson for the purpose of collecting the privilege tax imposed by law upon retail liquor dealers for the years 1881, 1882, 1883, 1884, and 1885. The bills charge that the defendants, during each of these years, sold spirituous and vinous liquors without taking out the license, and paying the tax imposed upon retail liquor dealers, and that they are indebted for the amount of such tax, and for the penalties and interest, imposed by law. The defendants, in effect, insist that they are not liquor dealers in the sense of the law, and that, having taken out license and paid all the taxes imposed upon them as merchants, that they are not liable to the tax upon liquor dealers; that these sales of liquors have been within the legitimate scope of their business as retail druggists, and only for medicinal uses.

The cases involve the determination of the question as to how far a retail druggist may handle or deal in spirituous or vinous liquors without subjecting himself to the penalties for the violation of the law prohibiting the sale of intoxicating liquors without the license required by law. That whisky, brandy, and wine are included in the list of remedial agents by pharmacopoeia and works upon *materia medica*, does not at all determine the question. That it is within the power of the state to regulate the sale of liquor, and confine its sale to those specially licensed by law, is not controverted by the learned counsel who represent defendants. It is clearly within the police power of the state to determine who, and under what circumstances, such sales shall be made. Says Judge Cooley on this question: "Those statutes which regulate or altogether prohibit the sale of intoxicating drinks as a beverage have also been by some persons supposed to conflict with the federal constitution."

Such of them, however, as assume to regulate merely, and to prohibit sales by other persons than those who are licensed by the public authorities, have not suggested any serious question of constitutional power. They are but the ordinary police regulations, such as the state may make in respect to all classes of trade or employment." Cooley, Const. Lim. side page 581.

This brings us to the inquiry as to whether the legislation of this state has in any way defined the extent to which druggists might deal in spirituous or vinous beverages. The first statute having reference to druggists in this connection is the act of June, 1870, which is as follows, (T. & S. Code, § 696a and b:)

"Section 1. Be it enacted," etc., "that hereafter all regularly licensed druggists in this state, without obtaining an additional license therefor, be, and they are hereby, authorized to furnish vinous liquors to any church officer to be used for sacramental or communion purpose, *or to fill the prescriptions of a regular practicing physician prescribing spirituous or vinous liquors as a medicinal remedy.*

"Sec. 2. That the sale or gift of any spirituous, vinous, or malt liquors, by any druggist in this state, *except as provided in the first section of this act*, shall be *unlawful*, and subject the person so offending to all the *penalties now prescribed by law for selling liquor without license.*"

It is unnecessary to determine whether, before this statute, druggists had a legal right, under the ordinary license of a merchant, to sell liquors even as a medicine. This act clearly defined and limited the extent to which they could thereafter deal in such liquor, without taking out, in addition to their license as druggists, a license as retail liquor dealers. In clear and positive language they were permitted to sell wines and spirits in just two cases,—to a church officer for communion purposes, and upon the prescription of a physician as a medicinal remedy. The sale or gift for any other purpose, or upon any other authority, is distinctly declared unlawful. The statute having prohibited all sales or gifts except as expressly provided, no other exception can be grafted on. The sale for mechanical, scientific, or medicinal uses, except upon a physician's prescription, became clearly unlawful, and an infringement upon the business of the licensed retail liquor dealer. A sale, even for medicinal purposes, unless upon prescription, was as unlawful as for any other use, unless such sale was made by a licensed liquor dealer. Statutes similar to this are in existence in a number of states, and sales by druggists for medical purposes held clearly unlawful. *State v. Whitney*, 15 Vt. 298; *State v. Brown*, 31 Me. 522; *Wright v. People*, 101 Ill. 126; *Woods v. State*, 36 Ark. 36; *State v. Ferguson*, 72 Mo. 297. A sale for necessary medical uses by one not having a license was held unlawful by the supreme court of this state. *Philips v. State*, 2 Yerg. 458.

The exercise of a privilege for which a license is required, and upon which a tax is imposed, subjects the person to the payment of the tax, and to punishment as a misdemeanor in most cases. This is clearly so where liquor is sold without license. The liability of defendants to pay the tax placed upon retail liquor dealers became absolute when they made such sale, whether specially mentioned in the annual revenue bills of the state or not. From 1870 down to 1882 druggists are not specially alluded to in the revenue legislation, but in 1882 the revenue act of 1881 was amended in these words: "Be it further enacted, that section four of said act be so amended as to make the paragraph providing for the taxation of liquor dealers apply to all druggists who retail liquor under existing laws." The contention of the state is that druggists who should thereafter sell liquors for communion purposes, or upon the prescription of a physician, should pay a liquor dealer's tax. We do not think this the true meaning of this amendment.

The act of 1870 had prohibited the sale, by druggists, of liquors, except in two cases provided for by the act, without obtaining license. This amend-

ment simply provides that if druggists shall sell liquors other than as provided or permitted by the act of 1870, and under the existing laws applicable to retailing liquors, that they shall pay the same tax as other retail liquor dealers. As before stated, this legislation and that of 1883 was wholly unnecessary to subject druggists who sold other than as permitted by the act of 1870 to the tax imposed on retail liquor dealers. The revenue act of 1883, after providing the amount of tax imposed on retail liquor dealers, concludes as follows: "*And the provisions of this act shall apply to all druggists.*" The literal construction of this act would subject druggists to the payment of the tax upon liquor dealers, whether they sold liquor or not. Was this the intention of the legislature? We do not think so. The druggist was already subjected to the privilege tax imposed upon all merchants, and we cannot believe the legislature intended that he should pay another privilege tax unless he exercised such additional privileges. This court, speaking through Judge COOPER, in the case of *Bell v. Watson*, 3 Lea, 328, said: "A safe and sound rule of construction of revenue laws is to hold, in the absence of express words disclosing a different intent, that they are not intended to subject the same property to be twice charged for the same tax, nor the same business to be twice taxed for the exercise of the same privilege." This is the plain, common-sense view of the question, and, applying it to the legislation under consideration, we hold that the act of 1883 did not subject a druggist to the payment of the tax imposed upon retail liquor dealers, unless he sold liquors contrary to the provisions of the act of 1870.

We now come to the act of 1885 providing revenue for the state. This act, after fixing the amount of tax imposed upon retail liquor dealers, concludes as follows: "And the above tax on liquor dealers applies to all druggists, *except in case of wine for sacramental purposes.*" The concluding section of this revenue act of 1885 is as follows: "Sec. 8. Be it further enacted, that all laws or parts of laws in conflict with this act be, and the same are hereby, repealed." The meaning of this act is plain. All druggists who shall sell liquors are required to pay this tax, and comply with the law regulating the sale of liquor, if they shall sell liquor, "*except for sacramental purposes.*" If they do not sell for any other than sacramental purposes, they are not subject to this tax. The necessary effect of this act is to repeal so much of the act of 1870 as permitted a druggist to sell upon the prescription of any regular practicing physician for medicinal purposes. The act of 1870 is in direct conflict with this act to this extent, and is therefore, to this extent, repealed both by necessary implications as well as by the terms of the last section of the act repealing all laws or parts of laws in conflict. The result is that, from and after the passage of this act of 1885, no druggist could sell wines, brandies, whisky, or any other intoxicating beverage without he paid the tax, and took out the license of a retail liquor dealer, except he sold wines for sacramental purposes. This cut off absolutely the sale upon prescription of a physician, which we have seen, when made in good faith, had been permitted without additional license. It follows that any druggist thereafter selling for other than sacramental uses subjected himself to the payment of this additional license tax, as well as to all the penalties prescribed by law for the sale of liquors without license. The hardship of such restriction upon the business of druggists furnishes no reason for ingrafting upon the law exceptions other than that expressly named in the law. Sales for medicinal purposes, but not upon the prescription of a regular physician, were clearly unlawful under all the legislation from 1870 down, and by this act of 1885 sales upon prescription are likewise made unlawful; for this tax upon retail liquor dealers is imposed upon all druggists who sell liquors for any purpose or use, "*except in case of wine for sacramental use.*" The very frequent and notorious evasions of the privilege accorded of selling upon prescription, undoubtedly led to the act of 1885. No exception is made in the law save a sale for sacramental purposes.

The only course for this court is to enforce the law as the legislature has made it, and not defeat its execution upon the hypothetical theory that public policy requires exceptions to be made which are not found in the act.

Said the supreme court of Illinois in a similar case: "If the legitimate business of a druggist or other tradesman necessarily involves the retail of liquors in small quantities, we see no reason founded upon public policy or otherwise why they should not, like other dealers, pay for the privilege of doing so. This construction, moreover, compels all persons who engage in the traffic to equally contribute to the support of the local government. The contrary construction would be discriminating between individuals engaged in the same business, with respect to the burden of the government, without any sufficient reason for doing so." *Wright v. People*, 101 Ill. 126.

The supreme court of Alabama said, in a case involving much the same question: "It was contended, under this state of facts, that, if the appellant gave or sold the bitters in question as a prescription and in good faith, he will not come within the prohibition of the statute, and should be acquitted. We know of no principle of law which could authorize us to incorporate so important an exception into the statute." *Carson v. State*, 38 Amer. Rep. 346.

Chief Justice SHAW, in answer to an argument that a sale strictly for medicinal purposes was allowable, said "that, if it were sufficient to avoid the prohibition of the statute for the purchaser to say that the spirit was intended for medicine, it would in effect repeal the statute. But the decisive answer is that the legislature has made no such exception." *Com. v. Kimball*, 24 Pick. 366.

The act of 1870, and the legislation subsequent to its enactment, has more than once been construed by this court. In the case of *Harper v. State*, 3 Lea, 211, in construing the law as it stood before the act of 1885, Judge TURNEY said concerning the act of 1870: "Taking the two sections together, and reading as the legislature intended them, their interpretation is that selling (by a druggist) or giving spirituous, vinous, or malt liquors, except upon the prescription of a practicing physician, shall subject the offender to all the penalties now prescribed by law for selling liquor without license." In the case of *Newman v. State*, 7 Lea, 617, this court, speaking again through Judge TURNEY, held that druggists are within the terms of the act requiring all persons selling liquor to take an oath not to mix or adulterate the same, and are indictable for selling without taking the oath. The objection that druggists could not be within the meaning of the act requiring dealers in liquors to take the oath against adulterations, because they are necessarily required to mix and compound, is fully met by the sixth section of the act of 1859-60, requiring that "it shall not be so construed as to prevent druggists, physicians, and persons engaged in the mechanical arts from mixing or adulterating liquors for medical or mechanical purposes." 7 Lea, 618. These decisions are referred to for the purpose of showing that the construction of the law applicable to the sale of liquors by druggists since the act of 1870 is in harmony with the view we have announced.

The conclusions reached by us upon a view of all the legislation bearing upon this question are—(1) That no druggist, simply because he uses alcoholic or vinous liquors in the compounding of tinctures, essences, or other preparations, is therefor liable to the tax of a liquor dealer. (2) That no druggist selling compounds, tinctures, essences, perfumery, or other preparation, of which either alcohol, wine, or other liquor is a component part, subjects himself to this tax; unless such sale is a mere evasion of the law,—a sham and subterfuge to avoid the law concerning sales of liquors. The contrary of these propositions has not been pressed by either the very able and industrious special counsel representing the state or by the attorney general, nor are the bills framed for any such purpose. No sound mind could conceive that either the sale or preparation of the ordinary remedies known to the pharmacopœia, when

such preparations are not intended as an evasion of the law, makes a druggist, a liquor dealer, or subjects him to such tax. (3) Prior to the act of 1885 a druggist might in good faith sell wine for communion purposes, or fill the prescription of a regular practicing physician for either alcoholic or vinous liquors, but at no time since the act of 1870 has it been lawful for him to sell without such prescription, even for medicinal purposes. (4) Since the act of 1885 it has not been lawful for a druggist to sell spirituous or vinous liquors for any purpose whatever, or upon prescription, "except wine for sacramental purposes." (5) The sale of liquors contrary to the act of 1870 and of the act of 1885 subjected all druggists to the necessity of taking out the license of a retail liquor dealer, giving bond as such, and taking the oaths required of such dealers. (6) The failure to take such additional license by a druggist selling contrary to the acts of 1870 and 1885, subjects him to the payment of the tax upon suit of the state, as well as an indictment for each sale.

We come now to the application of the law as thus construed to the facts in these cases. Before this can be done a question of evidence must be disposed of. In each case the state has called as a witness one or more of the defendants, and they have been examined at length as witnesses for the state as to the character of their sales of liquor during each of the years of 1881, 1882, 1883, 1884, and 1885. It is insisted that inasmuch as the unlawful sales of liquor subject the defendants to indictment, that the defendants cannot be compelled to criminate themselves by answering. This objection is a valid objection so far as the principle of law invoked is concerned; but the objection is not applicable to the facts of this case, nor was it properly raised. The sale of liquor without license was a misdemeanor, and the sales about which defendants were examined were barred by the statute of limitations at the time defendants were examined. Not being liable to a prosecution for the misdemeanor about which they were examined, the objection is bad. Whart. Ev. § 540. The objection made by defendants, as shown by the record, is a general objection to the question. No reason is given. In order to be available, the witness must himself, at the time he is examined, claim his exemption, and upon the ground that his answer would criminate himself. This was not done. A general objection was made. The witness is not shown to have answered only because compelled. Only in such case could the answer be afterwards suppressed. Whart. Ev. § 535, and authorities cited. The evidence of defendants is therefore competent, and the action of the chancellor in overruling their objection was correct.

It is unnecessary to distinguish these cases one from another; for it is clearly shown that each of defendants have, in each of the years 1881, 1882, 1883, 1884, and 1885, openly sold both spirituous and vinous liquors without any regard to having a prescription of a regular practicing physician. It is true that, to some extent, an effort was made to sell only for medicinal purposes, but such sales, before the act of 1885, were valid only when made in good faith and upon prescription. Each of defendants procured the liquor dealer's license required by the United States government, and paid the tax required by federal law. Doing the character of business they did, they were equally bound to take out the liquor dealer's license required by the state, and pay to it the tax required from retail liquor dealers. Failing to do this, they are each liable for the full amount of the tax of 1881, 1882, 1883, 1884, and 1885, both for the state and county; and for this a decree will be rendered, with interest from time each tax was due. The state having elected to sue for this tax as a debt, and in the chancery court, we think it cannot recover the penalties which might have been recovered by pursuing the statutory remedy of distress warrant. These penalties can only be enforced by strict pursuance of the statutory remedy given for their collection.

The decree of the chancellor will be affirmed, except as to the tax of 1881, and the interest upon each tax. Defendants will pay all costs.

MARR v. WESTERN UNION TEL. CO.

(Supreme Court of Tennessee. March 8, 1887.)

1. TELEGRAPH COMPANIES—NIGHT MESSAGES—LIMITING LIABILITY.

A contract by a telegraph company limiting its liability for sending unrepeatd messages at night, for delivery next day, at half the usual day rates, on condition that they shall not be responsible for damages for a sum in excess of 10 times the cost of transmission, is invalid, so far as the damage is a result of the negligence of the company or its servants.¹

2. SAME—DAMAGES—ADVANCE IN STOCK.

Plaintiff delivered to defendant, a telegraph company, a message, to be transmitted to a broker, to buy for him 1,000 shares of certain stock, but the message as sent was for 100 shares. Plaintiff knew of the error the day after the 100 shares had been purchased, but did not renew his order until several days after the stock had advanced. *Held*, that for the advance occurring after the plaintiff could have remedied the mistake the defendant was not responsible.

Appeal from circuit court, Davidson county.

F. C. Maury, for Marr. *J. W. Bonner*, for W. U. Tel. Co.

LURTON, J. The plaintiff, a banker and broker doing business in Nashville, delivered to the agent of the defendant company a message to be transmitted to Messrs. Pearl & Co., New York. This message was written upon the usual form or blank prepared for that purpose by the defendant, and known as a night message. As delivered, it was as follows:

"Form No. 45.

"THE WESTERN UNION TELEGRAPH COMPANY.—Night Message.

"The business of telegraphing is subject to errors and delays, arising from causes which cannot at all times be guarded against, including sometimes negligence of servants and agents whom it is necessary to employ. Errors and delays may be prevented by repetition, for which, during the day, half price extra is charged, in addition to the full tariff rates. The Western Union Telegraph Company will receive messages, to be sent without repetition, during the night for delivery not earlier than the morning of the next ensuing business day at reduced rates, but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays, for non-delivery of such messages happening from any cause, beyond a sum equal to ten times the amount paid for transmission, and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message. Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery, the sender hereby guaranteeing payment thereof. The company will be responsible to the limit of its lines only for messages destined beyond, but will act as the sender's agent

¹ A contract relieving a common carrier for liability for its own negligence, or that of its servants, is invalid, *The Surrey*, 26 Fed. Rep. 791; *The New Orleans*, Id. 44; *Rintoul v. New York Cent. & H. R. R. Co.*, 17 Fed. Rep. 905; *May v. The Powhatan*, 5 Fed. Rep. 375; *Ormsby v. Union Pac. R. Co.*, 4 Fed. Rep. 706; *Grogan v. Adams Exp. Co.*, (Pa.) 7 Atl. Rep. 134; *Rosenfeld v. Peoria, D. & E. Ry. Co.*, (Ind.) 2 N. E. Rep. 344; *Moulton v. St. Paul, M. & M. Ry. Co.*, (Minn.) 16 N. W. Rep. 497; *Black v. Goodrich Transp. Co.*, (Wis.) 13 N. W. Rep. 244; *Sprague v. Missouri Pac. Ry. Co.*, (Kan.) 8 Pac. Rep. 465; or of liability for any degree of such negligence, *Ormsby v. Union Pac. Ry. Co.*, 4 Fed. Rep. 706.

to deliver the message to connecting companies or carriers if desired, without charge and without liability.

THOS. T. ECKERT, General Manager.
"NOVIN GREEN, President.

"Receiver's No.		Time Filed.		Check.
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"Send the following night message subject to the above terms, which are hereby agreed to:

"_____, 188—.

"To Pearl & Co., Bankers, 16 Broad St., New York: Buy one thousand shares Memphis & Charleston.
THOS. S. MARR."

This message, as received, read as follows: "*Buy one hundred shares of Memphis & Charleston.*"

This number of the desired shares, they being, as the proof shows, of the par value of \$25 each, were purchased at 62 cents upon the dollar. The market rose rapidly on the day of this purchase, and closed at about 67, and remained at about that figure the day following. From that time it steadily advanced, until within three weeks it had reached the price of about 90 cents. The plaintiff was not advised of the error in his message until the day following the purchase of the 100 shares, but he did not renew his order for several days, by which time the stock had made a further advance, so that the stock actually cost him about \$3,000 more than it would have cost him but for the error in his message.

Plaintiff instituted suit in the circuit court to recover damages upon the ground of the negligence of the defendant in the transmission of his message. The cause was tried by the circuit judge without a jury, who found that the mistake was due to the negligence of the agent of the defendant at the receiving office in Nashville, but that, under the printed regulations of the company contained on the blank used by plaintiff, he was limited in his recovery of damages to a sum not exceeding 10 times the price paid for transmission, which was 30 cents; and he accordingly gave judgment for only \$3. From this there is an appeal. The commission of referees report that the stipulations or agreement contained in the printed blank are invalid in so far as they limit the recovery of plaintiff for damages resulting from the negligence of the defendant or its servants. They therefore recommend judgment here for the difference between the market value of 900 shares on the day the message was received and its value on the next day. Exceptions open the case for our consideration.

The evidence shows that this message was written plainly and distinctly. The blunder was undoubtedly the result of the careless and negligent misreading of the dispatch by the operator whose duty it was to transmit this message from the receiving office. The line between Nashville and Cincinnati, the point to which it was sent to be repeated to New York, was a continuous one. The instruments in use at both offices are shown to have been in good repair, and the line uninterrupted. No atmospheric or other electrical disturbance is attempted to be shown as having affected the correct transmission of the message if it had been correctly stated. Yet this message reached Cincinnati as, "buy one hundred shares," etc. The word "thousand" had been converted into "hundred." No effort to account for this has been made. It is clear, in such case, that this blunder was made by the transmitting operator at the receiving office. The message was either willfully mis sent, or was the result of the negligent missending of the operator. If started right, it is not pretended that it would not have reached the repeating office correctly. At least no effort has been made to account for such a noticeable change of one word into another so entirely different, over a continuous line of wire, when the instruments and wire were in repair, and efficient, by any cause

not within the control of the defendant. The trial judge and the commission of referees concur in finding that the mistake was due to negligence of the transmitting operator at Nashville. In this finding we have no doubt they were correct.

What damage shall the plaintiff recover? The defendant company insist that the stipulation upon the face of the blank form used and signed by the plaintiff, "that the sender will not claim damages for error or delays or non-delivery of such message, *happening from any cause*, beyond a sum equal to ten times the amount paid for transmission," is a reasonable and binding agreement, by which the recovery is limited even where the damage was the result of negligence. It must be assumed that the plaintiff knew of the terms and conditions contained upon the printed blank on which he wrote his message. His denial of actual knowledge cannot avail him, for it was his own fault if he is ignorant. He is estopped to say that he was not aware of the agreement on the blank signed and used by him. *Dillard v. Louisville & N. R. Co.*, 2 Lea, 288.

Assuming, therefore, that the plaintiff assented to the conditions contained in the agreement under which this message was sent, we reach the question as to the validity of any agreement by which the defendant company seeks to relieve itself from full liability for all the consequences of its own negligence, or that of its agents and servants. The question presented is of the greatest importance, and in this state is wholly undecided. We have had the benefit of very full and very able arguments from the opposing counsel, and their industry and learning have been of the greatest aid to us in arriving at a conclusion.

The science of telegraphy is of such recent discovery that the courts have had some difficulty in settling upon the principle of law applicable to the relations of telegraph companies to the public. Some of the earliest cases held that they were common carriers, and that the principle of law applicable to such carriers applied equally to them; or, at least, if not strictly common carriers, that they were governed by the same law. *Mac Andrew v. Electric Tel. Co.*, 17 C. B. 3; *Parks v. Alta California Tel. Co.*, 13 Cal. 422. Common carriers, by the common law, were held liable, not only for losses occurring through their negligence, but for loss occurring through any cause other than from the act of God or the public enemy. This extraordinary degree of responsibility, making them liable as insurers, was founded upon public policy. Their existence was of the utmost importance to the public; and, when once established, the employment of them by the general public was deemed a necessity. The unlimited opportunities offered them, by their exclusive possession of freights, by negligence or collusion or fraud to damage, delay, or rob, with practical immunity from detection, is stated to be the reason why considerations of public policy demanded so high a degree of liability. These reasons do not exist in regard to telegraph companies. They are not in any sense carriers of goods. They do not, therefore, have any exclusive possession of goods, and the reasons which make a carrier an insurer of the safe delivery of goods intrusted to him are manifestly not applicable to one whose business it is to transmit, by means of electricity, intelligence, and not goods. It is therefore well settled that they are not common carriers, by the almost unbroken current of authority. It can hardly be said that they are bailees in any true sense, inasmuch as they are not intrusted with goods for any purpose, either carriage, use, or repairs. They have been called common carriers of messages or intelligence; but this, while appropriately designating both their public character and the business they undertake, does not necessarily bring them within the law applicable to a carrier of goods.

There is, however, much analogy between the common carrier and the telegraph company. Both are in the exercise of a *quasi* public occupation, and both have by the public conferred upon them valuable franchises, and both

may and do invoke the high prerogative of exercising the state's right of eminent domain. The obligation to serve the public without discrimination, and for reasonable charges, is imposed upon both occupations. The use of the facilities afforded by telegraph companies has become as much of a public necessity as were common carriers at the same relative stage of development. It may, indeed, be said that, both commercially and socially, the telegraph line is now a public necessity. By statute law in this state, the public nature of the occupation of telegraph companies is fully recognized. They are given the right to set up their lines along the public roads and streets. They may appropriate private property to their uses, by the exercise of the right of eminent domain upon the terms of the statute. They are required to give preference to public messages in time of war or civil commotion, or when the arrest of criminals is sought. They are required to transmit messages in order of their delivery, *correctly*, and without unreasonable delay. They are required to receive and transmit messages from other telegraph companies. The willful injury of their lines is made a misdemeanor. Their occupation is therefore, in every sense, deemed as much of a public character as that of the common carrier. Code, M. & F. §§ 1535-1548.

In view, therefore, of the great importance their business is to the public, and the necessity the public is under of employing them, it is clear that they must be held to a degree of diligence commensurate with the employment they have undertaken. We do not think, in view of the novel and peculiar character of the business conducted by them, that they can or ought to be held liable as insurers. It is, however, equally clear that considerations of public policy demand that they shall be held responsible for a very high degree of diligence. In this state it has been held that a common carrier may, by special contract, based on a sufficient consideration, limit his *common-law* liability, but that he cannot stipulate for exemption for the consequences of *his own negligence, or that of his servants*. *Dillard v. Louisville & N. R. Co.*, 2 Lea, 288; *Coward v. East Tennessee, V. & G. R. R.*, 16 Lea, 224. This inability to contract against his own negligence is based upon the ground that "he exercises a public employment, and that diligence and good faith in the discharge of his duties are essential to the public interest, and public policy forbids that he should be relieved by special agreement from that degree of fidelity and diligence which the law has exacted in the discharge of his duties." *Coward v. East Tennessee, V. & G. R. R.*, 16 Lea, 229. The same reasons which make void the contracts of a common carrier by which he seeks to be wholly exempt from the consequences of his own negligence, or that of his servants, apply with equal force to similar agreements, contracts, or stipulations or rules or notices, by which a telegraph company seeks immunity from all responsibility for its negligence. The great weight of the decided cases clearly establishes this proposition. *Sweatland v. Illinois & M. Tel. Co.*, 27 Iowa, 432; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Manville v. Telegraph Co.*, 37 Iowa, 214; *Telegraph Co. v. Graham*, 1 Colo. 280; *Telegraph Co. v. Blanchard*, 68 Ga. 299; *Tyler v. Telegraph Co.*, 60 Ill. 421, 74 Ill. 168; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; *Trus v. Telegraph Co.*, 60 Me. 9; *Passmore v. Telegraph Co.*, 78 Pa. St. 238; *Candee v. Telegraph Co.*, 34 Wis. 471.

But it is insisted that if it be conceded that a telegraph company cannot by contract *exempt itself absolutely from all liability for negligence*, yet that it may, for a sufficient consideration, limit its liability to a certain pecuniary amount, when various grades of liability are offered, including full responsibility, and at various rates of charge. In the case now under consideration the defendant company offer in evidence the terms and conditions upon which they send messages other than the half-rate night message. The stipulations are contained upon the usual blanks furnished for day messages, and are as follows:

"Form 2. THE WESTERN UNION TELEGRAPH COMPANY.

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays the sender of a message should order it *repeated*; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of a *repeated* message, beyond fifty times the sum received for sending the same unless especially insured; nor, in any case, for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of message to any point on the lines of this company can be *insured* by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeating messages, viz.: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employe of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and, if a message is sent to such office by one of the company's messengers, he acts, for that purpose, as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made, to cover the cost of such delivery. The company will not be liable for damages in any case where the claim is not presented in writing, within sixty days after sending the message.

"THOS. T. ECKERT, General Manager.

"NOVIN GREEN, President.

"Receiver's No. | Time Filed. | Check.

"Send the following message subject to the above terms, which are hereby agreed to.

"_____, 188—."

If it be assumed that the plaintiff in this case was offered a choice of terms upon which he might send his message, and that he selected the night-message contract by preference, we are then called upon to determine whether the regulations, rules, and stipulations under which this company propose to do business for the public are just and reasonable limitations upon the responsibility imposed upon them in the absence of agreements and contracts. The courts of many of the states of this Union have held that a common carrier cannot, by any description of contract, rule, or regulation, limit his responsibility for full damages resulting from his own negligence, or that of his servants or agents. *Southern Exp. Co. v. Moon*, 39 Miss. 822; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13 N. W. Rep. 244; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Kansas City R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. Rep. 821; *Moulton v. St. Paul R. Co.*, 31 Minn. 85, 16 N. W. Rep. 497. And this is probably the law as settled in this state. *Coward v. East Tennessee, etc., R. Co.*, 16 Lea, 226.

But, on the other hand, many very respectable courts, including the supreme court of the United States, have held that "where a contract of carriage is fairly made with a railroad company, agreeing on a valuation of the property

carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151. In this latter case the court say that the test to which every limitation of the common-law liability of the carrier should be subjected is "*its just and reasonable character.*"

If it be assumed, for we do not determine this question, that a telegraph company may, by fair, just, and reasonable regulations, limit the amount of damages to which it may be subjected by reason of negligence, then will the terms and conditions upon which this company propose to conduct its business stand the test of justness and reasonableness. It must at the outset be conceded that a telegraph company, like a common carrier, must offer to do the business of the public subject to ordinary liability for negligence, upon terms fair and reasonable; and, if it does not do this, it does not offer a choice of terms, and cannot escape full responsibility, even upon the view of the law contained in the case of *Hart v. Pennsylvania R. Co.*

Now, upon an examination and analysis of the terms contained in both the day and night message blanks of the defendant company, we find: (1) That, in the usual day-message contract, they stipulate for immunity from all damage for error or delay in an unrepeatd message beyond the price paid for the transmission of the message. (2) If the message be repeated, they contract against liability beyond 50 times the toll paid. (3) They offer to insure the correctness of transmission, except error in cipher or obscure messages, and damage from unavoidable interruption of line, upon payment of price of a repeated day message, and a premium of 1 per cent. on an agreement of risk if under 1,000 miles, and 2 per cent. if over this; but such insurance must be by a contract in writing. (4) They offer to send unrepeatd messages at night, for delivery next business day, at half usual day rate, on condition that they shall not be responsible for damages for a sum in excess of 10 times the cost of transmission.

Now, to send the message the plaintiff desired to send, as a night message, he was required to pay 30 cents. But the defendant contracted against responsibility even for its own negligence beyond the sum of three dollars. Looking alone at the printed notices and rules, no proposition is made for repeating such a message. But the agent says that it would have been repeated if he had desired. Of this Marr had no notice whatever. On the contrary, the printed rules and regulations clearly imply that a night message will not be repeated. If he had, instead of sending a night message, sent an ordinary day message, without repeating, then the toll would have been 60 cents; but to do this he is forced to assent that he shall not be allowed damages, for errors committed through even the negligence of the company, a sum in excess of 60 cents,—the price of transmission. If he has the message repeated, and pays for this 30 cents more, the defendant still requires that he shall agree to release them from all liability beyond 50 times the toll paid,—a sum in itself trivial compared with the injury really sustained by him in this instance. If he make what defendants call a contract of insurance, he must, in addition to the price of the repeated message,—90 cents,—pay a premium of 1 per cent. upon an agreed amount of risk. The real consequences of an error in sending a commercial dispatch of the character of the one in question would be difficult to estimate in advance. But, if an estimate in accord with the very least damage that did in fact occur had been fixed, he would then have had to pay, in addition to the 90 cents, a premium of not less than \$11. If he pays even this exorbitant sum of \$11.90, he then obtains for that nothing more than an agreement that the company will be responsible for its own acts

of negligence to the extent of the agreed amount of risk. The exceptions out of the so-called contract of insurance leave, in substance, nothing more than the liability imposed by law for negligence, in the absence of any limitation by agreement.

Now, when we consider that the business of telegraphy is practically a monopoly, and that there is in fact no real competition for the business of the public, and the other fact, that the use of the facilities afforded by such companies has become a matter of social and commercial necessity, we can readily see that the public are under a species of coercion to assent to whatever conditions such companies choose to impose. Practically the scale or graded charges offered by this company afford no real choice of terms. The price at which they propose to send messages subject to ordinary legal liability—the insurance proposition—is so grossly in excess of the cost of service, as ascertained by comparison with the terms offered for service without such liability that we do not hesitate to hold that the conditions limiting the liability of this company for negligence, are not fair, just, or reasonable, and are void as against public policy. They constitute, taken together, but an artful arrangement and device by which the consequences of their own negligence is thrown upon the shoulders of their customers, and they are enabled to conduct business with no responsibility, beyond that of the most trivial character, for their own want of due care. The terms upon which they do assume full liability are so arranged, and so exorbitant as probably never to be called into use. We do not mean to decide that it is not in the power of such a company to graduate their charges in some sort of proportion to the responsibility and risk incurred. We are not insensible to the fact that public policy as much demands that liberty of contract shall be preserved as that unjust and unreasonable limitations shall be held void. But we do hold that, under the printed notices, regulations, and stipulations of this defendant, it did not propose to do the business of the public upon the terms imposed by law,—for a reasonable and just compensation, and that, therefore, these limitations contained in the agreement under which the message was sent, under any view of the power of the company to limit its liability for its own negligence, were invalid, in so far as the damage was a result of the negligence of the defendant or its servants.

In reaching this conclusion we have given due consideration to the opinions of the courts of last resort in other states. We have found much conflict upon some of the questions involved in suits of this character, but we have examined all the leading reported cases, and we can, in main, concur in the statement of Judge DILLON, who said: "We have examined all the leading cases known to have been decided in respect to this subject, [exemption from liability for negligence,] and have not found one holding, when this subject was the exact point in judgment, that the ordinary printed conditions as to repeating messages have the effect to relieve the company from mistakes caused by its own want of ordinary care." *Sweatland v. Illinois & M. Tel. Co.*, 27 Iowa, 432. The case of *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299, is a case decided since the opinion of Judge DILLON, and is not, of course, included in his criticism. The *Mac Andrew Case*, cited as an authority for the proposition that a telegraph company may contract against its own negligence, and so cited in many subsequent cases, can hardly be regarded as an authority; for it was an English case, and is based upon the English doctrine that a common carrier may contract against his own negligence,—a doctrine nowhere sustained in this country, except, perhaps, the state of New York. *Mac Andrew v. Electric Tel. Co.*, 17 C. B. 3. The case of *W. U. Tel. Co. v. Carew*, 15 Mich. 535, was a case involving no negligence of the company sued. The error occurred on the line of a connecting but independent company, and the court held that the stipulation that the receiving company should not be responsible for mistakes committed upon other lines was reasonable and valid. The case of *Ellis v. Telegraph Co.*, 13 Allen, 226, did not

involve the fact of negligence; for the court held that no negligence was proven. The case of *Camp v. W. U. Tel. Co.*, 1 Metc. (Ky.) 164, was a suit upon the contract to transmit as contained in the agreement under which the message was sent. The petition did not charge negligence, and consequently the case is not an authority for the proposition that they may contract against negligence.

The conclusion which we have reached as to the effect of stipulations contracting against negligence has the support of text writers of eminence and ability. The distinguished Judge Redfield, in commenting on the *Mac Andrew Case*, before cited, says in this case: "A query is made how far the company in such case [exempting itself from liability unless message is repeated] will be responsible for gross negligence. We think there ought to be no doubt in regard to the responsibility of the company in such cases for even ordinary negligence, and the whole extent to which such a condition should be held to qualify the responsibility of the company is that it will not be held absolutely responsible as an insurer of the accuracy of transmitting messages unless repeated and paid for as such." 2 Redf. R. R. (3d Ed.) 244. He repeats the same views in his work on Carriers, sections 552, 561. Gray, on Telegraph Communications, a work wholly devoted to the questions concerning telegraphic companies, throws the weight of his opinion against the validity of contracts to any extent limiting liability for negligence as contrary to public policy. Sections 50-52, and authorities cited.

We recognize the full force of the reasoning, as well as of the great reputation, of the judge deciding the case of *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299, but we cannot concur with him that these agreements are valid as relieving the company from ordinary negligence. He, however, does not hesitate to doubt whether they could be held as releasing the company from gross negligence or bad faith. This admission is noticeable; for it may well be doubted whether the absence of due care would not be gross negligence.

We have already cited, in the earlier part of this opinion, many authorities which, to a large degree, support the conclusion we have reached. In addition to those already cited we may refer to the following: *Telegraph Co. v. Cohen*, 73 Ga. 522; *Telegraph Co. v. Dryburg*, 35 Pa. St. 298; *Telegraph Co. v. Brown*, 58 Tex. 170; *Bartlett v. Telegraph Co.*, 62 Me. 209; *Telegraph Co. v. Fontaine*, 58 Ga. 433; *Hibbard v. Telegraph Co.*, 33 Wis. 558.

The damages assessed by the commission of referees is upon the correct basis. The loss resulting from change in market value was clearly the natural result of the telegraph operator's mistake. Being the natural result of the negligence of the defendant, the law adjudges that they were within the contemplation of the parties. This message was so written that the slightest reflection would enable the operator who undertook its transmission to see its commercial importance, and put him on his guard against error.

The proof shows, however, that if the plaintiff, so soon as he was advised of the miscarriage of his message, and that but 100 shares of the stock he desired had been bought, instead of 1,000, that he could by prompt action have caused the additional 900 to have been purchased at 67 cents on the par dollar, instead of 62, at which his order could have been filled but for the error. He did not take steps to have this stock bought until the stock had made a much greater advance. We are of opinion that for the advance occurring after he could have remedied the mistake that he cannot hold the defendant responsible. The law imposes upon a party subjected to injury by the action of another the active duty of making reasonable exertions to render the injury as light as possible. Where the injury results from breach of contract or unintentional negligence, this obligation to reduce the consequence of the injury by reasonable diligence is positively imposed by every consideration of public interest and sound morality; "and if the injured party, through negligence or willfulness, allows the damage to be unnecessarily enhanced, the increased

loss falls justly on him." *Leonard v. New York Tel. Co.*, 41 N. Y. 544; *Rittenhouse v. Telegraph Co.*, 44 N. Y. 263.

Rendering such judgment as the circuit judge should have rendered, we direct judgment to be here entered for \$1,125, with interest, and for all the costs of the cause. The report of the commission of referees is accordingly confirmed.

WALLER v. OGLESBY and others.

(*Supreme Court of Tennessee. January 5, 1887.*)

MORTGAGE—ASSIGNMENT—SUBROGATION—JUDGMENT CREDITOR.

A. executed a mortgage to B. on real and personal estate, with the following provision: "But this conveyance is made upon the express provision that if I, or my representatives, do pay to the said B., or his representatives, the sum of about \$8,000, with the interest thereon, on the first of January, 1877, and shall save the said B. harmless in all cases in which the said B. is bound for me as stayor and surety, this deed shall be void, and not otherwise." On the eleventh of June, 1877, B. assigned the mortgage to C. for the consideration of \$8,000, in this language: "All my right, title, claim, and interest in and to the mortgage, and the property therein described." On the eighth of January, 1881, D. recovered a judgment on a promissory note against A. and B., in which B. was surety. On this judgment execution was returned *nulla bona*. Held, that D. could not be subrogated to the rights of B. under the mortgage, and subject the property to the payment of her debt. LURTON and CALDWELL, JJ., dissent.

Appeal from chancery court, Williamson county.

E. M. Hearn, for appellant. *Cook & Marshall* and *T. W. Turley*, for appellees.

TURNER, C. J. On September 24, 1875, Oglesby executed to L. H. Holt a mortgage on real and personal estate, with the following provision: "But this conveyance is made upon the express provision that if I, or my representatives, do pay to the said Holt, or his representatives, the sum of about \$8,000, with the interest thereon, on first January, 1877, and shall save the said L. H. Holt harmless in all cases in which the said L. H. Holt is bound to me as stayor and surety, this deed shall be void; but not otherwise." On the eleventh June, 1877, L. H. Holt assigned the mortgage to Thomas Holt, executor of John Page, deceased, for the consideration of \$8,000, in this language: "All my right, title, claim, and interest in and to the mortgage, and the property therein described." Mrs. Waller, the owner of a note on Oglesby for \$994.66, on which L. H. Holt was security, recovered judgment on January 8, 1881, against both, execution was returned *nulla bona*, and on February 2, 1881, she filed this bill asking to be subrogated to the rights of L. H. Holt under the mortgage, and to subject the property to the payment of her debt.

The mortgage was a security to Holt for a debt due to himself, and an indemnity to him against his suretyship for the grantor. It was in his power to have surrendered the mortgage at any time, to have consented to a conversion of the property by the grantor, or in any manner to have abandoned his rights under it, and no one could have lawfully complained, provided his act was in good faith. Persons having accepted him as security could have no claim upon him to take any step to procure further security for them; nor was it any concern of theirs that he did or did not take steps to secure a debt due to himself, and to indemnify himself against debts for which he was security. These things were matters of contract for him and his debtor and principal. If he could contract to secure himself, he could also contract to release that security, and no legal injury would thereby result to other creditors of Oglesby. It was the right of Holt and Oglesby, after the execution of the mortgage, to have sold and absolutely conveyed to third persons the property embraced in the mortgage, and make perfect title thereto. By the mortgage Holt acquired such interest in the property conveyed as to authorize its pledge,

by mortgage or deed of trust, for a debt due to him, or its sale for a valuable consideration, not only to the extent of the \$8,000 secured to him, but also to the extent of any payment he might make on the debts for which he was surety embraced by the terms of this mortgage.

If, then, Holt undertook in good faith to secure another by the assignment of the mortgage, that other will be protected in his purchase, to the extent of the amount paid therefor, or undertaken to be secured by the transfer. Holt's act in taking the mortgage being for himself, and not for the benefit of the other creditors of Oglesby, it cannot be attributed to him as an act of bad faith or dishonesty that he preferred to pay his own debts, rather than those for which he was security. The claims of other creditors of Oglesby to subject the property to the payment of the debts due them can only be manifested by subrogation to the rights of Holt, who, at the time of the filing of the bill, had parted with all rights, or, at least, was postponed to the rights of his assignee. Having taken security to himself for a twofold purpose, and afterwards transferred that security for a single purpose of his own, that single purpose must be satisfied before he can set up any claim to the security. As the creditors of Oglesby must work out their right to the property through the claim of Holt, they must, like Holt, be deferred till Holt's assignee is satisfied, when they may appropriate any excess. The property has been sold, and failed to produce enough to satisfy Page.

The exceptions to report of commission are allowed, and decree of chancellor affirmed, with costs.

LURTON and CALDWELL, JJ., dissent.

BLACKBURN v. CLARKE.

(*Supreme Court of Tennessee. 1887.*)

1. ATTACHMENT—WHAT SUBJECT TO—EQUITABLE INTEREST.

No lien is acquired upon an equitable interest in land arising from a title bond, by a levy of attachment, or by a decree in a suit to which the holders of the legal title are not parties.

2. JUDGMENTS—SATISFACTION—SUIT SETTING ASIDE—PARTIES.

Satisfaction of a judgment or decree cannot be set aside in a suit between parties not embracing all those affected by the judgment or decree.

3. EXECUTION—SALE—SETTING ASIDE—SATISFYING JUDGMENT AS A CONDITION.

A judgment debtor who has allowed a merely equitable interest which he has in land to be levied upon and sold without objection, and afterwards rents the land of the judgment creditor, the latter having bought it in at the sale, cannot, in an independent suit brought long afterwards, have the levy and sale set aside, except upon condition of satisfying the judgment.

4. EQUITY—ACCOUNTING AND DECREE UPON BASIS OF A REMITTITUR—JUDGMENT IN SLANDER SUIT.

Where a defendant was held entitled, as preliminary to certain relief to be granted to plaintiff, to satisfaction of a judgment obtained by him against plaintiff in an action of slander, and remitted all of the money except enough to cover the costs and expenses of the two suits, *held*, that plaintiff could not maintain an objection to an accounting and decree upon that basis, the sum thus arrived at not equaling the amount of the judgment in the slander suit.

5. ATTORNEY'S LIEN—CONDITIONAL RECOVERY OF LAND.

If, in a suit brought by a judgment debtor, an execution sale previously made is set aside upon condition of plaintiff's satisfying the judgment, plaintiff's attorney can have no lien for fees on the land recovered which will take precedence of defendant's right to have his judgment satisfied.

SNODGRASS, J. The bill and amended bills in this cause were filed to set aside certain levies and sales made under attachment and decree of the chancery court, and execution issued from the circuit court. The levies and sales now in controversy upon this appeal were of two tracts of land described as the 75-acre tract and 7-acre tract, and certain town lots in Liberty, Tennes-

see; they having been decreed to be void, and complainant, Blackburn, alone appealing. The cross-bill of Clarke sought to have the satisfaction of his decree and judgments set aside in the event the sales were void, and to subject the land to sale in satisfaction of his judgment levies. His title to the 75-acre tract accrued in this way. In a circuit court proceeding by Clarke against complainant, Blackburn, and Martin Fouteb *et al.*, attachments had issued and been levied upon Fouteb's land, and upon the 75 acres belonging to Blackburn. Blackburn and others filed a bill in the chancery court, enjoining that suit; and such proceedings were had that on the second of August, 1873, Clarke obtained a decree against the complainants in that cause for \$1,143.46 and cost, and the land attached in the circuit court case was ordered sold to satisfy the decree. The sale was made, and Clarke purchased the Fouteb lands at a price which satisfied one-half of the amount of his decree. He also on the twenty-second November, 1873, at the price of \$590.36, bid off the 75 acres as attorney and agent of Jane Turney, a judgment creditor of Blackburn. He also bid \$682.20, full amount of that judgment, on this land, and has taken a sheriff's deed.

It turned out (as alleged in one of the amended bills, and proven) that Blackburn had no legal title to the 75-acre tract, he having only a title bond therefor. So, of course, Clarke got no title. The chancellor so held, but he decreed (setting aside satisfaction of decree and judgments to extent of the bids) that Clarke had a lien on this land for the amounts stated. This was error. Clarke's decree was not a lien, nor did he acquire any by virtue of his levy of attachment, because Blackburn had only an equitable interest, and the holder of the legal title was not before the court in either case. New Code, §§ 3694, 3698; *Lane v. Marshall*, 1 Heisk. 30; *Hillman v. Werner*, 9 Heisk. 586. Nor could satisfaction of the decree and judgment be set aside because the proper parties were not all before the court. Blackburn and Clarke being the only parties in the cause, and there being other judgment defendants in decree and judgment whose satisfaction was set aside. *Humberd v. Kerr*, 8 Baxt. 291. As to this tract, complainant was entitled to recover so far as these objections go.

But Blackburn was a party to the decree confirming Clarke's sale. He made no such question against the levy in that case. He did not appeal from the decree, but acquiesced in it, and subsequently rented the land from Clarke; and, coming into this court for equity, he must do equity. He will not, therefore, be allowed to take the land from Clarke without satisfying Clarke's real demand against it; that is, the amount bid at the chancery court sale, and the amount of the Turney judgment, which Clarke in fact paid, as found by the chancellor. Blackburn is, under the circumstances, estopped from claiming more. His litigation as to this tract is about his equitable interest only, as he does not bring before the court the transfer of the legal title. The town lots and the seven-acre tract were levied upon to satisfy an execution issued upon a judgment Clarke recovered in the circuit court against Blackburn for \$2,000, on May 31, 1869. The sale of the seven-acre tract and the lots was void because all sold together, but the court correctly decreed that they (so far as undisposed of by consent) should be sold to effectuate the lien fixed by the judgment and levy.

Clarke's judgment was in a slander suit, and, professing to desire no more of it collected than was sufficient to pay his fees, cost, and expenses in that suit, and this consequent upon it, he in court remitted all of the recovery except enough to cover these items, and in the account ordered they were estimated. Complainant excepts to this basis as fixing upon him an improper liability. His objection would be good were it not for the fact that they do not aggregate the sum of Clarke's original judgment and interest, and hence he does not, upon such basis, have to pay as much as Clarke was entitled to recover, and within that limit Clarke can have his recovery decreed and appro-

appropriated as he sees proper. Provided it does not increase complainant's liability, he cannot complain. The result of this settlement of the equities of the parties is the same in effect as that reached by the chancellor, though based in part upon different conclusions of law, and the decree ordering the sale upon default of payment of amount decreed is affirmed.

The cases may be remanded for execution of decree; costs of this court will be paid by appellant, Blackburn.

His solicitors insist on asserting a lien on the recovery superior to that of defendant, Clarke, but this cannot be allowed. Their recovery conditioned upon his, and they can have no superior right to their client, as against defendant. What their client in fact recovers will depend upon the result of the sale. If the entire proceeds are appropriated in satisfying the decree, there will be no recovery upon which their lien can rest. The attorney's lien is not upon any incidental recovery of title, and change in its condition pending the suit, but upon the recovery consequent upon all the decrees rendered.

There is nothing in the case cited by counsel, (*Wright v. Duffield*, 2 Baxt. 218,) when properly understood, contrary to this view. If so, it would not be allowed to stand as authority. In that case a married woman had attempted to convey her land. She received the purchase money, but, by reason of defective acknowledgment, the conveyance was void. The conveyance was made, and the money received, August 10, 1868. On the third of September, 1868, she filed her bill. No rents had then accrued. The defendant answered, and by cross-bill insisted upon their right to have the amount paid her declared a lien on the property. The land was put into the hands of a receiver, and rented out. When complainant recovered, and before sale, her solicitors asked the court to declare a lien on the land. The court declined to do this, but gave them a lien upon the rents, "since the property was taken out of the hands of complainant" upon the theory that the lien for the purchase money was only upon the property, and did not extend to the rents. It is not necessary to express any opinion as to the correctness of that holding upon the facts. It is sufficient to say that, in this case, the complainant, who is *sui juris*, has submitted to a decree vesting the right to his interest in the land in controversy, and the rights to take rents and profits in Clarke, has for years acquiesced in his ownership and possession, allowing him to receive the rents, and now will not be permitted to recover either without satisfying Clarke's debt. Not being himself allowed to do so directly, he cannot do it indirectly, for counsel fees.

Upon any surplus arising from the sale ordered after satisfying defendant's decree and costs, counsel for complainant will be entitled to a lien.

EWING, Receiver, v. COOK and others.

(Supreme Court of Tennessee. January 14, 1867.)

1. CREDITORS' BILL.—RIGHT OF REDEMPTION FROM EXECUTION SALE.

The statutory right of a judgment debtor to redeem from an execution sale of his land, made by a creditor, cannot be reached and subjected to sale by another creditor, who is in a position to redeem from the sale, and the filing of a bill in equity for that purpose is no obstacle to a redemption by the debtor, or an assignment by him of his right of redemption.

2. EXECUTION SALE.—RIGHT OF REDEMPTION.—WHAT MUST BE PAID.—ADVANCING BID.

Under a practice requiring a judgment creditor buying in his debtor's property at an execution sale, or a redemptioner from the sale, to advance his bid within a certain time to such a sum as he wishes, not exceeding the amount of his judgment, and allowing the debtor or another creditor to redeem from him at such price, a creditor or redemptioner, failing to make such advance, will hold the land subject to redemption at the price paid by him, and will have no equity to be paid the full amount of his debt, upon suit brought against him by one seeking to redeem. If he is a trustee, and has no authority to advance his bid, that fact will not alter the case.

Appeal from chancery court, Williamson county.

On rehearing.

Demoss & Malone and *R. M. Ewing*, for appellant. *Campbell & Son* and *Cook & Marshall*, for appellees.

LURTON, J. After full argument by counsel, this cause was decided from the bench. It is now heard upon a petition for a rehearing. The earnestness and ability of the counsel alike determined the court to give the case a careful reconsideration. The facts which raise the questions presented in the petition and argument are substantially as follows: Frank Wilson was the owner of the land in controversy, being a tract of about 350 acres, and stated to be of the value of \$19,000. This land had been sold at execution sale, July 2, 1877, to satisfy two judgments against Wilson, aggregating about \$400, in favor of one Caruthers. Caruthers became the purchaser at the sheriff's sale, bidding thereon his debt and costs, and took deed from the sheriff. Complainant, being a judgment creditor of Wilson in about the sum of \$10,000, filed an original bill in the chancery court, on the twenty-eighth March, 1878, against Frank Wilson and Caruthers, charging that Wilson was insolvent; that he was a judgment creditor of Wilson, and that execution had been returned not satisfied. His bill stated the facts concerning the levy and sale of Wilson's land to satisfy the judgments in favor of Caruthers, and the purchase by Caruthers. He prayed that Wilson's right of redemption be sold, and the proceeds applied to the payment of his debt. No attachment or injunction was sought. The next day after the filing of this bill Ewing redeemed this land from Caruthers, and took deed. September 2, 1878, and while this bill was pending, the judgment debtor, Wilson, assigned and transferred the land in question to the defendant H. H. Cook, in trust to secure certain creditors therein named, and authorizing Cook, as his trustee, to redeem this land for the benefit of his creditors thus secured. In December, 1878, Wilson died, leaving a will, by which he devised his interest in this land to Cook in trust for the benefit of the testator's minor children. A few days before the time of redemption expired, Cook offered to redeem this land from Ewing, making a sufficient tender of the redemption money paid by Ewing to Caruthers, together with the advance required by statute which had been made by Ewing, with interest, costs, etc. Ewing declined to permit redemption unless the whole of his debt should be paid in addition to the amount of his redemption bid. Ewing had failed to advance his redemption bid within 20 days after redemption, or at any other time, but nevertheless demanded that the whole of his debt, whether bid upon the land or not, should be paid to him. Upon Ewing's refusal to permit redemption, Cook filed his bill, stating all these facts, and bringing the tender he had made into court; prayed that Ewing be compelled to submit to redemption, and that the legal title to the land of Wilson be divested out of him, and vested in the complainant.

The right, by bill in equity, to subject to sale the debtor's right of redemption, is most earnestly insisted upon by Ewing, upon the ground that this right of redemption is an interest in land, and such a one as cannot be reached by execution; and that, therefore, the chancery court has jurisdiction to subject such interest to the satisfaction of the judgment in favor of complainant. The right of a judgment debtor to redeem his land sold under execution is not an equitable right at all. It is the creature of statute, and depends on statute law, and is in no sense a right either created or regulated by principles of equity. The right of redemption given by statute, both to the judgment debtor and judgment creditors, is a legal and not an equitable right. Strictly speaking, there is no estate in the judgment debtor after sale and conveyances of his land, under judgment sale. Nothing remains to the debtor, after execution sale and sheriff's deed, save a statutory right of redemption. This right of redemption has sometimes been spoken of as an equitable right, and his

interest in the lands subject to redemption as an equitable estate. This terminology springs from the supposed analogy between the statutory right of redemption and the equity of redemption of a mortgagor. But whatever may be the technical character of the interest springing from the right of redemption given to a judgment debtor whose lands have been sold under execution, it is not one which may be reached and subjected to sale by a creditor who is in condition to redeem as provided by statute. This is not an open or debatable question in this state.

Ewing was a judgment creditor of Wilson, and, as such, had a right to redeem, and within 20 days to have advanced his redemption bid to any sum within the limit of his judgment. The right of redemption he did exercise the day after he filed his bill. He had the plain, unquestioned right to have placed his whole debt on this land, at any time within 20 days, by crediting such advance bid upon the judgment he held against Wilson. This plain and most obvious course he, for reasons not clearly discernible, neglected or refused to pursue. He had undoubtedly the right to stand upon all the rights he had acquired by the filing of his bill to sell the debtor's right of redemption, and, preferring this course, he must abide the consequences. The chancery court having no jurisdiction to subject to sale the debtor's right of redemption, upon a bill by a judgment creditor, we are of opinion that the filing of his bill fastened no lien on the debtor's right of redemption, and was no obstacle to either a redemption by the debtor, or an assignment by the debtor of his right of redemption.

This is the obvious rule, as laid down by this court in the case of *Weakley v. Cockrill*, 6 Lea, 270, a thoroughly considered case, in which the opinion of Chancellor COOPER to the contrary was reversed. This case has been several times followed by this court, and we are not at all disposed to question its correctness.

That the pendency of this bill was no obstacle to a redemption by either the debtor or a judgment creditor is well decided in the case of *Bank of Lincoln v. Ridgway*, 3 Lea, 623.

The assignment by Wilson to Cook of his right of redemption was therefore valid, and vested in Cook the same right to redeem which the statute had given to Wilson. This transfer of this land, and the right to redeem same, was to Cook, in trust and for the benefit of the creditors of the assignor. It in no way defeated or prevented any creditor who had a right to redeem from exercising such right. Cook, by the assignment, simply took the share of Wilson. *McClein v. Harris*, 14 Lea, 510.

The next point insisted upon is that Ewing cannot be compelled to submit to redemption by the judgment debtor, Wilson, or his assignee, Cook, until his whole debt is paid. The argument made in favor of this position is that inasmuch as Ewing has obtained the legal title by his redemption from Caruthers, that a court of equity will not divest this legal title out of him, or compel him to submit to being redeemed by Wilson, his debtor, or his assignee, Cook, until his whole debt is paid.

The case of *Williams v. Love*, 2 Head, 80, is relied upon to support this contention. *Williams v. Love* was well decided, and we are not in the least disposed to criticize it. Its application to the facts of this case is, however, not discernible. Ewing held this land subject to the legal right of redemption by either the judgment debtor himself or any judgment creditor of Wilson. If Ewing had availed himself of his statutory right to advance his debt upon his redemption bid, neither the debtor, nor his assignee, nor a creditor, could have redeemed without paying the whole of the debt thus placed upon the land. Having failed to do this, he nevertheless insists that his *status* is, in effect, the same as if he had advanced his redemption bid as required by law. If this position be sound, then the statutory right of redemption secured to the debtor is effectually destroyed. A consequence of this doctrine would

be that the debtor would lose his land for an insignificant proportion of its value, and his debt remain unpaid. The legislative purpose in securing both to the judgment debtor and his creditors a right of redemption was to make the land pay as large a part of the debts of the owner as possible. The creditor who buys at an execution sale must, within 20 days, advance his bid, or he will be subject to redemption by either the debtor or another creditor at the amount of his original bid, and the slight advance prescribed by statute; so, when one creditor redeems from another, the former is required to advance such part of his debt as he desires to secure within 20 days, or he may be redeemed from without being paid any more than his redemption money, with interest, etc. The manifest purpose of all this is that the land shall pay as much of the debt of the debtor as its value. The position contended for, if once sanctioned, would have the contrary effect. The creditor might refuse to bid anything like the value of the land, and yet have a debt greater than its whole value. He might refuse to advance his bid, and thus enable the debtor to relieve himself of debt to the extent of the value of the land. Thus the unfortunate debtor would lose his land, and his debt remain unpaid. Such a result this court can never sanction.

The broad distinction between the case before us and that of *Williams v. Love* is that in that case the legal title which Love held was not subject to the statutory right of redemption. There the legal title could not be divested except by and through the powers of the court of chancery, which might refuse to exercise its functions save upon conditions that the party seeking the aid of equity should do equity. Again, the equity of Love was equal to the equity of Williams, and the former had the advantage of the legal title. Equities being equal, the holder of the legal title has the better case, and will not be disturbed except upon equitable principles. That Cook has been compelled to come into a court of equity to redeem does not put him in the attitude of Williams, or find Ewing in the *status* of Love. Out of the positive wrong of Ewing in refusing to convey the legal title upon a tender of all that he was legally entitled to demand, cannot spring an equitable right to hold on to that which the statute law of the state says he shall surrender. This court will regard as done that which ought to have been done, and, treating this redemption as having been legally made, will divest out of him the naked legal title which he wrongfully withholds. The statutory right of redemption cannot be defeated by the refusal of Ewing to convey, when a lawful tender was made to him of all which he was legally entitled to demand. That he may lose his debt may be righted. He had a straightforward, plain way to have saved it, by advancing it upon his redemption. He declined this method, and has hazarded all upon an experimental litigation. That he was a trustee is no sufficient reason for not advancing his debt upon the land. He deemed himself to have authority to redeem from Caruthers, and it was no greater assumption of power to have advanced his bid to something like what he deemed the land to be worth. But, if he had no authority to advance his bid, we should not deem the legal aspect of the case at all altered. The statutory right of redemption cannot be defeated because the creditor did not make, or have authority to make, a larger bid.

We are urged to construe the rights of complainant, Ewing, under the deed of assignment to Cook. As before stated, this deed was made for the purpose of securing certain creditors named therein. The debt due to Ewing was secured in this assignment, so far as the "debt has a priority, or is a lien on said property by reason of levy, sale, or otherwise, but no further." Without undertaking to state all the facts concerning this debt, and the various suits, it is sufficient to say that we do not think it was a lien on this land at the time of assignment of the land and the right of redemption to Cook. The same result would probably be reached, even if it had been a lien; for complainant has not claimed under his assignment, but has resisted it in every

way possible, and ought not to be permitted to now claim under it. It is sufficient to say that we do not think complainant has rights under this assignment.

The petitions of rehearing will be dismissed.

JORDON and others v. KEEBLE and another.

(*Supreme Court of Tennessee. February 10, 1887.*)

1. HUSBAND AND WIFE—CHARGING WIFE'S SEPARATE ESTATE.

Where a married woman bid in her husband's law-books at an execution sale, and gave her promissory note for the amount of his claim to the judgment creditor, in an action to subject the wife's separate estate to the payment of said note, *held* that, as the note itself did not charge the wife's separate estate, and as the law-books were never conveyed to the wife's sole and separate use, and were never settled upon her in any way, her separate estate cannot be charged with the payment of the note.

2. SAME—PAROL EVIDENCE OF INTENT TO CHARGE—PROMISSORY NOTE OF WIFE.

A promissory note in the usual form, made by a married woman, which contains nothing about the separate estate of the wife, does not constitute a charge upon the wife's personal estate, and parol evidence is not admissible to prove that the note was intended as a charge.

3. SAME—ACTION ON JUDGMENT AGAINST WIFE—EQUITY.

Before a court of equity will decree the satisfaction of a judgment at law against a married woman out of her separate estate, it must be made to appear that the married woman has, by a valid promise or enjoyment, charged the payment of the debt, upon which the judgment was rendered, on her separate estate.

Appeal from chancery court, Rutherford county.

W. H. Williamson, for appellants. *H. P. Keeble*, for appellees.

LURTON, J. Mrs. Keeble is the owner of certain real estate situated in the county of Rutherford, which, under decree of the chancery court of said county, was vested in her husband, H. P. Keeble, as trustee, "to her sole and separate use and benefit, clear of the control, and free from the liabilities, of her husband, Horace P. Keeble." By the same decree she is given power to dispose of this estate "by deed or last will and testament, or otherwise," her husband and trustee "joining her in such disposition to convey the legal title." The complainant Flecher recovered a judgment in 1874, in the circuit court of Rutherford county, against H. P. Keeble and wife, C. C. Keeble, for \$592.32. This judgment was recovered upon a note executed by both H. P. Keeble and Mrs. Keeble, and the judgment has been assigned to complainant, E. L. Jordan. Execution issued, and has been returned *nulla bona*. This bill is filed to subject to the satisfaction of this judgment the separate estate of Mrs. Keeble.

In aid of the relief sought, the bill alleges that the note upon which the judgment was rendered was given by Mrs. Keeble, that the credit was extended her upon the faith of her separate estate, and that she expressly contracted that her separate estate should be bound for this debt, and that she agreed to sell a portion of her separate estate to pay this debt. The facts proven show that Major Keeble, the husband of the defendant, Mrs. C. C. Keeble, was involved in debt, and that two or more executions were levied upon his law library and office furniture. The principal creditor in these executions was the complainant Flecher, and he agreed that if Mrs. Keeble would bid at the execution sale the amount of the several debts, that she should not be required to pay costs, but that he would take her note payable in 12 months. She did, under this arrangement, bid off the library and furniture of her husband, and executed her note, together with her husband, for the amount of her bid. Upon this note the judgment sued upon is based. This note, upon its face, is an ordinary promissory note in usual form, and contains no agreement whatever binding the separate estate of Mrs. Keeble, and makes no al-

lusion to it in any way. Such a note, saying nothing about the separate estate of the wife, does not constitute a charge upon that estate, and parol evidence has been held by this court not admissible to prove that the note was intended to be a charge. *Ragsdale v. Gossett*, 2 Lea, 729.

Upon an examination of the whole proof in the cause, we do not think that the allegation of the bill that there was an express engagement that this note should be paid out of, or be a charge upon, the separate estate, is sustained. That complainant, Flecher, looked alone to that estate, and gave credit upon its existence, we do not doubt. But a long line of decisions have settled the law of this state to be that the separate estate of a married woman cannot be charged by implication, and that nothing but an express agreement will enable a creditor to reach such estate. The property bought by Mrs. Keeble, and for which this note was given, being law-books and office furniture, cannot in any sense be said to have been bought for the benefit of Mrs. Keeble's separate estate. The books were never conveyed to her sole and separate use, they were never settled upon her by deed, decree, or settlement of any sort, and, as the note has never been paid, they have not been paid for out of her separate estate. Their purchase cannot, therefore, be in any sense said to have been either for the enlargement of her separate estate, or for its benefit.

The case for a charge is not so strong as that of *Litton v. Baldwin*, 8 Humph. 209. Mrs. Litton, having a separate estate, bought articles decided by the court to have been necessary to her use and comfort. She bought, at a chancery sale, household furniture, and gave her note with a third person as security, and the credit was given to her, and alone upon the faith of her separate estate. This court held that her separate estate was not liable, and this was put upon the express ground that to charge the separate estate of a married woman with her contracts and engagements, that there must be proof of an express agreement and intention to create such charge. There was in that case more plausible grounds for making the separate estate liable than in this, for there the purchases were shown to have been absolutely necessary to the comfort of the wife. See, also, the case of *Hughes v. Peters*, 1 Cold. 67, where the fact that the benefit was wholly to the separate estate of the wife was held insufficient, the wife not herself contracting to have the work done. The question, however, as to the circumstances under which the separate estate of a married woman may be made liable by a debt contracted for the benefit of such estate, where there is no express agreement that it shall be bound, is not before us upon the facts of this case.

It is insisted, however, that as complainant has obtained a judgment at law against Mrs. Keeble, that, upon the footing of a judgment creditor, he may reach the separate estate, and that she is precluded from now making defense to this relief. We do not agree to this proposition. Both at law and in equity the contracts of a married woman are not binding upon her. The fact that a married woman has a separate estate does not in itself enable her to contract as a *feme sole*, or remove any of the disabilities of coverture, save and except in so far as she has, by her contract, bound and charged her separate estate. Her engagements or contracts do not bind her personally, even though she has a separate estate. A court of equity, and a court of equity *alone*, can subject the separate estate of a married woman to the satisfaction of her enjoyments. This court will not hold her bound personally or pecuniarily, and will only enforce her enjoyments out of her separate estate, and then only to the extent, as we have already seen, that she has contracted that it shall be liable. This court in such case, there being in this state no statute enlarging the power of a married woman to bind herself by contract save and except as to the conveyance of her estate, does not render any personal judgment against her, but proceeds *in rem*, and in a proper case decrees satisfaction out of her separate estate. The woman is not debtor, or treated as debtor, in any true sense. Said Lord Justice JAMES in *Bank of Australia v. Lempiere*, L. R. 4

P. C. 597: "It is not the woman as a woman who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the enjoyment." It must follow, therefore, that before a court of equity will decree satisfaction of a judgment at law against a married woman, out of her separate estate, that it must be made to appear that the married woman has, by a valid promise or enjoyment, charged the payment of the debt, upon which the judgment was rendered, on her separate estate. This has not been made to appear in this case, and the fact that the complainant is a judgment creditor places him, with regard to this separate estate, in no better situation than if his suit was upon his note.

In a very able and clear opinion rendered by Chancellor COOPER, he reached and announced the same conclusion. *Chatterton v. Young*, 2 Tenn. Ch. 768. We do not understand the decisions of this court to be in conflict with this conclusion. The case of *Howell v. Hale*, 5 Lea, 405, is relied upon as in opposition to this view. The property of the married woman subjected to the payment of the judgment against her in that case was an estate of inheritance, and constituted her general, and not her separate, estate. Mrs. Hale, as appears in the body of the opinion, in her petition described her estate as "her own absolute property before marriage." At most, that case only holds that the general estate of a married woman may be subjected to the payment of a judgment. Without assenting to this, we are content to say that the separate estate cannot be applied by a court of equity to the satisfaction of a judgment against a married woman, unless the debt upon which it is based would have been a charge on the estate if the judgment had not been rendered.

There is nothing in the case of *Yeatman v. Bellmain*, 6 Lea, 488, which militates against the law as here disclosed. Mrs. Bellmain had been abandoned by her husband, and was engaged in business on her own account, and it was held by the court that she came within the provisions of section 2805, S. & T. Code, and that she was capable, therefore, of contracting, and of suing and being sued, as a *feme sole*.

The defendants having conceded in their answers that the library purchased by Mrs. Keeble might be subjected to the payment of this debt, and the decree of the chancellor to that effect not having been appealed from by Mrs. Keeble, that matter is not now before us. The report of the referees will be set aside, and the decree of the chancellor, dismissing complainant's bill in so far as it sought to subject the estate of Mrs. Keeble to the payment of this debt, is affirmed.

Appellants will pay all the costs of this appeal.

WARREN, Adm'r, etc., and others v. FREEMAN and Wife.

(Supreme Court of Tennessee. March 6, 1887.)

1. HUSBAND AND WIFE — SEPARATE PROPERTY OF WIFE — NECESSARIES — PROMISSORY NOTES.

Where a married woman who owns land as her separate property, without restriction upon her power of enjoyment or alienation, executes a promissory note to the administrator of a decedent "for necessities furnished me by [the decedent] in his life-time, and I bind my separate estate for the payment of this note," held, that the note was a charge upon the land; the fact that the necessities for which it was given were furnished before the execution of the note being unimportant, when it appears they were furnished to the wife alone upon the credit of her separate estate. TURNER, C. J., dissenting.

2. SAME—REAL AND PERSONAL PROPERTY.

A charge upon the separate property of a wife is not a lien upon her land, and does not restrict her power of *bona fide* alienation.

3. SAME—ACKNOWLEDGING CONTRACT.

Any contract which will authorize a court of equity to subject a wife's personal property to the charge of her debt will warrant the subjection of her land held to the same uses; and a privy examination or authentication for registration is not necessary to make her contract a charge upon the land.

4. SAME—LANDS BOUGHT AS SEPARATE ESTATE.

Lands of a decedent were sold to a married woman under a decree of a chancery court, and the title by the decree vested in her *to her sole and separate use*, free from all debts or contracts of her husband, and a conveyance was made by the heirs of the decedent of the lands to her, *without restriction or limitation upon her title*, a year after the decree. *Held*, that all the title the heirs had was divested by the decree of the court confirming the sale, and no title passed by their subsequent deed, and that the married woman had the right to charge the lands as her separate property for her debts.

Appeal from chancery court, Cannon county.

J. A. Jones, for appellants. *F. R. Burris*, for appellees.

CALDWELL, J. This is a bill to subject the separate real estate of a married woman to the payment of her debt. The lands of John H. Wood, deceased, were sold under decree of the chancery court, Cannon county, for division among the heirs and creditors. His daughter, Mrs. Martha J. Freeman, bought 122 acres of the land at the price of \$2,691.56. The sale was confirmed October 25, 1881, and title was by decree of the court vested in her, "*to her sole and separate use*, free from the debts or contracts of her husband, J. H. Freeman." The note now sought to be collected out of that land is in these words:

"One day after date I promise to pay H. C. Warren, adm'r, and E. T. Fisher, adm'r of A. H. Fisher, dec'd, the sum of \$313.18 for necessities furnished me by A. H. Fisher in his life-time, and I bind my separate estate for the payment of this note.

"*This May 29, 1884.*

[Signed]

"Mrs. M. J. FREEMAN.

"J. H. FREEMAN, Security."

The payees of the note brought this bill in the chancery court against Mrs. Freeman and her husband. The complainants allege the execution of the note, and that the debt evidenced thereby was created alone upon the credit of the separate estate of the wife, the husband being insolvent at the time, etc. Defendants admit the execution and justice of the note, and that the husband was then and is now insolvent. They say, however, that in law the note is the debt of the husband, and not binding upon the wife; but they do not deny the allegation of the bill that the credit was extended to the wife alone upon the faith of her separate estate, or that the debt is "for necessities furnished" her, as recited in the face of the note. They plead the *coverture of the wife*, and deny the liability of her land for the payment of her note. The note and title papers constitute the whole of the proof in the cause. The chancellor dismissed the bill as to the wife, and complainants have appealed.

Is the decree right? We think, clearly not. The right of a married woman to own and enjoy separate property has long been recognized and encouraged by the courts and legislature in this state; and, where there is no restriction or limitation upon her powers, with reference thereto, in the instrument of settlement upon her, it is well settled by the decisions of this court that her separate estate will in equity be held liable for her contracts and engagements, when she has therein expressly stipulated to that effect. *Litton v. Baldwin*, 8 Humph. 210; *Cherry v. Clements*, 10 Humph. 552; *Parham v. Riley*, 4 Cold. 5; *Shacklett v. Polk*, 4 Heisk. 115; *Ragsdale v. Gossett*, 2 Lea. 736. These authorities are conclusive against Mrs. Freeman in the present case. She owns the land as separate property, without the slightest restriction upon her power of enjoyment or alienation. This property she expressly

contracts in writing to bind for her debt, which she says was created by necessities being furnished *her* by the creditor. That the necessities were furnished before the execution of the note we deem unimportant. That they were furnished her alone upon the credit of her separate estate is fairly inferable from the face of the note itself, and from the insolvency of her husband, as alleged in the bill and admitted in the answer. It is certain that she regarded the debt as her own, and agreed in writing to charge its payment upon her separate property. It is likewise certain that her husband so regarded it, otherwise he would not have signed as "security." If it be true, as stated in the answer, that Mrs. Freeman did not understand her legal rights when she executed the note, the burden of showing that fact was upon her. It was not incumbent upon complainants to disprove her statement in avoidance of her contract. It is true that subjection of separate estate was refused in most of the cases to which we have referred; but the law was distinctly announced as we have stated it in each of them, and the relief, when denied, was denied expressly and alone upon the ground that the creditor did not bring his case within the rule, by showing the *intention and agreement of the married woman to bind her separate property*.

The same principle was recognized and approved, at a former day of the present term of this court, in the case of *Jordon v. Keeble*, ante, 511, Judge LURTON delivering the opinion. There Jordon was repelled because the note of the married woman did not purport on its face to bind her separate estate. In *Porter v. Baldwin*, 7 Humph. 177, the separate estate was subjected to the payment of the married woman's note upon the ground that it was given for the rent of a house for her to live in, (or for her comfort, or for necessities, as in this case,) though there was no agreement on her part to bind her property.

We do not ignore, but recognize and follow, the rule of the common law which declares the contracts of married women, as such, absolutely void and of no binding effect. No personal liability can be adjudged against her. Only her *separate estate*, which itself rests upon equitable principles, can, under like principles, be taken to meet her engagements entered with reference to that estate.

In *Cocke v. Garrett*, 7 Baxt. 365, and in the case, just mentioned, of *Jordon v. Keeble*, the remedy is declared to be *in rem*, and not *in personam*. It is elsewhere said: "The true *rationale* of the doctrine is that the liability of a wife's separate property for her engagements is a mere equitable incident of her separate estate, which is itself a creature of equity." 3 Pom. Eq. Jur. 49. And certain English judges, quoted by the same author, say: "It is a special equitable remedy arising out of a special equitable right." "It is not the woman, as a woman, who becomes a debtor; but her engagement has made that particular part of her property which is settled to her separate use a *debtor*, and liable to satisfy the engagement." Id. Judge Story says: "Her agreement, however, creating the charge, is not, (it has been said,) properly speaking, an obligatory contract, for as a *feme covert* she is incapable of contracting, but is rather an appointment out of her separate estate. The power of appointment is incident to the power of enjoyment of her separate property; and every security thereon executed by her is to be deemed an appointment, *pro tanto*, of the separate estate." 2 Story, Eq. Jur. § 1399.

The chancellor was of opinion that the note in suit would have bound the separate estate of Mrs. Freeman in *personalty* if she had possessed any *personal* separate property, but that it did not bind her separate *real* estate, because not executed under privy examination, as in case of a deed or mortgage. This distinction is not taken in any case which we have examined, and we do not regard it as sound. To *charge* her separate property with her debt is in no sense to pass or incur her title. The liability is not a *lien* upon her land, and does not in the slightest degree restrict her powers of *bona fide*

alienation. Therefore any contract which will authorize a court of equity to subject her separate *personal* property will warrant the subjection of her land, held to the same uses; and the privy examination, or authentication for registration, is no more necessary in the one case than the other, and is not required in either. In *Mences v. Johnson* this court enforced a written charge of a married woman upon her separate estate in land, though her contract was not authenticated for registration by the statutory privy examination. 12 Lea, 561.

There is no merit in the other ground of defense presented in the answer, which is that "the heirs" conveyed the land in question to Mrs. Freeman by their deed, "without restriction or limitation" upon her title, the next year after the decree vesting the title in her "to her sole and separate use," and that she claims under that deed. All the title "the heirs" had was divested by the decree confirming the sale, and passed no estate by their subsequent deed. The only title she has is that vested in her by the issue. The deed neither adds nor detracts from that title.

The decree dismissing the bill is reversed, and decree will be entered here subjecting the land, or a sufficiency thereof, to the payment of the debt of complainants' interest and costs.

TURNER, C. J. The bill is filed by the administratrix and administrator of the estate of A. M. Fisher to subject the separate real estate of Mrs. Freeman to the payment of a note made to the complainants in their representative capacity, charging that the note sued on was executed May 29, 1884, the intestate having died April 30, 1884. The allegations relied upon for a recovery are as follows: "The *defendants* purchased goods and other necessities from A. M. Fisher, and had them charged to her, and bound to her separate estate for the payment of the same." "After the death of A. M. Fisher, M. J. and J. H. Freeman executed the following note," (set out in the majority opinion:) "The credit was originally extended to her on account of her separate estate." The bill is sworn to by H. C. Warren alone. The language is: "The averments of the bill are true, to the best of his knowledge, information, and belief." He does not and cannot pretend to know any fact. The answer denies the debt to be the debt of the wife, and says it is the debt of the husband alone. There is no proof of the truth of the allegations of the bill, nor is there any admission of their truth in the answer. The affidavit to the bill cannot be looked to as evidence. The answer (which is sworn to) makes an issue.

Other questions out of the way, I think the decree is correct; but the "necessaries" were not furnished at the time of the making of the note. The note is not executed to the party who did furnish the necessities, nor is any evidence left by him that he contracted with the wife upon the faith of her separate estate, and with a stipulation in writing by her that her separate estate is bound on a contract for "goods and other necessities." When the goods were furnished is left to surmise. It may have been one, five, or ten years before the execution of the note. As I understand the law in such cases the wife's stipulation in writing to bind her separate estate must be entered into at the time of the purchase and delivery of the goods, and be a part of the contract of sale and purchase; or, to put it more clearly, it must be upon the faith and credit of such express stipulation by her that the goods are furnished or the work done. When the goods have been delivered without such stipulation, a subsequent contract or undertaking to bind the separate estate is without consideration. Here the "goods and other necessities" were certainly consumed before the stipulation to bind her estate was made or thought of. If the *feme covert* may, after she and her husband have received the articles upon the joint assessment of herself and husband, and even after the death of the one who furnished them, bind her separate estate by a

simple recital in a note, she may do so at any period in her life, without regard to lapse of time, circumstances of purchase, or change of domestic relation. The result will be the introduction of a new rule for the disposition of the estates of married women.

The note in this case is due at one day. The bill seeks to reach real estate while the undertaking by her does not prevent her disposition of it under the forms of law. The creditor is enabled by his due paper to impound the property at once, and defeat any purpose of disposition otherwise than to the satisfaction of his debt, as is done in this case.

A review of the facts claimed shows that husband and wife bought the goods, had them charged to her, and bound her separate estate for the payment. Upon what principle is the wife or her property to be bound by a contract made under such circumstances? If the facts charged are true, they simply make a contract for the husband, and the consent of the wife is a nullity, she being persuaded to have acted under his coercion in all undertakings in the usual form in his presence. I know of no rule, case, or *dictum* that will take her act in this case out of the general—I may say universal—rule in this state.

The wife pleads her coverture, and further defends upon the ground that she signed the note without clearly understanding the obligation she was taking upon herself, and without in fact knowing whether she possessed a separate estate; that she did not have the benefit of the advice of counsel, of her husband, nor of any one else; that complainant Warren presented the note, and induced her to attach her signature. Complainant Warren in no way meets these responses of the answer. He alone could have explained. He was the only witness to the transaction, and the principal actor. The statements in the *answer* directly thrust at his integrity. If he proposes to hold a married woman to her contract with him, he ought to be required to establish its fairness when it is solemnly challenged by answer under oath. Failing to do so, I am to treat her version as true; and his case should fail. While he could know nothing of the contract he charges between his intestate and Freeman and wife, he does know what passed at the execution of the note, and whether Mrs. Freeman understood the character and effect of the paper he had prepared, and which he induced her to sign. His silence is significant.

CURTIS & CO. MANUF'G CO. v. WILLIAMS.

(*Supreme Court of Arkansas.* February 28, 1887.)

1. SALE—IMPLIED WARRANTY—MANUFACTURER.

Where a manufacturer undertakes to supply goods manufactured by himself, to be used for a particular purpose, and the vendee has not had the opportunity to inspect the goods, and trusts, as he must necessarily do in such a case, to the judgment and skill of the manufacturer, it is an implied term in the contract of sale that he shall furnish a merchantable article, reasonably fit for the purpose for which it was intended.¹

2. SAME—EVIDENCE—VERDICT.

The facts in this case examined, and *held*, that the evidence was sufficient to justify the verdict.

Appeal from circuit court, Clay county.

F. G. Taylor, for appellant. J. C. Hawthorne, for appellee.

SMITH, J. The complaint alleges, in brief, that appellee, at the request of appellant, purchased from it a pair of trucks and eight tram-car wheels, man-

¹ When an article is manufactured or sold for a particular purpose, a warranty is implied that it is reasonably fit for that purpose. *Shatto v. Abernethy*, (Minn.) 29 N. W. Rep. 325, and note.

ufactured by appellant; that appellant represented the same to be good, both in quality and workmanship, and that said trucks and tram-car wheels were not good both in quality and workmanship, but were defective, and became useless to appellee, to his damage in the sum of \$110. The answer admits the sale of the trucks and tram-car wheels, but denies that appellant represented the same to be good, either in quality or workmanship, and also denies that the truck and train-car wheels were defective, and alleges that appellee used the same several months, and did not make any complaint, or notify the appellant of any defects; that appellant did not know that appellee claimed that any of the articles were defective until after suit was brought for the purchase money.

H. H. Williams, the plaintiff, in substance, testified: "In August, 1883, I commenced to correspond with appellant in reference to tram-car wheels and trucks. In October it shipped me a heavy pair of trucks, that were too heavy for the purpose for which I purchased them. An agent of appellant was down, and informed me that they were getting up a new kind of tram-car wheels and trucks. I informed him of the kind I wanted; and, upon the agent representing that they could fill the order, and their machinery was adapted to use on my tram-road, gave an order for a set of tram-car wheels for the axles that had been shipped with the heavy wheels; also gave an order for three eight-wheel tram-car wheels and axles. In October, 1883, I received the goods, and commenced to use the tram cars then soon. Sent truck-wheels out to be used, and, on learning that they were not in use, made an examination, and tried to use them. The hubs were so irregular that in making a revolution they would run off the track. Had no way of making them smooth. In the fall I went to St. Louis, and advised appellant that I could not use the wheels, and that I would return them. Appellant said they would not be worth anything to it. About sixty days after I commenced to use the tram cars, the wheels on the axles of one became loose. I tightened them up several times. It was on account of defect in pressing them on the axles that caused them to come off. I paid \$140 for the eight wheels and four axles that came loose, and think their value was depreciated \$80; that is, they were worth \$80 less by reason of the defect. Paid \$24.80 for the truck-wheels that proved worthless. Gave my acceptance for the machinery, and renewed same two or three times. May 4, 1884, agent of appellant came down. I showed him defective car-wheels, and asked a set-off. Suit was commenced soon afterwards. I did intend to file a counter-claim, but had given two notes, and could not remember for certain which note included the purchase money of the defective machinery. The reason I did not ask at once to be allowed a credit for the defective machinery was that I was owing them a considerable bill, and supposed, when we made final settlement, they would allow me a proper credit. Was on good terms with appellant, and dealt with it to the extent of ten or twelve hundred dollars. The other two cars that I purchased and paid \$140 each, are good, and I am yet using them." John Sees testified: "I am a machinist. Have seen the four truck-wheels. They were worthless, except for old iron. It would cost \$20 to grind the hubs smooth with a grind rock, and \$5 to make them smooth with machinery." W. T. Griffith testified that the four light wheels were totally worthless to use on tram-road. This was all of plaintiff's testimony.

For defendant, John Stewart testified: "I am secretary of Curtis & Co. Manufacturing Company, the defendant. In August, 1883, plaintiff bought of it ten sets of wheels and axles complete, for tram cars, for which he gave his acceptance, amounting to \$490, due January 14, 1884. On maturity, we renewed this paper at his request, on promise of payment on March 17, 1884. At maturity, plaintiff called on me and gave his note for three hundred dollars, and promised to pay balance on his return from Iowa in a few days. He failed to pay the balance or assign any reason. To accommodate him.

further, took his note for balance. Plaintiff failed to pay these notes on maturity. We instructed B. W. Brown to call on him for payment. We brought suit and recovered our money. In circuit court plaintiff filed counter-claim, but withdrew it. Had a great many meetings with plaintiff, and he never intimated any claim for damages or defects in any of the machinery sold him; neither was there any complaint in any of his correspondence. All of the business was done through me. Plaintiff expressed himself several times to be well satisfied, saying everything furnished him was first class. Defendant did not know of any defects in any of the machinery sold plaintiff. Plaintiff bought goods at different times after the original sale. On February 29, 1884, he bought last article, and his account was closed, and he was rendered a statement giving all the debits and credits."

The jury returned a verdict for \$100, and the defendant moved for a new trial for misdirection, and because the verdict is not sustained by the law and the evidence. But his motion was denied.

The bill of exceptions shows that the court charged the jury, and also refused the defendant's prayers for directions. But, as this charge and these prayers are not incorporated in the bill of exceptions, nor referred to with such certainty as to identify them and make them a part of the record, we are relieved from inquiring into their correctness. The only question, then, presuming the jury to have been properly charged, is whether the foregoing testimony warrants the verdict that was given. Proof of an express warranty by the defendant of the quality of this machinery was not essential to a recovery. Ordinarily, upon sale of a chattel, the law implies no warranty of quality. But there are exceptions to the rule, as well established as the rule itself. One of these exceptions is where a manufacturer undertakes to supply goods manufactured by himself, to be used for a particular purpose, and the vendee has not had the opportunity to inspect the goods. In that case the vendee necessarily trusts to the judgment and skill of the manufacturer, and it is an implied term in the contract that he shall furnish a merchantable article, reasonably fit for the purpose for which it is intended. *Benj. Sales*, §§ 645, 657, *et seq.*; 1 Pars. Cont. 586; *Brown v. Edgington*, 2 Man. & G. 279; *Jones v. Just*, L. R. 3 Q. B. 197; *Harris v. Waite*, 51 Vt. 481, 31 Amer. Rep. 694; *Rodgers v. Niles*, 11 Ohio St. 48.

From the testimony, the jury might believe that the trucks and tram-car wheels were defective, and ill-adapted to the buyer's road, with which road the defendant was acquainted, and that seasonable notice of the defect was given, accompanied by an offer to return them, which was declined. Affirmed.

GILL v. HARDIN and another.

(*Supreme Court of Arkansas. March 5, 1887.*)

ESTOPPEL—MORTGAGE—DEED ABSOLUTE—PURCHASER—POSSESSION—NOTICE.

A., being in debt to B., executed a mortgage to him upon real estate. The land at the time was incumbered by other liens, which were paid off by B. and one C., another of A.'s creditors, who was also to be protected by the mortgage. A. then executed a deed, absolute in form, to D., under a parol agreement that he should sell the land, and out of the proceeds discharge, first, the debt to B., then that to the other creditor, and pay the residue over to him. D. afterwards sold and conveyed the land to E., who, before concluding his purchase, informed A., who was still in possession, that he was negotiating for it. A. supposed that E. had been referred to him by D. to ascertain the price to be placed on the land, but gave him no intimation of a secret agreement between him and D. that the property should not be sold without his consent. *Held*, in a suit by A. against the purchaser, that he is concluded from setting up the fact that the deed was intended as a mortgage.

Appeal from circuit court, Conway county.

S. R. Allen, for appellant. *J. H. Harrod*, for appellees.

COCKRILL, C. J. The appellant, Gill, was indebted to one Moore, and, desiring to secure the payment of the debt, agreed to execute a mortgage to him upon real estate in the town of Morrilton for that purpose. The land at that time was incumbered by mortgage and judgment liens, and after negotiation between the parties these liens were paid off by Moore and a Dr. Crowell, another of Gill's creditors, who was also to be protected by the mortgage, and Gill then executed a deed, absolute in form, to the appellee Hardin, under a parol agreement that Hardin should sell the land, and out of the proceeds discharge, first, the debt to Moore, then that to the other creditor, and pay the residue over to him. The deed was executed to Hardin instead of Moore, because it was feared Moore's wife would retard the contemplated sales by refusing to relinquish dower. The device of securing the debts by a conveyance absolute in form was suggested by Gill, for the reason, as he testifies, that he was "somewhat involved," which is made plain by the explanation that he was in debt. There appears to have been a mutual understanding between the secured creditors and Gill that Hardin should not execute a deed to any part of the land until Gill approved the price for which it was to be sold. About a year after the conveyance to Hardin, Hervey, one of the appellees, purchased the land from Hardin for the sum of \$1,200, paid on delivery of the deed. Before concluding his purchase, he sought Gill, who was in possession of the property, and informed him that he was negotiating with Hardin to purchase it. Gill supposed that Hervey had been referred to him by Hardin to ascertain the price to be placed on the land, but gave him no intimation of the secret agreement not to sell the premises without his consent. Hervey returned to Hardin, and obtained a conveyance. The price paid was less than the amount due Moore. Gill was dissatisfied with the sale, and filed his bill against Hervey, Hardin, and the heirs of Moore to redeem. In the mean time Hervey had instituted his action for the possession of the land. Gill filed a cross-complaint, the same in effect as his original complaint, and the case was transferred to equity, and there consolidated and tried with Gill's suit. The decree was against Gill throughout, and he has appealed.

The principle that the possession of land is notice to the world of the possessor's equities in the premises is invoked to charge Hervey with notice of the secret agreement between Gill and his creditors. It is held by high authority that possession by a grantor is not notice of equities in him contemporaneous with the deed to one who purchases the land on the faith of his recorded conveyance; the presumption of a claim of right which arises from possession being rebutted, it is said, by the absolute deed. *Newhall v. Pierce*, 5 Pick. 450; *Bloomer v. Henderson*, 8 Mich. 395; 1 Jones, Mortg. § 600, and cases cited; Wade, Notice, § 299, and cases. But the facts of this case do not render it necessary to narrow the consideration of the question to such limits. The doctrine of constructive notice from possession, however broad or limited its application, is applied only as a shield to protect him who has equitable rights, and not for the benefit of one who is without equity. *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 126. Now, Gill's deed was made absolute in form, as we may infer from his statement, in order to enable him to hide his equity of redemption in the land from the search of his creditors. He had thus given to Hardin for this fraudulent purpose the means of deceiving Hervey, and leading him to believe that Hardin was the unconditional owner of the land. By his deed, he was continually holding him out as such. He came in actual contact with Hervey while the treaty for purchase was on, and was then informed by Hervey himself of that fact; but he held his peace about the secret agreement, and permitted him to be entrapped in the snare his active agency had set. He is not, for these reasons, entitled to the consideration of

equity in a suit against the purchaser, and he is therefore concluded from setting up the fact that the deed was intended as a mortgage. *Groton Sav. Bank v. Batty, supra*; *Bramble v. Kingsbury*, 89 Ark. 181.

Let the decree be affirmed.

PARKES v. WEBB.

(*Supreme Court of Arkansas*. March 12, 1887.)

1. JUSTICES OF THE PEACE—JURISDICTION—TROVER.

Const. Ark. art. 7, § 40, conferring upon justices of the peace jurisdiction in all matters of damage to personal property, where the amount in controversy does not exceed \$100, includes all injuries which one may sustain in respect to his ownership of personal property, and therefore embraces damages for trover and conversion.

2. MORTGAGEE—OF CROP—BY TENANT—LAND RENTED ON SHARES.

The object of Mansf. Dig. Ark. § 4452, providing that, where land is rented for a share in the crop, no mortgage or conveyance of any part of the crop made by the person cultivating the land shall have validity, unless made with the consent of the employer or owner of the land or crop, which consent must be indorsed on such mortgage or conveyance, is not to impose an absolute restraint on the tenant's power of alienation, but merely to protect the landlord; and therefore, when their respective rights in the crops have been ascertained and adjusted, and the laborer's or tenant's part specifically set aside to him, he may mortgage it or dispose of it as he will, independently of the landlord's consent. And a mortgage made in such case of the tenant or laborer's share, without the landlord's consent, will prevail as against a subsequent purchaser from the tenant or laborer.

Appeal from circuit court, Franklin county.

Ed. H. Mathes, for appellants. *U. M. & G. B. Rose*, for appellee.

COCKRILL, C. J. This action was begun by the appellee against the appellants, before a justice of the peace, to recover damages for the conversion of a one-half interest in a bale of cotton. On appeal to the circuit court, he recovered \$27.50, the amount claimed. It is urged that the justice had no jurisdiction of the cause of action. Justices of the peace have jurisdiction, among other causes, where the amount in controversy does not exceed \$100, in all matters of damage to personal property. Article 7, § 40, Const. 1874. This clause has been construed to mean all injuries which one may sustain in respect to his ownership of personal property, and includes damages for conversion. *St. Louis, I. M. & S. Ry. v. Briggs*, 47 Ark. 59. But it is argued that the plaintiff did not prove that he was the owner of the property. He was the mortgagee in an instrument covering the cotton, which had been duly acknowledged and filed for record. His mortgagor was a share cropper, whose only interest in the crop of cotton when the mortgage was executed was the right to have a share of the cotton, when made, set apart to him as his wages, or to assert a lien on the crop for their payment. Mansf. Dig. § 4445. The bale of cotton in dispute was purchased by the appellants from the cropper's landlord, the latter informing them at the time of purchase that one-half belonged to him, and the other to the share cropper, or to his mortgagee, the appellee. The argument is that the mortgage was void (1) because the mortgagor had nothing to mortgage at the time the instrument was executed; and (2) that, if he had an interest in the cotton, the mortgage is invalid under the statute, because the consent of the landlord to its execution was not obtained.

1. It was recently explained and reasserted, in *Hammock v. Creekmoore, ante*, 180, that a cropper on shares, with such rights as the mortgagor here had, may mortgage his contingent interest in the crop to be raised; and, since the act of March 11, 1875, when there is anything *in esse* for the mortgagee to take hold upon, the legal title vests in the mortgagee, (*Beard v. State*, 43 Ark. 284,) and he may maintain an action for the conversion of the property covered by the mortgage, (*Jarratt v. McDaniel*, 82 Ark. 598; *Meadow v. Wise*,

41 Ark. 285.) It was clearly proved that the cotton in question had been set apart by the landlord as the mortgagor's, and was actually sold by him as such. The mortgage had then attached, and the appellants purchased subject to it.

2. The statute relied upon as invalidating the mortgage, after providing that the landlord shall have a lien for certain purposes upon the laborer's interest in the crop without the necessity of a written contract, reads as follows: "And in such cases no mortgage or conveyance of any part of the crop made by the person cultivating the land of another shall have validity, unless made with the consent of the employer or owner of the land or crop, which consent must be indorsed on such mortgage or conveyance." Mansf. Dig. § 4452. This provision is from the act designed to regulate the landlord and labor system. It defines certain rights of the two classes, and undertakes to protect each against imposition by the other. No other end is aimed at. It cannot be said to be the intention of the act to place the tenant under the tutelage of the landlord, or to grant to the latter any paternal power of care or control over him. The prohibition, then, against conveyance or mortgage must have been intended only as a protection to the landlord, and not as an absolute restraint upon alienation by the tenant or laborer. The latter has the power, notwithstanding the act, to enjoy the fruits of his labor by anticipation, if he sees fit, to the same extent that the landlord has, and without consulting him. The laborer has a lien on the crop produced to protect his interest, (section 4445,) and he can do no act by sale or mortgage to prejudice the statutory rights of the landlord; but when their respective interests in the crop are settled by agreement, as was done in this case, and the laborer's property specifically designated, a stranger cannot be heard to raise the objection that the landlord had not consented to the laborer's contract of sale or mortgage. It is then a matter of no concern to the landlord, and his consent is immaterial.

The appellants wholly denied the appellee's right to any part of the property. Their acts amounted to a conversion, and the action against them was properly maintained. *Bertrand v. Taylor*, 32 Ark. 470; *Hammock v. Creechmoore*, *supra*.

Affirmed.

DUNNAGAN v. SHAFFER and others.

(Supreme Court of Arkansas. March 12, 1887.)

JUSTICE OF THE PEACE—CIVIL JURISDICTION—POWER TO SET ASIDE EXECUTION SALE.

A justice of the peace had no civil jurisdiction at common law. His jurisdiction in that respect is entirely statutory, and, being an inferior court, he takes nothing by implication except what is necessary to make effective his express powers. He has no authority to set aside a sale made under execution.

Appeal from circuit court, Green county.

L. L. Mack, for appellant. *N. W. Norton*, for appellees.

BATTLE, J. Shaffer, Swartz & Co. recovered a judgment, "before a justice of the peace, against D. A. Smith, and sued out an execution thereon. The constable to whom the execution was directed levied it upon certain personal property of Smith, and sold it, and William Dunnagan became the purchaser. Shaffer, Swartz & Co. then applied to the justice to set aside the sale, on the ground it was illegal. Ten days' notice of the application having first been given, the justice heard the application, and set aside the sale. William Dunnagan then filed in the Green circuit court a petition for *certiorari*, reciting therein the foregoing facts, and asked that the order setting aside the sale be vacated. Defendants filed a demurrer to the petition, which the court

sustained, and dismissed the petition; and petitioner appealed. The only question in the case is, did the justice of the peace have authority to set aside the sale?

In *Jones v. Reed*, 1 Johns. Cas. 20, it is laid down that "it is a clear and salutary principle that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority given them. They can take nothing by implication, but must show the power expressly given them in every instance. The sound rule of construction in respect to the courts of justices of the peace is to be liberal in reviewing their proceedings as far as respects regularity and form, and strict in holding them to the exact limits of jurisdiction prescribed to them by the statute." *Wight v. Warner*, 1 Doug. 384.

In *Whitesides v. Kershaw*, 44 Ark. 380, this court, in speaking of the jurisdiction of justices of the peace, said: "At common law they had no civil jurisdiction. The grant of this authority is American, and results from positive law. With us their jurisdiction is derived from the constitution, and they possess only such jurisdiction as is expressly given, coupled with the incidental powers necessary to carry it into effect. All jurisdiction was parceled out and distributed by the constitution, and the jurisdiction not expressly granted to some other court, or authorized to be granted, is reserved to the circuit courts. The justices of the peace take nothing by implication, except what is necessary to make effective their express powers."

In *People v. Delaware Common Pleas*, 18 Wend. 558, it was held a justice of the peace, after having entered in his docket the amount for which he had rendered judgment against a defendant, and after having informed the parties, had no power to alter the same by reducing the amount, although he subsequently discovered that, in adding up the several items which he considered the plaintiff entitled to recover, he had made a mistake by putting down the sum total at \$10 more than ought to have been done, and that such an error may be corrected in a court of record on motion, but not in a justice's court.

In *St. Joseph Manuf'g Co. v. Harrington*, 53 Iowa, 380, 5 N. W. Rep. 568, it was held a justice of the peace did not have power to instruct a jury called in the trial of a cause before him, because the power to do so was not conferred by statute.

In *Doughty v. Walker*, 54 Ga. 595, and *Brown v. Buttz*, 15 S. C. 488, it was held a justice of the peace could not set aside a judgment recovered before him.

In *Richards v. Reed*, 39 Ind. 330, it was held a submission to arbitration cannot be made a rule of court in a court of a justice of the peace, because not authorized by statute.

In *McNamara v. Spees*, 25 Wis. 589, it was held that a justice of the peace, having received a verdict against a defendant on Saturday night, and having failed to render judgment forthwith as required by statute, but adjourned it over until Monday following, thereby lost jurisdiction.

In *Brady v. Taber*, 29 Mich. 199, it was held an adjournment of a cause in a justice's court for more than four days after the trial is completed, for the purpose of rendering judgment, deprives the justice of jurisdiction under the Michigan statute, and that a judgment rendered five days after the completion of the trial is void.

We cite these cases to show how the rule laid down in *Whitesides v. Kershaw*, *supra*, has been applied. According to this rule and the authorities cited, a justice of the peace has no authority to set aside a sale under execution. It is not necessary to the exercise of the jurisdiction vested in him by the constitution. If the sale be void, the property can be resold, without a formal order setting the sale aside. Having the power, as held by this court in *Scanland v. Mixer*, 34 Ark. 354, to quash the return of an execution issued

by him, for legal cause, he can remove the only obstacle that might be in the way of a second levy and sale.

The judgment of the court below is therefore reversed, and this cause is remanded, with instructions to the court to overrule the demurrer to appellant's petition, and for other proceedings not inconsistent with this opinion.

STATE, Use of Nevada Co., v. HICKS.

(Supreme Court of Arkansas. March 12, 1887.)

1. STATUTES—CONSTRUCTION—ACTION—COUNTIES.

The Arkansas act of February 27, 1879, providing that "hereafter" counties should prosecute their suits in the name of the state, does not apply to suits pending at the time of the passage of the act; it being plainly the intention of the legislature by the use of the word "hereafter" to make the act purely prospective.

2. CONSTITUTIONAL LAW—LEGISLATURE—STATUTES—PRACTICE.

Mansf. Dig. Ark. § 6343, providing that "no action, plea, prosecution, or proceeding, civil or criminal, pending at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provision had not been repealed," is unconstitutional, as the legislature cannot deprive itself of the right to exercise its power of amending or repealing statutes by prescribing the method in which it shall be done.

Appeal from circuit court, Nevada county.

U. M. & G. B. Rose and Smoot & McRae, for appellant. *A. B. & R. B. Williams*, for appellee.

CATE, Special Judge. In August, 1876, the county court of Nevada county made a contract with appellees to build a county bridge for the sum of \$1,500, to be built by the first day of November following. Commissioners examined the bridge on sixth day of said month, and reported same not according to specification of contract, and the county court, acting on said report, rejected the bridge, and declared the bond, given by contractors for the proper completion of the bridge, forfeited, and directed suit to be brought on it. This suit was brought on seventeenth day of November, 1878, in the circuit court of Hempstead county. For answer, defendants, who are the appellees here, stated that the bridge was completed in time and manner as required by contract; that it had not been rejected; that the county court had not ordered suit on bond; that the bridge had not been ordered to be taken down; that it was still standing where it was built, and was in use by the public, etc., and that it was reasonably worth \$1,300; and asking that this be considered matter of cross-complaint, and that they have judgment for same. Case was transferred and heard on equity side of docket, and on third day of February, 1880, decree was entered in favor of defendants in the circuit court, and against the county, for \$1,300. From this decree an appeal was taken to this court, and decree was affirmed at May term, 1882, and reported in 38 Ark. 557, and the county of Nevada was ordered to pay said sum of \$1,300, and proper mandate issued. Afterwards, on September 6, 1884, the county of Nevada, in name of state for its use, filed in the chancery court of Hempstead county a bill of review, asking that the order and decree made in the circuit and supreme courts in the original suit be set aside and held for naught. To support this it is urged (1) that there is newly-discovered evidence; and (2) that by reason of the act of February 12, 1879, which was passed while the suit was pending, the circuit court had no power or jurisdiction to entertain a claim against a county, or render judgment therein. A demurrer was sustained, bill dismissed, and appeal to this court.

As to the first proposition, it is stated that about the time the county made its contract with Hicks *et al.*, appellees, to build the county bridge, it also granted a charter to one Grayson to erect a toll-bridge on the same creek at the same point; that appellees bought said charter of Grayson, and took from him

an assignment of his privileges under the same, and have ever since held the bridge as their private property under Grayson's franchise; that the county, prior to the rendition of the original decree, had no knowledge of this assignment of Grayson's franchise to appellees, and no reason to suppose it had been done, wherefore they were unable to plead it in bar of appellee's claim. As to this it seems to be immaterial whether the county had knowledge of the assignment of Grayson's privileges to appellees or not. This was not at issue. The question determined in the original case was the performance or non-performance of a contract to build a public bridge for the county, and has nothing whatever to do with Grayson's right to build a toll-bridge. Appellees had a right to acquire as many assignments to build toll-bridges as they should choose, and, for the purpose of the matter determined in the original suit, the county had no need to know anything about it; and if such was the fact, it was of no importance whether it was ever discovered or not. It can be seen, however, that if appellees undertook to build a county bridge for free public use, and then proceeded to hold it as a toll-bridge for their own use, and at the same time demand pay for building it, then this would be a proper matter to reply to appellee's counter-claim; and for this purpose it would not be material whether appellees were collecting toll under an assignment to them of a grant to Grayson, or without semblance of authority. They had no right to appropriate a public bridge for their benefit in such a way; and if it was done, it must have been known to the county court, for it is difficult to conceive how the county court could conduct this somewhat protracted litigation about a bridge, and not know, until the matter was determined in the courts, that appellees were all the time taking tolls on the same. There is no pretense of such want of knowledge of this material fact, but only an alleged ignorance of his supposed claim of right to take toll under an assignment. This is certainly insufficient to constitute such a showing as to authorize the court to set aside the former proceedings and decree.

As to the act of February 27, 1879, which was passed pending the suit, it is urged with great earnestness by appellants that it has the effect to terminate the whole proceedings; that all steps taken after the passage of the act were void, as it expressly provided that the counties should prosecute their suits in the name of the state, and that all demands against counties should be presented to the county court, and repealed all the sections of the statute providing for bringing suits against counties in the circuit court.

It is held in *Green v. Abraham*, 43 Ark. 421, that "the bringing of a suit vests in a party no right to a particular decision. His case must be determined on the law as it stands at the time of the judgment, not at the bringing of the suit; and if, pending an appeal, the law is changed, the appellate court must determine the case under the law in force at the time of the decision;" and this is the language of Judge Cooley in his work on Constitutional Limitations.

In the case of *Insurance Co. v. Ritchie*, 5 Wall. 541, an action was brought under a revenue law, which was repealed pending the suit, and it was held that the action must fail; the court saying: "It is clear that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction; and it is equally clear that where a jurisdiction conferred by statute is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction."

Numerous other authorities on this subject, and in the same direction, might be cited. However, only one more will be referred to, as it states the rule very clearly, and in a way to render it specially applicable here. In *South Carolina v. Gaillard*, 101 U.S. 493, the court says: "It is well settled that if a statute giving a special remedy is repealed *without a saving clause in favor of pending suits*, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after."

From 1839 to 1879 there were statutes providing that suits by and against counties might be brought in the circuit court, and the manner of bringing and conducting them. The act February 27, 1879, in its second section provides that "hereafter" a different proceeding will obtain. Now, it was obviously the intention of the legislature by the use of the word "hereafter" to make the act purely prospective, and with a saving to suits pending. Now, this being so, the county, having brought its suit in the proper court before the passage of the act, had a right to a final hearing in that court, and the appellees or defendants had a right to all their proper defenses. That these defenses were proper and meritorious, has already been determined by this court, and is settled, and the act in question was as ineffectual to take away their right to defend in the Hempstead circuit court as the right of the county to prosecute its suit. In further support of this view appellees insist that, under section 6343, Mansf. Dig., the act of February 27, 1879, could not affect a suit pending. However, on this, the question is raised as to whether the legislature can constitutionally limit its own legislative power.

In passing on a somewhat similar statute, the supreme court of Illinois holds that "it is not competent for the legislature to limit its own legislative powers by prescribing rules intended to govern the method of repealing and amending statutes. The power to repeal and amend statutes is vested in the legislature by the constitution, and the legislature cannot deprive itself of the right to exercise this power by prescribing rules as to the method in which it shall be done." *Mix v. Illinois Cent. R. Co.*, (syllabus) 6 N. E. Rep. 42.

In *Files v. Fuller*, 44 Ark. 273, EAKIN, J., in passing upon this statute, says: "We have an old statute of 1837, which has passed unchallenged through the portals of all subsequent constitutions. It provides that no action, plea, prosecution, or proceeding, civil or criminal, pending at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provision had not been repealed. This statute has very little importance save in hermeneutics, and has been rarely invoked, for no legislature has power to prescribe to the courts rules of interpretation, or to fix, for future legislatures, any limits of power as to the effect of their action. Any subsequent legislature might make its repealing action operate in pending suits as effectually as if no such statute existed; and the courts are quite free yet to consider what the subsequent legislature did in fact intend or had power to do. Still it has kept its place on the statute-books, and it is persuasive, at least, that subsequent legislatures meant to keep in harmony with it, and in their legislation supposed it would go without saying that when a repeal was made, all rights in suit pending under the old statutes would be preserved." This construction of this statute by Justice EAKIN seems to be most sound and reasonable, inasmuch as, instead of fixing an inflexible rule in construing such acts, it holds that "the courts are quite free yet to consider what the subsequent legislature did in fact intend, or have power to do." And, in considering these statutes, section 6343, Mansf. Dig., seems to be a general law, and the act of February 27, 1879, by its terms, evidences an intention on the part of the legislature to keep in harmony with the existing law, and to except from the operation actions and pleas pending at the time of its passage.

Accordingly, there was no error in the court below sustaining the demurrer, and it is affirmed.

O'BRYAN v. FITZPATRICK.

(Supreme Court of Arkansas. March 19, 1887.)

CONTRACT—VALIDITY—INTOXICATING LIQUORS—PRINCIPAL AND AGENT.

By an agreement between plaintiffs and defendant, the latter was to sell "Fitzpatrick Bitters," a compound containing intoxicating liquor as a chief ingredient. to be resold in violation of Arkansas statute of March 8, 1879, prohibiting the sale of any "compound or preparation" of ardent spirits, "commonly called tonics," without license. Plaintiffs agreed to pay defendant a commission, and represented that the liquor could be sold without license, and authorized him to sell with a guaranty to that effect. Under this agreement, defendant sold a part of the liquor, when plaintiffs called for a settlement, and, not being satisfied with the result, sued defendant for the liquor, as goods sold and delivered. A sale of these bitters without a license had been held an indictable offense prior to the sale in this case. *Held*, plaintiffs could not recover; the contract being illegal, *potior est conditio defendentis*.¹

Appeal from Garland.

John M. Harrell, for appellant. Geo. H. Sanders and E. W. Rector, for appellee.

COCKRILL, C. J. Jacks and Fitzpatrick were partners in business, and largely engaged in the sale of "Fitzpatrick Bitters," a compound containing intoxicating liquor as a chief ingredient, as the proof shows. They consigned 25 cases of this liquor to O'Bryan for sale, agreeing to give him all over a stated price per case realized. At the same time, they represented to O'Bryan that the liquor could be sold without license, gave him a number of circulars for general distribution which contained the same statement, and authorized him to sell with a guaranty that the liquor could be resold without license, and that they would hold harmless from all damage those who purchased from him, and resold without procuring a license. This transaction was subsequent to the act of March 8, 1879, which prohibits the sale of "any compound or preparation" of ardent spirits, "commonly called tonics, bitters, or medicated liquors, in any quantity, or for any purpose whatever, without first procuring a license," to exercise the privilege. A sale of these same bitters without a license was held to be an indictable offense in *Foster v. State*, 36 Ark. 258. The contract between the parties amounted, then, to this: that O'Bryan, who was a licensed liquor dealer, should sell Jacks & Fitzpatrick's liquor, to be resold in violation of this statute. Under this arrangement, O'Bryan sold a part of the liquor, when the appellees called for a settlement, and, not being satisfied with his answer, demanded pay for the goods sold, and possession of what he had on hand, and not receiving either, they sued him for the value of the 25 cases as for goods sold and delivered by them to him. The question is, can they recover?

It is well settled that an act which is forbidden by statute cannot be made the foundation of a contract. *Lindsey v. Rottaken*, 32 Ark. 620. It follows that a sale of liquor in violation of law is illegal. *Dunbar v. Johnson*, 108 Mass. 519. A mere knowledge by the vendor that liquor is to be resold in violation of the statute, without a participation in the illegal act, will not vitiate the sales he may make to intermediate dealers. 1 Whart. Cont. § 343; *Tatum v. Kelley*, 25 Ark. 209; *Parsons Oil Co. v. Boyett*, 44 Ark. 230. But if the vendor designedly contributes to the scheme, or is to derive a benefit from it, or if there is a unity of purpose between him and the party to be

¹An action which grows out of and is founded upon an illegal transaction, where plaintiff and defendant are in equal guilt, cannot be maintained. *Gibbs & Sterrett Manufg Co. v. Brucker*, 4 Sup. Ct. Rep. 572; *Fisher v. Lord*, (N. H.) 3 Atl. Rep. 927, and note; *Gould v. Kendall*, (Neb.) 19 N. W. Rep. 483; *Clarke v. Lincoln Lumber Co.*, (Wis.) 18 N. W. Rep. 492; *Hinnen v. Newman*, (Kan.) 12 Pac. Rep. 144; *Feineman v. Sachs*, (Kan.) 7 Pac. Rep. 222; *Mackintosh v. Renton*, (Wash. T.) 3 Pac. Rep. 830; *Bach v. Smith*, (Wash. T.) 3 Pac. Rep. 831.

supplied, he is infected with the latter's criminality, and the contract is void. *Fisher v. Lord*, 63 N. H. 514, 3 Atl. Rep. 927; *Foster v. Thurston*, 11 Cush. 322; *Riley v. Jordan*, 122 Mass. 231. Here the effect of the arrangement between Jacks & Co. and O'Bryan was that parties should be incited to purchase for the purpose of violating the law under a guaranty from the vendors to shield them from the consequences of the violation. This made all the parties concerned active participants in the illegal act of sale. O'Bryan was only the agent of the appellees to effect the illegal sales; but an agent who undertakes to perform a contract which is void as against public policy or in violation of law, is under no legal obligation to carry out his undertaking. He may violate his instructions or his moral obligation in regard to it with impunity; for the law refuses to interfere in such matters, upon the principle that no suit can arise from an illegal transaction. Whart. Ag. §§ 249-25. The courts will not interfere between the guilty participants for the benefit of either, but will leave them in the condition in which they are found from motives of public policy, even though the defense of illegality may appear unscientific. *Martin v. Hodge*, 47 Ark. 378, 1 S. W. Rep. 694. But "judges are not astute," it has been said, "in finding means to enable one rogue to defeat the better rights of another;" and so, when money has been collected for the use of a principal by an agent employed in an executed illegal transaction, the former may sue him for money had and received to his use, and recover it upon the agent's express or implied promise to pay; the courts declining to look beyond this promise to the illegal contract. *Barker v. Parker*, 23 Ark. 390; *Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 Wall. 483; *Willson v. Owen*, 30 Mich. 474; *Baldwin v. Potter*, 46 Vt. 402; *Pointer v. Smith*, 7 Heisk. 137, 144; *Lemon v. Grosskopf*, 22 Wis. 447. Or if a party repents of his illegal design while the contract continues executory, he may rescind, and the courts will aid him to recover his money or property paid or advanced to further the illegal act, and so prevent the thing from being done. *Perkins v. Clemm*, 23 Ark. 221; *McLain v. Huffman*, 30 Ark. 428; *Spring Co. v. Knowlton*, 103 U. S. 49. But, in the case before us, the attempt is not to recover money paid to an agent to the principal's use, nor is it a case of repentance or contrition. The plaintiffs have not sought to disaffirm the contract made with O'Bryan, and retake their goods, or to show that they have been sold by O'Bryan, and the price received by him to their use; but they claim the value of the goods from a guilty participator, as upon a contract of purchase and sale. This is an affirmation on their part of the validity of the contract between them and O'Bryan, whether it was in fact one of sale or consignment. To sustain their demand would be to recognize and enforce their illegal contract; but the maxim, *melior est conditio possidentis*, applies, and we must leave the matter in the condition the parties themselves have placed it.

Reverse the judgment, and remand the cause for further proceedings not inconsistent with this opinion.

SANDERS v. BARBEE.

(Court of Appeals of Kentucky. February 26, 1887.)

1. ADVERSE POSSESSION—NEED NOT BE FOR A PERIOD NEXT BEFORE SUIT BROUGHT.

Actual, continuous, adverse possession of land for any period of 15 years, whether the 15 years be next before the institution of the suit to recover the land, or at any other time, will confer a perfect title, and toll the right of entry under an elder patent.

2. SAME—WHAT CONSTITUTES.

Adverse possession is not acquired by marking off a boundary around land, unless the claimant, or some one for him, reside on the land within such boundary, and claims up to the boundary adversely.

Appellant, Sanders, conveyed to appellee, Barbee, a certain tract of land, and afterwards one Sharp, claiming under a prior patent issued to her ancestor, brought suit against Barbee, and recovered a portion of the land. Barbee thereupon sued Sanders upon the latter's covenant of warranty of title to recover the purchase money for that part of the land from which Sharp had evicted him. Sanders defended on the ground that Barbee ought not to have lost the land in the Sharp suit, as his title was really better than the plaintiff's in that suit, as one Gardner, under whom Sanders claimed, had held possession of the land for more than 15 years adversely to the Sharp patent. But the lower court adjudged against Sanders, and held that, although the evidence might convince the jury that Sanders and Gardner had been in possession of the land as much as 15 years before the Sharp suit, yet, unless such possession embraced and covered the 15 years *next before* the institution of the Sharp suit, it was not available as a defense in that suit; and Sanders, complaining that the jury were not instructed that it was sufficient if Gardner, or those claiming under him, had the possession for 15 years continuously *next before* the suit, or *at any other time*, appealed.

W. B. Settle, for appellant. *Edwards & Hazelip*, for appellee.

LEWIS, J. It was not strictly accurate to instruct the jury that the defendant could not avail himself of any possession of Barbee, and those under whom he claims, unless such possession was continuous for 15 years before the institution of the suit by Sharp, if the instruction be construed as referring merely to the period of 15 years next before the institution of that suit; for an actual, continuous, adverse possession for any period of 15 years will ripen into a perfect title, and toll the right of entry under an elder patent. But the evidence does not show that Barbee, and those under whom he claims, ever did have such possession, for a period of 15 years, as would have defeated a recovery by Sharp, who claimed under an elder and superior title. There is some proof that Gardner cultivated, and had inclosed, a part of the land in controversy, but it does not appear how much was so inclosed, nor that he had it actually inclosed for 15 years continuously; and as to the residue he never was in the actual occupancy, and consequently could not acquire a possessory title superior to the title of Sharp, who claimed under a patent from the commonwealth. As said by the court to the jury: "No possession was acquired by making a marked boundary around the land, unless the party claiming the land, or some one for him, resided on the land within such boundary, and claimed the land to such boundary adversely."

The court furthermore instructed the jury that if the land, or any part of it, was continuously inclosed by a fence, and so continuously and adversely claimed and held for 15 years before the institution of the suit by Sharp, then to the extent of the land so held and claimed, there could be no recovery in this action. That part of the instruction may be also construed to relate to the 15 years next before the institution of the suit by Sharp. But, as before said, the evidence is not such as to authorize a jury to say any part of the land was thus inclosed by a fence for any continuous period of 15 years, and therefore the defendant in this action was not prejudiced. An adverse possession without title should never prevail against the true owner, unless the evidence of such possession continuously for the period fixed by statute is satisfactory. We think this record shows clearly that the plaintiff could not have successfully resisted a recovery by Sharp, and, as he has been evicted, there is a breach of warranty of title, and he is entitled to the verdict and judgment in his favor. Judgment affirmed.

v.3s.w.no.6—34

LOUISVILLE & N. H. CO. v. BALLARD.

(Court of Appeals of Kentucky. March 5, 1887.)

1. CARRIERS—OF PASSENGERS—PROTECTION DUE FEMALE PASSENGERS.

A railroad company is bound to protect all passengers on its trains from oppression, fraud, malice, insult, or other willful misconduct on the part of those in charge of the train, and to protect female passengers from obscenity, immodest conduct, or wanton approach, but not from "*indecorous*" conduct. For its failure to provide such protection it is liable for exemplary damages.

2. SAME—EVIDENCE—MISCONDUCT OF BRAKEMAN—*RES GESTÆ*.

In an action against a railroad for damages in carrying plaintiff beyond her station, and for misconduct towards her on the part of the conductor of the train, evidence of misconduct towards her on the part of a brakeman was admissible, although the misconduct of the conductor only was complained of in plaintiff's petition. Especially is it admissible as it occurred in the presence of the conductor, and at the time of the acts of the conductor complained of, and is therefore part of the *res gestæ*.

Appeal from circuit court, Marion county.

Wm. Lindsay and Bawntree & Lisle, for appellant. *Hill & Rives*, for appellee.

HOLT, J. The appellee, Lou E. Ballard, after purchasing a proper ticket, took passage from one intermediate station to another, upon a passenger train of the Louisville & Nashville Railroad. It failed to stop at the platform at her place of destination, which was a flag station. It was a down grade at that point, and there is some evidence tending to show that the car brakes did not operate well, in consequence of which the train ran some 50 or 60 yards beyond the platform, where it was stopped, and the station then announced by the proper person, but the appellee did not get off the train. Upon the other hand, there is testimony tending to show that this stop was not made, and that no effort was made to stop the train, until it was done at the request of the appellee, at a point between her destination and the next station. The weight of the evidence shows that the conductor then informed her that she could either go on to the next station, or he would stop the train and she could get off there; and that, upon his so telling her the second time, he did stop it, and she got off at that point, which was a lonely place, and about a mile beyond her station.

She says that the conductor "seemed very impatient, and his tone was rather rough for a gentleman;" that he did not assist her in getting off with her baggage, which consisted of a valise and bundle; and that, as she jumped from the lower step of the platform to the ground, he stood upon the platform, while a brakeman of the train, who was standing by, looked at her and "grinned." Upon the other hand, there is evidence to the effect that the conductor did assist her out of the car, and was altogether kind and polite in his manner. There was no request upon her part that the train should be backed to her station, but this should have been done, under the circumstances. The appellee was compelled to walk back to her station, and from thence, three-quarters of a mile, to her home, in consequence of which she was confined to her bed the most of the time for three or four days, and unable to teach her school for a week. The jury in this action by her for damages returned a verdict for \$3,000.

Manifestly it cannot be sustained upon the ground that it did not include exemplary damages, and was compensatory only, for a breach of the contract for transportation. If upheld, it must be upon the ground that she was entitled to exemplary damages, and that this question was submitted to the jury by proper instructions. They were told: "If the jury believe from the evidence that the defendant's agents or employees, or any of them, in charge of defendant's train, carried the plaintiff beyond the station for which she had

purchased a ticket, and refused to put her off at her station, and were *indecorous* or insulting, either in words, tone, or manner, they should find for the plaintiff, and award her damages in their discretion, not exceeding five thousand dollars, the amount claimed in the petition."

A corporation can act only through natural persons. It of necessity commits its business absolutely to their charge. They are, however, selected by it. In the case of a railroad, the safety and comfort of passengers is necessarily committed to them. They act for it. Its entire power, *pro hac vice*, is vested in them, and as to passengers *in transitu* they should be considered as the corporation itself. It is therefore as responsible for their acts in the conduct of the train, and the treatment of passengers, as the officers of the train would be for themselves, if they were the owners of it. Public interests require this rule. They also demand that the corporation should be and it is liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employees in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult, or other willful misconduct, evincing a reckless disregard of consequences. *Dawson v. Louisville & N. R. Co.*, 6 Ky. Law Rep. 668.

As to female passengers the rule goes still further. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct, or wanton approach. *Com. v. Power*, 7 Metc. 596; *Craker v. Railway Co.*, 36 Wis. 657; *Nieto v. Clark*, 1 Cliff. 145; *Chamberlain v. Chandler*, 3 Mason, 242.

It was improper, however, to instruct the jury, as was done in this instance, that "*indecorous*" conduct alone is sufficient to authorize exemplary damages. The term is too broad. It may embrace conduct which would not authorize their infliction. It is true that the peculiar element which, entering into the commission of wrongful acts, justifies the imposition of such damages, cannot be so definitely defined, perhaps, as to meet every case that may arise. It has been said that they are allowable where the wrongful act has been accompanied with "circumstances of aggravation," (*Chiles v. Drake*, 2 Metc. (Ky.) 146;) or if a trespass be "committed in a high-handed and threatening manner," (*Jennings v. Maddox*, 8 B. Mon. 430;) or where the tort is "accompanied by oppression, fraud, malice, or negligence so great as to raise a presumption of malice," (*Parker v. Jenkins*, 3 Bush. 587;) or, as was said in *Dawson v. Railroad Co.*, *supra*, where the wrongful act is accompanied by "insult, indignity, oppression, or inhumanity."

It would, however, be extending the rule unwarrantably to hold that they could be imposed provided the conduct was merely "*indecorous*." This, as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting. It does not necessarily, or, indeed, generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered, while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult.

In the case now under consideration the jury may have believed it was indecorous in the conductor not to stop the train at the platform, or not to carry her valise for her when she was leaving the train, or to let her get off between stations, although she chose to do so rather than suffer inconvenience by being carried to the next station, or in merely telling her that she could walk back to her station; yet none of these things amounted to "insult, indignity, oppression, or inhumanity."

The lower court properly refused the request as made for special findings. The interrogatories offered merely required the jury to say what amount they found as compensatory, and what sum as exemplary damages. They in-

volved mixed questions of law and of fact. Upon a retrial the question of limiting the finding to compensatory damages should be presented to the jury under proper instructions, and the difference between them and those which are exemplary defined.

The evidence as to the conduct of the brakeman was competent. It is true that it was not specifically complained of in the petition, but only that of the conductor. The brakeman was, however, one of the agents of the railroad company in the management of the train upon which the appellee was a passenger. It is not necessary that a petition should enumerate specifically that this or that person connected with the management of the train was guilty of improper conduct in order to authorize the admission of evidence as to this or that particular party. It is sufficient to aver the breach of duty upon the part of those in control of the train. Besides, in this instance, the conduct of the brakeman complained of was in the immediate presence of the conductor, and occurred at the time of the other alleged acts of which the appellee complains. We do not mean to say whether he was guilty of improper conduct or not, but it was a part of the *res gestæ*, and therefore admissible. Any circumstances attending the commission of a trespass or a wrong, although not set forth in the declaration, may be given in evidence, with a view of affecting the question of damages, save where they within themselves constitute an independent cause of action. Sedg. Dam. side p. 538, note 3.

For the reason indicated, the judgment below is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

WORTHINGTON v. MILLER'S ADM'R.

(Court of Appeals of Kentucky. March 8, 1887.)

WITNESS—TRANSACTION WITH DECEDENT—PARTNERSHIP.

A judgment having been rendered against several as partners, one of them appealed, and the judgment was reversed as to him. Upon the return of the case to the lower court, he offered his copartner as a witness to prove a payment to the plaintiff's testate before the latter's death; claiming that, as the copartner had not appealed, the judgment remained in full force against him, and deprived him of all further interest in the controversy. *Held*, that under Civil Code Ky. § 606, subsec. 2, providing that no person shall testify for himself concerning any transaction with one dead, the copartner was incompetent. The judgment was a unit, and the copartner permitting the judgment to stand against him without appeal did not render him competent to testify for the other partner as to the payment to the dead man. The firm was the party defendant, and no member of it could testify as to transactions with the decedent, so as to absolve the firm from its obligations.¹

Appeal from circuit court, Kenton county.

Hallam & Myers, for appellant. *J. F. & C. H. Fisk*, for appellee.

PRYOR, C. J. This case has been heretofore in this court, once on the appeal of Miller's administrator, and once on the appeal of Worthington, and is now here for the third time. The action was instituted by the administrator of Miller on the following obligation: "Due John J. Miller two hundred and thirty-four dollars and forty cents. JAMES WHIPPS & Co.,"—the action being against James Whipps & Co.; the petition alleging that James Whipps and Henry Worthington were members, and that Wilcox, the other member, was dead, or had retired from the firm. Worthington denied by his answer the existence of any such firm, or that Whipps had any authority to sign his name to such a paper, or to make him liable as a member of a firm to which he never

¹ As to the admissibility of testimony concerning transactions with persons since deceased, see *Robertson v. Mowell*, (Md.) 8 Atl. Rep. 273; *Rhodes v. Pray*, (Minn.) 32 N. W. Rep. 86; *Hill v. Helton*, (Ala.) 1 South. Rep. 340; *Harris v. Seinsheimer*, (Tex.) 3 S. W. Rep. 307; *Gilder v. City of Brenham*, Id. 309; *Park v. Locke*, (Ark.) 2 S. W. Rep. 696, and note.

belonged; that Whipps was the mere agent to purchase tobacco for him (Worthington) and Wilcox, and without any power to sign their names in any way to paper evidencing an indebtedness. He further pleaded payment to the intestate for the tobacco for which this note was executed. Issues were made as to the partnership, and on the plea of payment.

When the case was here on the appeal of the administrator of Miller, it was held that Whipps, being sued as a member of the firm, was incompetent to testify as to the payment by him to the intestate, and a reversal on that account was had. When it went back, there was a judgment against Worthington and James Whipps that was brought here on Worthington's appeal, and reversed on account of an erroneous instruction. Whipps did not appeal, but the *supersedeas* was executed by Worthington, and the case sent back, the judgment being reversed, leaving, as Worthington contends, the judgment in full force as to Whipps, but reversed as to him, (Worthington.) On the return of the case, Worthington offered Whipps as a witness to prove payment, insisting that the latter was no longer a party to the action, and had no interest in the result. The court refused to permit the witness to testify, and this is the error complained of.

Whipps was insolvent, and therefore was not particularly interested in the result. Whether solvent or insolvent, and waiving the question that as the obligation sued on was a firm liability, and proceeded on as such, the judgment was a unit, it seems to us that the individual liability assumed by one partner in permitting judgment by default to go against him cannot render him a competent witness to testify for the other partners, with reference to the same transaction, as to what transpired between the witness and the dead man as to the payment of this note. If paid, it relieves the partnership from any liability for the debt; and, while the partnership assets might be amply sufficient to satisfy the judgment, a member of the firm is permitted to testify, as against the intestate, that he paid to the intestate in his life-time the entire amount, thereby exonerating the firm from the payment of the firm debt. The firm is the party defendant to the action, and no member of it can testify as to transactions with the decedent so as to absolve the firm from its obligation. There was no error, therefore, in refusing to permit the witness to testify. Judgment affirmed.

COMMONWEALTH v. WHITNEY.

(Court of Appeals of Kentucky. March 10, 1887.)

FALSE PRETENSES—OBTAINING GOODS—INDICTMENT—SUFFICIENCY OF.

An indictment under Gen. St. Ky. c. 29, art. 13, § 2, punishing any person who, by any false pretense or statement, with intention to commit a fraud, obtains from another money or property which may be the subject of larceny, alleged that the accused fraudulently represented to A. that B. had told him to come to A.'s store, and get certain property specifically described in the indictment, and that B. would pay for it, and the said A., relying on the representations of the accused, let him have the goods; that *all said statements* were false, and known to be false when made. *Held*, that the averment that *all said statements* were false was sufficiently definite to enable the accused to know the nature of the charge against him.

Appeal from circuit court, Barren county.

P. W. Harden, for appellant.

PRYOR, C. J. The statute provides that "if any person, by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money or property, or other things which may be the subject of larceny, he shall be confined in the penitentiary not less than one nor more than five years." The accused in this case, as is alleged in the indictment, fraudulently represented to J. T. Reed that he was then at work for Lucian Carden, and had been for two years, and that Carden had told him to come to

Reed's store-house, and get the property specifically described in the indictment, and that he (Carden) would call and settle and pay for them, and the said Reed, relying on the representations of the accused, let him have the goods; that all said statements and representations were false, and known to be false by the accused when made, and were made by him with the intent to commit a fraud, and by reason of which the goods were delivered.

It seems to us the averment that *all said representations were false and fraudulent* is sufficient to enable the accused to know the nature of the charge against him, and the false representations relied on by the commonwealth for a conviction. The criminal intent is alleged, and a definite statement of the facts constituting the offense. The statement inducing the owner to part with his goods was that Carden was then indebted to the accused for work and labor, and had told him to call and get the goods. The fact that the payment was to be made in the future by Carden was not the false pretense or statement authorizing the conviction. It was inducing the merchant to part with the goods on the false statement that Carden was then indebted to him, and had directed him to make the purchase on his (Carden's) credit. These facts, if true, with the averment of the fraudulent intent, constituted the offense, and, in our opinion, the indictment was good. The judgment will not be reversed, as an acquittal was had upon a peremptory instruction, and the case is brought here to test the sufficiency of the indictment.

GARVEY, Ex'r, etc., v. GARVEY and others.

(Court of Appeals of Kentucky. March 12, 1887.)

FRAUDULENT CONVEYANCE—DEED FROM FATHER TO SONS.

In an action by an executor against the testator's son to enforce a note due the estate by the son, and to set aside a deed to land made by the son to his sons as voluntary and fraudulent, it appearing that the sons had paid about what the land was worth, that their grandfather had said to them that he did not look to the land for the payment of the note, but intended it to be charged against their father as an advancement, *held*, that there was not sufficient evidence to set the deed aside as voluntary or fraudulent.

Appeal from circuit court, Owen county.

Jeremiah Garvey sold and conveyed a tract of land to his son, appellee Joel T. Garvey, without reserving any lien for the unpaid purchase money for which a note was given. Appellee failed to pay the note when it fell due, and claimed that his father had given or advanced him the land. The father thereupon brought suit to enforce payment of the note; but he having died, and the suit being dismissed, this action was brought by his executor, the appellant, upon the note. The appellee having in the mean time conveyed the land to his sons, the appellees J. R. and S. S. Garvey, appellant asked that the deed be set aside as voluntary and fraudulent, and that the land be subjected to the payment of the note. Judgment for the appellees, and the executor appeals.

Warren Montfort, for appellant. J. W. Landrum and J. W. Greene, for appellees.

LEWIS, J. The judgment of the lower court in the case of *Jerry Garvey* against *Joel T. Garvey* (heretofore before this court) was reversed on the ground that it was improperly decided that the note sued on was an advancement, but it was at the same time held by this court that the plaintiff could not maintain the action because the note was not payable during the life-time of the plaintiff. But, *Jerry Garvey* having died a short time after the return of that cause, this action was instituted by the executor of his will, and the question before us on the present appeal is one of fact, so far as relates to the sale and conveyance of the land by Joel T. Garvey to his two

sons, J. R. and S. S. Garvey; and after a careful examination of the record we are unable to discover any evidence authorizing the conclusion that that sale was fraudulent. The evidence of every witness who is asked about them is that J. R. and S. S. Garvey are each industrious, sober, and economical, and that they were engaged in farming and trading in tobacco and live-stock steadily from 1874 until 1879, when the deed was made. They themselves detail minutely and particularly how much they made during each of the years, and make it clear that they had sufficient means to purchase and pay for the land, and they, as well as J. T. Garvey, state that the purchase was made in good faith, and for a valuable consideration. The only evidence to the contrary consists of the vague opinion of two or three witnesses, who have an interest in the result of the suit, that possibly they did not make enough money during the period mentioned; which is offset by the opinion of disinterested witnesses to the contrary. We think the allegation that the sale was secret is not supported by the evidence.

The price paid for the land is shown to be about the value of it at the time. Appellees testify that Jerry Garvey stated to them in substance, before they purchased the land, that the note against J. T. Garvey, his son and their father, was to be paid out of his share of his estate after his (Jerry Garvey's) death, and, if so, clearly he did not look to the land to pay the note; and they are corroborated by other witnesses on this point. If it be true that the purchase was made by appellees under the belief induced by the disclaimer of the only creditor of J. T. Garvey that he did not look to the land for the satisfaction of his debt, it is impossible to see how that purchase could have been made with the intent to defraud the executor, or how he could have been defrauded. We perceive no sufficient evidence of fraud on the part of either the seller or purchaser of the land in question, and the court did not err in dismissing the petition as to J. R. and S. S. Garvey. And, as the pending motion to set aside the personal judgment against J. T. Garvey has not been finally decided, we can take no cognizance at this time of the action of the lower court in regard to it. Judgment affirmed.

GRISWOLD and others v. GOLDING and others.

(Court of Appeals of Kentucky. March 14, 1887.)

CONFLICT OF LAWS—MARRIED WOMAN'S NOTE.

A married woman executed a note in Missouri for necessities furnished herself and husband, no place of payment being named in the note. *Held*, the *lex loci contractus* determines the rights and legal effect of the note; and, it appearing that by the law of Missouri the contract of a married woman imposes no legal obligation, and cannot be enforced against her general estate, no suit can be maintained in this state to enforce the note against her general estate located here, although by the law of this state such a note would have been enforceable against her general estate.¹

Appeal from Campbell court.

Chas. Eginton, W. M. Beckner, and Raymond C. Gray, for appellants.
W. H. Mackay, for appellees.

HOLT, J. The appellee Josephine A. Golding was the owner, in 1869, of a considerable landed estate in Kentucky. It was her general estate. At that time she conveyed it to one Hunter, her husband, W. S. Golding, uniting in

¹The general rule is that a negotiable instrument, made in one state and payable in another, is governed by the laws of the latter. *Shoe & Leather Nat. Bank v. Woods*, (Mass.) 8 N. E. Rep. 753, and note; *Spearman v. Ward*, (Pa.) 8 Atl. Rep. 480. Where no place of payment is expressed, it will be governed by the law of the place of delivery, *Hart v. Wills*, (Iowa,) 2 N. W. Rep. 619; and an indorsement written on a note in one state, the note being subsequently sold and delivered in another, is to be construed according to the laws of the latter, *Briggs v. Latham*, (Kan.) 13 Pac. Rep. 129.

the deed, in order that it might be reconveyed jointly to her and her husband, each to have a life-interest in one-half of it, with remainder to her at his death, but to him in the event of her dying first without children. This was done. Subsequently they executed this note:

"\$1,377.75.

ST. LOUIS, June 26, 1876.

"Ninety days after date we promise to pay, to the order of Griswold, Clement, and Scudder, thirteen hundred and seventy-seven 75-100 dollars, payable at ———; value received.

[Signed]

"WAT. S. GOLDING.

"JOSEPHINE A. GOLDING."

It was given for necessities, and executed and delivered in the state of Missouri, where the obligors, who were then husband and wife, had their domicile. The former had no estate whatever aside from that named in the deed aforesaid, and the latter had none of any character in Missouri. They were divorced before this suit was brought upon the note, and in which it is sought to subject her land in this state to its payment. Before its institution, she had also brought suit in this state seeking a cancellation of the deeds above named, and a restoration of the property above named to her; so that the last-named action was a *lis pendens* when this suit was brought, and in it the relief sought by her was obtained, and the judgment granting it was sustained by this court upon appeal. The only question, therefore, now presented, is whether her land in Kentucky, held by her as her general estate, can be subjected to the payment of the note. By the law of this state, in force when it was executed, the general estate of the wife was liable for the payment of a debt created by her for necessities for herself and family, her husband included, if evidenced by a note signed by both her and her husband. This debt was created, and the note executed, however, in the state of Missouri, where the obligors then resided. The contract was not to be performed elsewhere. No place of payment was named in the note. It does not appear that the appellee promised the creditor that it should be a charge upon, or that it should be paid out of, her Kentucky estate, or, indeed, that she made any representation whatever as to the debt or her estate. Under such circumstances, the law presumes that it was executed with reference to the law of Missouri, and the *lex loci contractus* must determine its validity and legal effect. Its nature and obligation must be interpreted by it. If valid and enforceable against her general estate under the law of that state, then, *jure gentium*, it is so everywhere, by the tacit or implied consent of the parties.

Story, in speaking of a *feme covert*, says: "Her acts done in the place of her domicile will have validity or not, as they are or are not valid there." Story, Conf. Laws, § 136. If, however, it was not enforceable against her general estate by the law of Missouri, and by it created no personal obligation upon her, then it is so everywhere. If no obligation arose there, then none can be imposed here, because none exists. It is a general rule, applicable to contracts, that, if void or illegal by the law of the place of contract, they are so everywhere. If shown to be so by the law of the place where they were made, they cannot ordinarily be enforced elsewhere, (*Hyde v. Goodnow*, 3 N. Y. 266;) and this rule is universal and absolute, unless a different place, and one where, by the local law, they would be legal and enforceable, be appointed for their performance. *Ford v. Insurance Co.*, 6 Bush, 133.

By the law of Missouri the contract of a married woman imposes no personal obligation, and it cannot be enforced as against her *general* estate. It has no validity, save as to her *separate* property, as to which she is regarded by the law as a *feme sole*. Its utmost effect is to create an equitable charge upon her separate estate.

It is urged, however, that, as the note imposed no personal obligation upon the wife, and as she had no estate in Missouri, it should be presumed that she

signed it with a view to its being a charge upon her land in this state, as otherwise it would have no force whatever. This does not necessarily follow. If she had acquired separate estate in Missouri subsequent to its execution, it does not appear from the authorities we have at hand that it could not have been charged with the debt. But, whether this be so or not, we are unwilling to presume, in the absence of any testimony whatever, and when, if so, the parties could have made it appear, that she signed the note with a view to its performance in this state, or to its being a charge upon her land in Kentucky. It results that, as the appellee was not competent under the laws of Missouri to contract during her coverture, so as to bind herself or her general estate, that the note sued upon cannot be enforced against her or her general estate in the courts of this state. If so, it would be done in the absence of obligation, and without any contract. Judgment affirmed.

CLEVELAND v. HARDING and others.

(*Supreme Court of Texas.* February 15, 1887.)

DEBTOR AND CREDITOR—BUSINESS CONTINUED BY WIDOW—LIABILITY OF OLD STOCK FOR DEBTS CONTRACTED BY WIDOW.

A widow, after the death of her husband, continued the business in the husband's name, and bought an additional stock of goods. *Held*, in an action by one claiming payment for goods sold after the husband's death, the stock acquired before his death was not subject to such claim, but the stock acquired after his death was, unless in could be clearly shown to have been acquired with the old stock by exchange or purchase.

Appeal from Jefferson county.

Hal W. Greer, for appellant. *Tom J. Russell*, for appellees.

WILLIE, C. J. W. D. Cleveland brought suit against Elizabeth Harding, George N. Harding, Laura Harding, Louisa Doucette, and her husband, A. B. Doucette, as partners under the firm name of I. N. Harding on a verified account for goods sold and delivered, amounting to \$247.58. He also sued out a writ of garnishment against George E. Vallade, who answered denying any indebtedness to the firm, or having any of their effects in his possession. This answer was controverted by the plaintiff; and the partnership of the defendants having been denied by them under oath, and the general denial having been pleaded by them, the case went to trial upon these issues as between the plaintiff and the defendants, and upon the issue as above stated between the plaintiff and the garnishee. The facts as developed upon the trial showed that I. N. Harding, who was, at the time, a merchant in Beaumont, Texas, died July 10, 1884, leaving a widow, the defendant Elizabeth Harding, and George and Laura Harding and Louisa Doucette, his children, and that these four were the only persons entitled to the estate left by him, all of which was the community property of himself and the said Elizabeth Harding. Mrs. Harding, the widow, at first proposed to administer the community estate as survivor, but afterwards concluded to continue the business previously carried on by her husband, which was done with the approval of her children. The mother and children permitted their interest in the property to remain in the business as before the death of I. N. Harding. There is some conflict, or at least uncertainty, in the evidence, as to the understanding upon which the business was carried on after the death of I. N. Harding. According to the testimony of George Harding, one of the sons of the deceased, who seems to have been in charge of the business for some time, the widow and heirs together kept up the former business of I. N. Harding, and shared in its profits. According to the testimony of others of the defendants, the heirs allowed it to be carried on by their mother, and received none of the profits, but some of them were paid salaries for services rendered as clerks or employees in con-

ducting the business. While the business was thus carried on, the account upon which this suit is brought was contracted. Subsequently, in August, 1885, Vallade administered on the estate of I. N. Harding, and as such received into his charge such goods as were at the time in the business, conducted, as before stated, in the name of I. N. Harding. The court in which the administration was opened, set aside out of the estate \$800 to the widow as exempt property. It did not clearly appear what part of the goods taken into possession by the administrator were of the stock left by I. N. Harding at the day of his death, and how much was acquired after his death. The cause was submitted to the judge for his decision, and his conclusions of law and fact show that he held that no partnership by agreement of the heirs had been shown, or that their agreement with one another was calculated to make any one dealing with the firm believe that they were partners; that they merely consented that their mother might carry on the business, and that their interest might remain in it, and that this would not make them partners. He further concluded that most of the goods in Vallade's hands were old goods on hand when I. N. Harding died, and that Vallade was administering his estate, and therefore none of the goods which came to him could be subjected to the garnishment, and accordingly gave judgment for the appellees, and from that judgment this appeal is taken.

Upon the death of I. N. Harding the stock of goods with which he was doing business, being community property, passed to his wife and children charged with the payment of community debts; and these were to be first satisfied before any subsequently contracted by the widow and children could be enforced against it. The community estate not having been administered as provided by law, and creditors not seeking to subject it to their claims, there was no obstacle to the widow and children continuing the business followed by the deceased, and replenishing the stock by contracting debts for new goods to be placed in it. Subject to the right of creditors of the deceased to proceed against the old stock to satisfy their debts, there can be no doubt but that for any debts contracted in keeping up the business the property of those carrying on the trade would be liable, whether it consisted of the stock in trade or other means. A business thus conducted would be governed by the same rules as if it were prosecuted by other parties. The parties engaged in it would be partners or not, accordingly as they had so agreed or shared in the profits, or held themselves out to the world as such. If the evidence showed satisfactorily the defendants continued the business of the deceased by agreement between themselves, shared in the profits of the same, or by their conduct induced the appellant to believe that they were partners, and credit them as such, they were liable for the debts contracted under the circumstances. The evidence is not clear as to the terms upon which the business was conducted after the death of I. N. Harding. The testimony of George Harding tended strongly to prove a partnership between the widow and her children, formed by agreement, and in which each member of the firm shared in the profits of the concern. The evidence of the widow and the other children tended with equal force to show that she conducted the business for her own benefit, paying her children salaries for their services in assisting her. Did the plaintiff's rights depend solely upon the establishment of a partnership between the defendants, or as to himself, we could not say that the court committed an error in finding against him upon this point, and rendering judgment for the defendants. But the evidence is uncontroverted that the debt sued on was contracted for goods furnished the person or persons merchandising under the name of I. N. Harding, and to replenish the stock in trade of that concern, whether a partnership or not. The debt accruing from the purchase of these goods was due either from the widow alone, or from the widow and such of the other defendants as were interested as partners with her in the store, or held themselves out to the plaintiff as

being interested in the business. The plaintiff held a just debt payable by the parties carrying on the business, and was entitled to a judgment against them. He may have been mistaken as to the names and number of the persons who were carrying on the business, and charged some parties as partners who were not actually so; but the evidence is beyond dispute that one or more of the parties made defendants to the action were conducting a mercantile business under the name of I. N. Harding, and as such had contracted the debt, and against such he was certainly entitled to judgment. The court should have determined from the evidence which of the defendants, if any, were carrying on the business in the name of I. N. Harding, and had bought the goods of Cleveland, and against such, whether one or more, should have rendered judgment for the plaintiff.

The court should further have ascertained, if possible, what effects of those held by Vallade, the garnishee, as administrator of I. N. Harding, deceased, were the property of said deceased at the date of his death, and what had since been acquired by the defendants, who had kept up the business after his death. As to the former the garnishee could not be charged, as they were to be administered by him under the orders of the county court; but, as to the latter, they did not, presumably at least, form any part of the deceased's estate; and, unless it can be clearly shown upon another trial that they were acquired with the property of the deceased by exchange or purchase, they should be held liable to the plaintiff's garnishment.

In order that the case may be disposed of below in accordance with these views, the judgment is reversed, and the cause remanded.

LEACHE v. STATE.¹

(Court of Appeals of Texas. November 13, 1886.)

1. CRIMINAL PRACTICE—SEPARATING WITNESSES.

The statutes of this state do not exempt expert nor any particular class of witnesses from the operation of the "rule" sequestering witnesses. The enforcement of that rule is left largely to the discretion of the trial court.

2. SAME—EXPERTS.

While the general doctrine in this state has been to exempt expert witnesses from the "rule," especially in cases involving the question of insanity, that they might hear and speak on the whole testimony, it has never been held to defeat the sufficiency of expert testimony based upon the hypothetical statements of the evidence. The expert witness, however, can state his opinion only upon the whole evidence; and, if the witness has not heard the evidence, each side to the issue has a right to an opinion upon any hypothesis consistent with the evidence, and, if the one side fails, the other may bring out the whole of the hypothetical case.

3. EVIDENCE—EXPERTS—REASON FOR OPINIONS.

An expert may be asked by either party as to the reasons upon which his evidence is based, or he may, with leave of the court, give such explanation on his own account. He cannot go further, but may be examined in details in order to test his credibility and judgment.

4. CRIMINAL PRACTICE—INSANITY—CHARGE OF THE COURT.

See the opinion *in extenso* for an elaborate review of the authorities upon the question of insanity, and for the general rules deduced by the court thereon; and for charges of the court on the question held correct.

5. SAME—PRESUMPTION.

The rule does not obtain in this state that the law presumes insanity to continue after it is once shown to exist, and a special instruction to such effect was properly refused.

6. SAME—OBJECTING TO CHARGE.

Objections to charges given, or to the refusal of special instructions, should be perpetuated by a bill of exceptions. When such errors are raised for the first time in the motion for new trial, this court will interfere only when it is manifest that they were calculated to injure the rights of the accused.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

7. SAME—BURDEN OF PROOF.

When the defense relies upon any substantive, distinct, separate, and independent matter, which does not necessarily constitute a part of the transaction, the burden of proving it rests upon the defendant, and the trial court should so charge.

8. SAME—NEW TRIAL.

New trial should be applied for within two days after conviction, but, for good cause shown, the motion may, in felony cases, be considered at any time during the trial term.

9. MURDER—INSANITY—BURDEN OF PROOF.

If insanity be the defense interposed, the burden of proof rests upon the defense.

Appeal from district court, Comanche county.

A term in the penitentiary was assessed against the appellant upon his conviction in the first degree for the murder of J. N. Martin.

The evidence for the state shows conclusively that, on the twentieth day of June, 1885, the defendant was on the streets of the town of De Leon, very much under the influence of whisky, cursing and swearing in front of a drug-store; that the proprietor finally prevailed on the deceased and another to attempt the removal of the defendant to his home. Deceased urgently begged defendant to go home, and finally, with the help of another, undertook to lead him home. At a point about 400 yards from the drug-store the parties stopped for some purpose, when the defendant suddenly drew a pistol, and fatally shot the deceased. It was also testified for the state that, some days prior to the killing, the defendant claimed to have had a difficulty with deceased, and afterwards uttered threats to kill deceased.

The defense proved that the difficulty referred to by the witness for the state did not occur between defendant and deceased, but between deceased and another in defendant's presence, and that defendant was no party to the difficulty, and was in no way affected by it; impeached the witness who testified to the threats; and proved that, up to the moment deceased started home with defendant, they had been intimate friends. It was proved that the defendant was very drunk at the time of the killing, either upon whisky or some drug. By his wife and several members of his family, the defendant proved that for years he had been addicted to the morphine and whisky habit. The witnesses testified that, when under the conjoint influence of whisky and morphine, the defendant was absolutely and totally insane, and they related a great many instances of eccentric conduct on his part. His wife testified that he took a dose or two of morphine at home on the evening prior to the killing, and took a large quantity in a bottle with him when he left home. It was also testified that one or more of his maternal relatives died insane, and that others were inmates of a lunatic asylum in a distant state.

Pearre & Boynton, for appellant, cited against the charges of the court on the defense of insanity, approved in the opinion, the following authorities: *State v. Felter*, 25 Iowa, 67; *Buckn. Unsoundness of Mind*, 59; *Whart. Hom. (2d Ed.)* § 570; *Whart. & S. Med. Jur.* §§ 152-158; 15 *Amer. Jour. of Insan.* 303; *Brown, Insan.* § 8; 2 *Bouv. Dict. (15th Ed.)* "Lucid Intervals;" *Life Ins. Co. v. Terry*, 15 Wall. 580; *Farrer v. State*, 2 Ohio St. 54-70; *Insurance Co. v. Rodel*, 95 U. S. 232-340; *Dejarnette v. Com.*, (Va. 1881,) 2 *Crim. Law Mag.* 348; *Polk v. State*, 19 Ind. 170; *Stevens v. State*, 81 Ind. 485; *State v. Klinger*, 43 Mo. 127; *Com. v. Heath*, 11 Gray, 303; *People v. Coffman*, 24 Cal. 230; *Com. v. Eddy*, 7 Gray, 583; *Fisher v. People*, 23 Ill. 283; *State v. Marler*, 2 Ala. 43; *State v. Brinyea*, 5 Ala. 241; *Smith v. Com.*, 1 Duv. 224; *Dove v. State*, 3 Helsk. 371; *State v. Bartlett*, 43 N. H. 224; *People v. Garbutt*, 17 Mich. 9; *Underwood v. People*, 32 Mich. 1; *Hopps v. People*, 31 Ill. 385; *Chase v. People*, 40 Ill. 352; *Ogletree v. State*, 28 Ala. 701; *State v. Crawford*, 11 Kan. 32; *State v. Lawrence*, 57 Me. 574; *State v. Hundley*, 46 Mo. 414; *Ex parte Holyland*, 11 Ves. 11; *Harden v. Hays*, 9 Pa. St. 151; *Clark v. State*, 12 Ohio, 496, note a; *Baldwin v. State*, 12 Mo. 223.

Herring & Kelley, N. R. Lindsey, J. C. Jenkins, and B. D. Shropshire, also for appellant.

Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. Appellant was convicted of murder of the second degree for the killing of one J. N. Martin, his punishment being assessed at 14 years in the penitentiary. On the trial his defenses, in addition to the plea of not guilty, were—*First*, resistance to an unlawful arrest by an officer acting without authority of a warrant, and when no offense had been committed by defendant; and, *second*, insanity.

Among the witnesses summoned by defendant were several medical experts, whose testimony he proposed to use on the issue of insanity. In placing the witnesses under "the rule" which had been invoked preliminary to the introduction of the evidence, the court required the medical experts also to be placed under the rule with the other witnesses, over the protest of defendant, who insisted upon his right to have them remain in the court-room so that they might hear all the testimony adduced on the plea of insanity, and be thereby the better enabled to express an opinion upon that issue. Where "the rule" is invoked as to witnesses, the mode and manner of its enforcement is confided largely to the discretion of the court, and the exercise of that discretion will not be revised except in the clearest cases of abuse. *Kennedy v. State*, 19 Tex. App. 620; *Bond v. State*, 20 Tex. App. 421; Posey, *Crim. Dig.* Tex. 611, 612. No exception is provided by statute exempting any particular class of witnesses from the operation of the rule. *Code Crim. Proc. arts.* 662-666. Ordinarily, witnesses who are summoned as experts are excepted from the rule, and, in cases involving the question of insanity, the better and more satisfactory practice would be to allow them to remain in the room, and hear the testimony of all the other witnesses, in order that from the whole testimony they may be enabled to determine from the evidence itself the matter upon which their opinion is desired. *Johnson v. State*, 10 Tex. App. 571. Mr. Wharton states the rule otherwise, and holds that "when insanity is set up by a defendant, and denied by the prosecution, an expert cannot be asked his opinion as to the evidence in the case as rendered, not only because this puts the expert in the place of the jury in determining as to the credibility of the facts in evidence, but because the assistance thus afforded is in most trials illusory, experts usually being in conflict, and the duty devolving on the court and jury of supervising the reasoning of experts being one which can rarely be escaped." *Whart. Crim. Ev.* § 418.

This whole subject was fully discussed by us in *Webb's Case*, 9 Tex. App. 490, and upon a review of the authorities it was said that, "as to medical experts, they may state their opinion upon the whole evidence, if they have heard it all, or upon an hypothetical statement which is in conformity with the whole evidence. All authorities agree that it is inadmissible to permit an expert to give his opinion upon anything short of the whole evidence in the case, whether he has personally heard it, or it is stated to him hypothetically;" citing Redfield's addition to section 53, *Greenl. Ev.* Where the expert has not heard the evidence, each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence, and, if meagerly presented in the examination on one side, it may be fully presented on the other; the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted. *Coyle v. Com.*, 104 Pa. St. 117.

In the case in hand it is not shown that the hypothetical method of obtaining the opinion of the experts was either defective in not submitting all the facts essential to an intelligent opinion, nor that the opinions were such as would have been given differently had the evidence been heard directly by these witnesses, and their conclusions drawn from it, and not from an hypo-

thetical statement of it. We cannot perceive that the discretion of the trial judge was abused in the matter to the prejudice of defendant.

Dr. D. R. Wallace, superintendent of the insane asylum at Terrell, Texas, qualified as an expert, and, upon the hypothetical statements submitted to him, declared as his opinion that the defendant, at the time of the homicide, was suffering from recurrent insanity. He further stated, in effect, that, had defendant been consigned as insane to his custody, at no time covered by the facts stated would he have felt authorized to release him as a sane man from the asylum. Appellant's counsel asked this witness if he could give any illustrations of recurrent insanity which had come within his own personal experience. This testimony was objected to by the prosecution, and excluded by the court. We have had no access to the authority (Lawson, Exp. Ev.) cited in support of the admissibility of the evidence in the brief of appellant's counsel; but, even if admissible, in our view of the case, its exclusion could not materially affect defendant's rights, and the ruling would be error without prejudice, which is not reversible error. The general rule seems to be that "an expert may be asked by either party as to the reasons on which his opinion is based, or he may, with leave of the court, give such explanation on his own account. Beyond this he cannot go in such examination, though he may be examined in details in order to test his credibility and judgment." Whart. Crim. Ev. (8th Ed.) § 419.

Many objections are urged to the charge of the court upon the question of insanity, and it is urgently insisted that it was error to refuse defendant's special requested instructions upon the subject. The chief objection is that the court did not instruct the jury to the effect "that defendant would not be responsible if he was overwhelmed by an impulse which took away his will power, and rendered him incapable of controlling his actions." In effect, the complaint is that the court did not sufficiently charge upon moral insanity or irresistible and uncontrollable impulse as an excuse for crime. As given, the charge of the court upon this branch is almost a literal copy of an approved charge on insanity given in Willson's Criminal Forms, (Form No. 716, p. 335,) and which is taken from the charge given the jury by the Hon. JOHN C. ROBERTSON, presiding in the trial court in the case of *King v. State*, reported in 9 Tex. App. 515.

Different courts and different law writers have announced different tests of responsibility for crime where insanity was claimed as a defense to its commission. Mr. Greenleaf's rule is, whether the accused was laboring under such defect of reason from disease of the mind as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know that he was doing wrong,—the party's knowledge of right and wrong in respect to the very act with which he is charged. 2 Greenl. Ev. § 373. And this seems the rule as recognized in Texas in the early case of *Carter v. State*, 12 Tex. 500; and also in *Webb's Case*, 5 Tex. App. 596; *Williams v. State*, 7 Tex. App. 163; and *Clark v. State*, 8 Tex. App. 350.

Mr. Taylor, in his celebrated work on Medical Jurisprudence, speaking of moral insanity, says: "The law does not recognize moral insanity as an independent state; hence, however perverted the affections, moral feelings, or sentiments may be, a medical jurist must always look for some indications of disturbed reason. Moral insanity is not admitted as a bar to responsibility for civil or criminal acts, except in so far as it may be accompanied by intellectual disturbance." Page 780. From the time of the decision in the noted *McNaghten's Case*, 10 Clark & F. 200, the English courts have followed the doctrine as the same is announced by Greenleaf, and they have refused to recognize the co-existence of an impulse absolutely irresistible with capacity to distinguish between right and wrong with reference to the act, and in most of the American states the test is still a knowledge of right and wrong. In his work on Homicide Mr. Wharton says: "Irresistible impulse is not moral

insanity, supposing moral insanity to consist of insanity of the moral system co-existing with mental sanity. Moral insanity, as thus defined, has no support either in psychology or law. Nor is irresistible impulse convertible with passionate propensity, no matter how strong in persons not insane. In other words, the irresistible impulse of the lunatic which confers irresponsibility is essentially distinct from the passion, however violent, of the sane, which does not confer irresponsibility." Section 574. A number of most respectable authorities deny that moral insanity has any place in law, and, with regard to irresistible impulse, they hold, "if it were irresistible, the person accused is entitled to be acquitted, because the act was not voluntary, and was not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all." Steph. Crim. Law, 91; 1 Whart. Crim. Law, (8th Ed.) § 145; *Macfarland's Trial*, 8 Abb. Pr. (N. S.) 57; *Fisher v. People*, 23 Ill. 283; *Com. v. Haskell*, 2 Brewst. 491; *Blackburn v. State*, 23 Ohio St. 146; *State v. Gut*, 13 Minn. 341, (Gil. 315); *Life Ins. Co. v. Terry*, 15 Wall. 580; *Com. v. Mosler*, 4 Pa. St. 264; *Dejarnette v. Com.*, 75 Va. 867; *Goodwin v. State*, 4 Crim. Law Mag. 586.

It is held in Oregon that if the accused knew enough to know the difference between right and wrong, and that he was violating the law by the commission of the act, it will not excuse him, although he had surrendered his judgment to some mad passion, which, for the time being, was exercising a strong influence over his conduct. *State v. Murray*, 6 Crim. Law Mag. 255. Un-governable passion is not insanity, and one whose power of will is not impaired by disease, and who, yielding to passion, slays another, is subject to the punishment fixed by law. *Sanders v. State*, 94 Ind. 147.

It is said by the supreme court of Alabama: "There is a species of mental disorder, a good deal discussed in modern treatises, sometimes called 'irresistible impulse,' 'moral insanity,' and perhaps by some other names. If by these terms it is meant to affirm that a morbid state of the affections or passions, or an unseating of the moral system, the mental faculties remaining meanwhile in a normal, sound condition, excuses acts otherwise criminal, we are not inclined to assent to the proposition. The senses and mental powers remaining unimpaired, that which is sometimes called moral or emotional insanity savors too much of a seared conscience or atrocious wickedness to be entertained as a legal defense. GIBSON, C. J., in *Com. v. Mosler*, 4 Pa. St. 266, while recognizing the existence of moral or homicidal insanity as 'consisting of an irresistible inclination to kill, or to commit some other particular offense,' adds: 'There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance.' With all respect for the great jurist who uttered this language, we submit if this is not almost if not quite the synonym of that highest evidence of murderous intent known to the common law,—a heart totally depraved and fatally bent on mischief. Well might he add: 'The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary to show by clear proof either its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature.' What is meant by 'evinced itself in more than a single instance,' and how this principle would work in administration, we are left to speculate. Can that be sound legal principle whose general recognition would destroy

social order as well as personal safety? We concur with Mr. Wharton (Howe, § 574) that moral insanity, which consists of irresistible impulse co-existing with mental sanity, 'has no support either in psychology or law.' " *Boswell v. State*, 63 Ala. 307.

And so in *People v. Hoin*, 62 Cal. 120, it is held that "an irresistible impulse to commit an act which one knows is wrong or unlawful, if it ever exists, does not constitute the insanity which is a legal defense. Whatever may be the abstract truth, the law never recognizes an impulse as uncontrollable which yet leaves the reasoning powers, including the capacity to appreciate the nature and quality of the particular act, unaffected by mental disease. It cannot be said to be irresistible because not resisted." And in *Walker v. People* it is laid down that, if an accused has sufficient reason to know right from wrong, it is immaterial whether he had sufficient power of control to govern his actions. 26 Hun. 67.

But even in Pennsylvania the doctrine of uncontrollable impulse appears to have been greatly modified, if not repudiated entirely; for we find the supreme court of that state, in 1885, announcing, in *Com. v. Taylor*, that "moral insanity is not sufficient to constitute a defense unless it be shown that the propensities in question exist to such an extent as to subjugate the intellect, control the will, and render it impossible for the person to do otherwise than yield thereto. No mere moral obliquity of perception will protect a person from punishment for his act. The jury should be satisfied, with reference to the act in question, that his reason, conscience, and judgment were so entirely perverted as to render the commission thereof a duty of overwhelming necessity." A man in the condition thus described would be unquestionably insane to all intents and purposes, in our opinion.

We deduce from the authorities, as a correct general conclusion, that the law does not require, as the condition on which criminal responsibility shall follow the commission of crime, the possession of one's faculties in full vigor, or a mind unimpaired by disease or infirmity; that the mind may be weakened by disease, or impaired, and yet the accused be criminally responsible for his acts; that he can only discharge himself from responsibility by proving that his intellect was so disordered that he did not know the nature and quality of the act he was doing, and that it was an act which he ought not to do. But that if, on the other hand, he had sufficient intelligence to know what he was doing, and the will and the power to do or not to do it, he is, in contemplation of law, responsible for the act he has committed. *State v. Martin*, (N. J.) 3 Crim. Law Mag. 44. See, also, *Dunn v. People*, 109 Ill. 635, and 1 Bish. Crim. Law, § 391.

But let us concede, for the sake of argument, that defendant was entitled in this case to have the doctrine of irresistible impulse and uncontrollable will given in charge to the jury, then we think it is manifest, from the following extracts taken from the charge, that the law was sufficiently given, and that defendant has no just ground of complaint in the matter. The jury were instructed: "A safe and reasonable test in all cases would be that whenever it should appear from all the evidence that, at the time of doing the act, the prisoner was not of sound mind, but was affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted; for in such a case reason would be at the time dethroned, and the power to exercise judgment would be wanting. But this unsoundness of mind or affection of insanity must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong, and depriving the accused of the power of choosing between right and wrong as to the particular act done." This portion of the charge is a quotation from the opinion of BREESE, J., in *Hopps v. People*, 31 Ill. 385. Again we copy from the charge: "If it is true that defendant took

the life of deceased, and at the time the mental and physical machine had slipped from the control of defendant, *or if some controlling mental or physical disease was in truth the acting power within him which he could not resist*, and he was impelled without intent, reason, or purpose, he would not be accountable to the law. If, on the other hand, he was of sound mind, capable of reasoning, and knowing the act he was committing to be unlawful and wrong, and knowing the consequences of the act, *and had the mental power to resist and refrain from evil*, his plea of insanity would not avail him as a defense." And yet again the jury were told: "But if the mind was in a diseased and unsound state to such a high degree that for the time being *it overwhelmed the reason, conscience, and judgment, and the defendant in committing the homicide acted from an irresistible and uncontrollable impulse*, it would be the act of the body without the concurrence of the mind. In such a case there would be wanting the necessary ingredient of every crime,—the intent and purpose to commit it."

We are of opinion that the charge upon the general doctrine of insanity was sufficiently full, and that it amply submitted the question of irresistible impulse and uncontrollable passion, at least as far as we are willing to go in that direction, and therefore there was no error in refusing the special requested instructions.

But, again, it is insisted that the court erred in the refusal of defendant's special instruction to the effect that the law presumes insanity to continue after once shown to exist. In *Webb's Case*, 5 Tex. App. 596, this court quotes from Mr. Greenleaf that, "if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental, being caused by the violence of a disease. But this presumption is rather matter of fact than law, or, at most, partly of law and partly of fact." 1 Greenl. Ev. § 42.

Dr. Wallace's opinion was that defendant was a subject of "recurrent insanity." "Recurrent" means returning from time to time. Mr. Wharton lays it down as a rule that there is no presumption that fitful and exceptional attacks of insanity are continuous,—a proposition manifest in itself. It is only insanity of a chronic or permanent character, which, on being proved, is presumed to continue. Whart. Crim. Ev. § 730. On the other hand, the rule prevails that, where an insane person has lucid intervals, the law presumes the offense of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. 1 Russ. Crimes, (9th Ed.) top p. 10, side p. 11; 1 Hale, P. C. 33, 34.

In an able article on "Presumptions in Criminal Cases," published in the first volume of the Criminal Law Magazine, Dr. Wharton says: "Supposing, however, insanity has been proven to exist at a particular time, is it presumed to continue? So we have been sometimes told, but erroneously. Some diseases which are classed under the general category of insanity are undoubtedly chronic and permanent, and from them recovery is hopeless. From senile *dementia* and congenital idiocy there can be, as a rule, no recovery. There are few other forms of insanity of which recovery may not be predicated, at least as a contingency; and many forms of insanity, for example, puerperal and climacteric, arising from some peculiar transitional condition of the system, are notoriously temporary. It is a *petitio principii* to say that chronic insanity is presumed to continue; it is untrue to say that temporary insanity is to be considered as anything else than temporary. The fact is, there is no presumption of law whatever as to the continuance of disease of any kind. The question is one of experience, to be determined by the character of the disease, taken in connection with the character of the person in whom it acts." Aside from this, the burden is upon the defendant to show that he was insane at the time of and with regard to the particular act, and the presumption of sanity in temporary or recurrent insanity is against him, and must be

overcome by him with a preponderance of evidence. 2 Bish Crim. Proc. 674. It was not error to refuse the special instruction upon this subject.

That portion of the charge relating to the authority and duty of a peace officer to arrest without warrant is also complained of. Such an arrest is allowed where an offense is committed in the presence or within view of the officer, if the offense is a felony, or an "offense against the public peace." Code Crim. Proc. art. 226. It is made a disturbance of the peace if one in a public place, street, or highway, or near a private house, shall use loud and vociferous language, or swear or curse in a manner calculated to disturb the inhabitants. Pen. Code, art. 314; Acts Eighteenth Leg. Reg. Sess. 12. The court instructed the jury that the officer would have the right to arrest defendant without a warrant if the latter swore or cursed in the street or highway, or in a public place, in his presence. This charge was erroneous, because to curse and swear in a public place, street, or highway is not an offense unless done "in a manner calculated to disturb the inhabitants of such public place." Article 314. While a counter-instruction was asked for defendant and refused, there is no bill of exceptions saved to either the charge given or that refused. One ground of the motion for a new trial is that the court erred in refusing instructions asked by defendant.

Our statutes make a difference in the practice with regard to charges in civil and criminal cases. In the former the charge is regarded as excepted to without the necessity of taking any bill of exceptions thereto, (Rev. St. art. 1318; 2 Cond. Cas. Willson, §§ 135, 656,) while in the latter it is expressly provided that, if any of the eight provisions of the Code with regard to the charge are disregarded, "the judgment shall be reversed, *if the error is excepted to at the time of the trial*," (Code Crim. Proc. art. 685; *Clanton v. State*, 20 Tex. App. 615, and authorities cited.) If no exception has been taken, then the question of the error in the charge may be raised on motion for a new trial, and a new trial shall be granted "where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant." Code Crim. Proc. art. 777, subd. 2. It is a well-settled rule that a charge of the court, when first questioned as to its correctness in the motion for new trial, will not be revised on appeal unless, when viewed in the light of the circumstances, it was calculated to prejudice the rights of the accused. *Hart v. State*, 21 Tex. App. 163; *Mendiola v. State*, 18 Tex. App. 463; *Lewis v. State*, Id. 401; *Elam v. State*, 16 Tex. App. 34; *Gardner v. State*, 11 Tex. App. 265; *Mace v. State*, 9 Tex. App. 110; *Henry v. State*, Id. 358.

Applying these rules to the facts proven, we cannot perceive that the error of the charge was calculated to injure defendant's rights. It is abundantly shown that he was cursing in a public place, and handling, if not flourishing, a knife. The druggist in front of whose store he was cursing was disturbed, and asked the deceased, as an officer, to take defendant away from his house. Complained of for the first time on the motion for new trial, when considered in the light of these facts, we must hold that the error in the charge was without prejudice.

Another objection is that the court, in effect, charged the jury that, when the facts have been proven which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to justify or excuse the prohibited act. Pen. Code, art. 51. This identical question was raised in *Jones v. State*, 13 Tex. App. 1, and it was there held that, "when an accused relies upon any substantive, distinct, separate, and independent matter as a defense, which is outside of and does not necessarily constitute part of the act or transaction with which he is charged, (such as the defense of insanity, etc.,) then it devolves upon him to establish such special and foreign matter by a preponderance of evidence. It would not be error to instruct in such cases that the burden of proving such defenses devolved upon the ac-

cused." *Smith v. State*, 18 Tex. App. 69; *Com. v. Boyer*, 7 Allen, 806; *State v. Hemrick*, 62 Iowa, 414, 17 N. W. Rep. 594; *Ball v. Com.*, 81 Ky. 662.

The supplementary motion for new trial was properly overruled. "A new trial must be applied for within two days after the conviction; but for good cause shown, the court, in cases of felony, may allow the application to be made at any time before the adjournment of the term at which the conviction was had." Code Crim. Proc. art. 779; *Hart v. State*, 21 Tex. App. 163; *Smith v. State*, 15 Tex. App. 139; *Bullock v. State*, 12 Tex. App. 42; *White v. State*, 10 Tex. App. 167.

Appellant was convicted at one term, and an appeal was taken. The appeal was dismissed, and the motion was made at a subsequent term. That was not the term at which the conviction was had.

It only remains to pass upon the sufficiency of the evidence. It is true the medical expert Dr. Wallace thought the defendant insane to the extent that he would not have released him from the asylum, if in his charge, during any portion of the time covered by the testimony. Other witnesses did not think him insane. "The proved existence of mental disease does not necessarily exempt a person from criminal responsibility." Tayl Med. Jur. 813. When the issue is on trial in a court of law, "it is not *medical*, but *legal*, insanity, which is required to be proved on these occasions to the satisfaction of a jury." Id. 884. "An expert's conclusions do not bind them, and should they, upon the whole evidence, judge differently from him, their verdict is to follow, not his opinion, but their own." 2 Bish. Crim. Proc. (3d Ed.) § 684. In our opinion defendant's plea of insanity was certainly not clearly established, if, in fact, the evidence tended to establish it at all. To have made it available it should have been established, by a preponderance of evidence, to the satisfaction of the jury.

Because we have failed to find any reversible error in the record, the judgment of the court below is in all things affirmed.

RYAN v. STATE.¹

(Court of Appeals of Texas. January 26, 1887.)

1. CRIMINAL PRACTICE—VENUE—EVIDENCE.

Proof of the venue of the offense should not merely be inferential, but should establish that issue beyond peradventure.

2. LARCENY—OWNERSHIP—CHARGE OF THE COURT.

See the statement of the case for evidence, on a trial for larceny, held insufficient to establish the allegation of ownership, or that of a fraudulent taking of the alleged stolen property.

3. SAME—PURCHASE.

Purchase of the alleged stolen property was an issue presented by the evidence in this case, and should have been embraced in the charge of the court.

Appeal from district court, Liberty county.

This conviction was had upon an indictment for the theft of one head of cattle, the property of John West. The penalty imposed was a term of two years in the penitentiary.

The evidence, both for the state and the defense, established the taking of the animal. The state's witness West admitted that he had agreed to trade the animal to the defendant, but denied that the trade was ever consummated. A single witness testified that the animal taken by the defendant was the property of West. For the defense it was proved that, when he took the animal, the defendant took it openly, claiming to have purchased it from West. Two or three witnesses testified positively that the animal taken by

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

defendant was owned by Mrs. Pepkin. It was proved that on demand, after the taking of the animal, the defendant paid Mrs. Pepkin for it. The only proof of venue was that the parties all *lived* in Liberty county.

S. R. Perryman, for appellant, maintained the propositions announced in the opinion.

Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. To say the least of it, it is questionable from the record if the venue of the offense in this case was affirmatively proven upon the trial below. Upon another trial it should be established more definitely.

Appellant was indicted for theft of an animal belonging to one John West. Even if the allegation of ownership had been proven as alleged, then the evidence is by no means conclusive and convincing that defendant stole the same, but, on the other hand, it tends strongly to show that he took it openly, claiming to have traded for it with West. Ownership in West is, however, not sustained by the weight of the testimony. To our minds it seems the preponderance of the evidence goes to establish that the animal, though taken by defendant as the property of West, belonged in fact to one Mrs. Pepkin. With regard to this important question of ownership, defendant's refused special instruction presented the point much more strongly and pertinently than the charge of the court, and, under the peculiar circumstances shown, should perhaps have been given. There was testimony tending to establish a purchase of the animal by defendant, and the charge of the court fails to present this phase of the case. *Ray v. State*, 13 Tex. App. 51.

Because the evidence fails to establish a fraudulent taking by defendant, and fails to establish the ownership as alleged in the indictment, the judgment is reversed, and the cause remanded.

KIRCHOFF v. VOSS.

(*Supreme Court of Texas*. February 4, 1887.)

1. CONTRACT—CONSIDERATION—ACCEPTING NEW OBLIGATION.

A. and several others being liable as makers of two notes aggregating \$350, the holder of the notes agreed to release A., and also to release a lien which he held as security for the notes, if A. would pay \$100 cash, and give his note for \$115, payable at an earlier date than the last maturing of the joint notes. *Held*, that there was sufficient consideration to support the promise to release, as the original notes were satisfied, to the extent of \$215, earlier than they matured, and the original obligors other than A. still continued liable for the balance.¹

2. SAME—TIME TO BE OF ESSENCE, WHEN.

The holder of a vendor's lien agreeing to release the lien *when* a certain note should be paid, it is not necessary that the note should be paid promptly at maturity in order to secure the release, as time did not appear to be of the essence of the contract. If a party desires to make time of the essence of his contract, he should leave no doubt of his intention so to do it.

Appeal from Fayette county.

Moore, Duncan & Meerscheidt, for appellant. *Brown & Dunn*, for appellee.

STAYTON, J. The appellee brought this action against Joseph Zeigelbauer and Ed. Moellenbrandt, on the notes executed by the former to the latter, and indorsed by him to the appellee. The notes were given for land sold by Moellenbrandt to Zeigelbauer, on which the appellee sought to establish and enforce the vendor's lien. The appellant, asserting a claim to the land, was made a defendant, and in his answer he claimed to be the owner. It appears that on July 17, 1879, Gus. Moellenbrandt, then the owner of a tract of land of

¹See note at end of case.

which the 100 acres in controversy is a part, executed a deed of trust on the tract of land to secure the payment of five promissory notes on that day executed to appellant by Gus. Moellenbrandt, Ed. Moellenbrandt, and others, amounting in the aggregate to \$1,100. One of these notes became due January 1, 1885, and another on January 1, 1884, and these were for the aggregate sum of \$350. The other notes matured earlier. On October 26, 1882, Gus. Moellenbrandt conveyed the 100 acres of land in controversy to Ed. Moellenbrandt. On March 15, 1883, John Kirchoff entered into a written agreement with Ed. Moellenbrandt, by which he agreed, in consideration of \$100 then paid to him, and in further consideration of a negotiable note for \$115, due and payable to him on December 25, 1884, bearing interest after maturity, executed to him by Ed. Moellenbrandt on the same day, to release the latter from liability on the notes which he held secured by the trust deed. He further agreed that, when the note for \$115 was paid, to release the 100 acres of land from the lien held by him. That note was not paid at maturity, and an extension of time was asked and refused. On the first Tuesday in February, 1885, not crediting the notes which he held with the \$100 paid on March 15, 1883, there was due to Kirchoff \$692.50 on the notes secured by trust deed. On the first Tuesday in February, 1885, Kirchoff caused the trustee to sell the entire tract of land covered by the trust deed, and himself became the purchaser. Soon after the sale Ed. Moellenbrandt offered to pay the note for \$115, with all interest due upon it, and Kirchoff refused to receive it, and the full amount thereof, with all interest due on it, was paid into court. Judgment was entered establishing and enforcing the vendor's lien claimed by the appellee, and directing the money paid into court to be paid to Kirchoff, and from that judgment he appeals.

He insists that there was no consideration for his promise to release the land from the lien held by him. In this we think he is mistaken. The notes which he held were made by three persons besides Ed. Moellenbrandt, and they all seem to have been principals. The liability of all the others continued after the release of Ed. Moellenbrandt; and, by the payment made and note executed by the latter, Kirchoff had placed in his hands a means by which the indebtedness of all, falling due after December 25, 1884, to the extent of \$215, might be satisfied before it was due by the terms of the notes which he held. This was or may have been an advantage to him. He so deemed it, and it must be deemed a sufficient consideration for his promise to release the lien. It is urged that he had the right to withdraw his promise to release the lien if the note for \$115 was not paid at maturity. His contract did not, in terms, reserve any such right to him. His language is: "And the lien on said 100 acres I hereby agree to release to said Ed. Moellenbrandt when said note of \$115 is paid in full." His contract for interest at the rate of 10 per cent. after maturity of the note indicates that time was not of the essence of the contract, and there is nothing in the contract to indicate that either party so regarded it at the time the contract was made. If a party desires to make time of the essence of the contract, he should leave no doubt of the intention of the contracting parties so to make it. The appellant can take no advantage through his purchase under the trust deed.

The judgment rendered is correct, and will be affirmed.

NOTE.

CONSIDERATION—PART PAYMENT OF DEBT. The payment of part of an undisputed debt is not a sufficient consideration to support a lease of the remainder. *Day v. Gardner*, (N. J.) 7 Atl. Rep. 365; *Hooker v. Hyde*, (Wis.) 21 N. W. Rep. 52; *Bryant v. Brazil*, (Iowa,) 3 N. W. Rep. 117; *St. Louis, Ft. S. & W. R. Co. v. Davis*, (Kan.) 11 Pac. Rep. 421. Such release will be supported by the acceptance of such part on receiving a new or additional security. *Day v. Gardner*, (N. J.) 7 Atl. Rep. 365; *Varney v. Conery*, (Me.) 1 Atl. Rep. 683; *Mason v. Campbell*, (Minn.) 6 N. W. Rep. 405; *Schmidt v. Ludwig*, (Minn.) 1 N. W. Rep. 803; or on receiving such payment before the maturity of the indebtedness, *Schweider v. Lang*, (Minn.) 13 N. W. Rep. 33; where such payment is

made by a third party out of his own funds, *Indianapolis R. M. Co. v. St. Louis, Ft. S. & W. R. Co.*, 7 Sup. Ct. Rep. 542; where a new obligation is given and accepted upon an agreement that the former one shall be canceled, *Jaffray v. Crane*, (Wis.) 7 N. W. Rep. 300. Such release will also be supported by the acceptance of property of less value than the debt. *Day v. Gardner*, (N. J.) 7 Atl. Rep. 365; *Heal v. Handley*, (Ill.) 6 N. E. Rep. 45.

MARTIN and others v. ROBINSON and others.

(*Supreme Court of Texas*. February 11, 1887.)

1. PROBATE COURT—ORDER GRANTING ADMINISTRATION.

When a court of record, having jurisdiction over all matters relating to the administration of the estates of decedents, assumes to exercise it in a given case, all presumptions are in favor of the validity of its proceedings, and if the record of such a court shows that the steps necessary to clothe it with power to act in the given case were taken, or if the record be silent upon this subject, then its judgment must be held conclusive in any other court of the same sovereignty when collaterally called in question.

2. SAME—ERRONEOUS ORDER.

An order of a probate court, granting administration in the county in which it sits, although erroneous, is not for that reason void, but voidable only.

3. SAME—ADMINISTRATION GRANTED AFTER MANY YEARS—PRESUMPTIONS.

An order of a probate court, granting administration upon the estate of an intestate, will not be deemed void upon the sole ground that over 14 years elapsed after the death of the intestate before administration was granted. A probate court ought closely to scrutinize an application made after the lapse of so many years, and should be well satisfied of the necessity of administration, before it grants one; but after it has once determined that administration is proper, no other court not exercising an appellate jurisdiction can hold its judgment void, or even erroneous.

4. EXECUTOR'S SALE—INNOCENT PURCHASER—VENDOR'S FRAUD.

Claims against a decedent's estate having been allowed by the fraudulent collusion of the claimant and the administrator, and lands ordered sold by the court to pay the claims, the claimant purchased the lands, and afterwards sold to others. *Held*, in an action by the heirs of the intestate against these subsequent purchasers, the lands could not be recovered; it appearing they had been purchased *bona fide*, and for value, from the original purchaser, who was guilty of the fraud.

5. VENUE—ACTION TO RECOVER DIFFERENT TRACTS OF LAND IN DIFFERENT COUNTIES.

An action to recover three different tracts of land located in three different counties cannot be brought in one of the counties merely because the plaintiff relies on the same state of facts to recover each of the tracts, unless the defendants who claim land in the counties other than that in which the suit is brought waive their right to be sued only in the county in which the land they claim is situated.

Appeal from Houston county.

J. R. Burnett, for appellants. *H. G. Roberson*, for appellees.

STAYTON, J. On May 11, 1867, the following application for letters of administration was filed in the probate court for Houston county:

"*The State of Texas, Houston County.*

"*To Hon. J. M. Odell, Chief Justice of said County:* John S. Martin, who resides in said county, would respectfully represent to your honor that James Carter, formerly of said state, departed this life at Corpus Christi some time in the year 1852, without leaving any will so far as known to petitioner. And, further, petitioner shows that there has never been any administration on the estate of said Carter, deceased, and that the principal part of the estate of said Carter is situated in said county, to-wit, 1,476 acres of land, the head-right of said Carter. And, further, petitioner shows that his wife, Eliza L. Martin, is the niece of said Carter, deceased, and is the next of kin, and the oldest heir at law of said Carter, deceased. The premises considered, the petitioner prays that the usual notice be given to the next term of the county court pertaining to estates in and for said county of Houston, and for an order appointing petitioner administrator of the estate of said Carter, deceased, and for such other orders as may be necessary and proper, petitioner will ever pray," etc.

On May 27, 1867, the applicant was appointed administrator, the amount of his bond fixed, and appraisers appointed. On the next day Martin executed the bond required and qualified, and on the day after this an inventory and appraisement, showing only the land named in the application, was filed, and these were received and directed to be recorded. On September 24, 1867, an additional inventory was filed, showing that the estate owned one-third of a league of land in Kauffman county, another tract of like size in Angelina county, and five leagues of land in Nueces county, title to which was stated to be doubtful. These lands were appraised by persons appointed by the court, and on October 30, 1867, the additional inventory and appraisement were approved and directed to be recorded; the land in Nueces county being appraised at five dollars.

The following claims, after having been duly authenticated, were allowed by the administrator, and approved by the county judge on February 6, 1868: Claims proved by Mrs. Todd are as follows: Copies of two notes executed by James Carter, one for \$2,000, due January 1, 1853, the other for \$1,000, due January 1, 1854, both dated Rusk, Texas, December 8, 1852, and payable to Jackson Todd or bearer, with 10 per cent. interest from date. These claims were duly authenticated by Mrs. Todd, the affidavits also stating that the originals had been stolen from Jackson Todd on February 22, 1856. Also an original account of W. G. Johnson for \$59.47, for goods sold to Carter in 1852, at Corpus Christi, which account appeared by the creditor's receipt to have been paid by Jackson Todd June 2, 1853. Also an original account of Dr. P. N. Luckett for \$120 for medicines, etc., the last item being, "April 20, 1853, for visit, prescription, and medicine," and which is indorsed paid by Todd, May 17, 1853. Also original note of James Carter, dated Clinton, Louisiana, March 22, 1847, for \$195, payable 30 days after date, to Lucy Morgan or bearer, with 8 per cent. interest from date, indorsed, "Sold this note to J. Todd, no recourse back on me, this tenth of January, 1848. [Signed] LUCY MORGAN;" also indorsed, "Received on this note \$20, this tenth of February, 1852. [Signed] J. TODD." Mrs. Todd was the widow of Jackson Todd, who died in the year 1856; and there is some evidence that she claimed that the two notes first named were given by Carter for negroes given to her by her father.

The claims presented by Mrs. Todd were first sworn to by her before a justice of the peace on October 25, 1867, and they were allowed by the administrator a few days afterwards, upon which they were again sworn to before a county judge, and on February 6, 1868, they were reallocated by the administrator, and approved by county judge. On July 30, 1867, the administrator filed an application to sell the land in Houston county to pay expenses of administration, and a sale was made and reported; but, on October 31, 1867, the sale was disapproved, and a resale ordered. On October 29, 1867, the administrator filed an application, under oath, to sell the lands in Kauffman and Angelina counties, representing in his application that claims against the estate amounting to over \$3,250 had been presented to him, and that a sale was necessary to pay debts, and on the next day the court granted the application to sell. The three tracts were sold on the first Tuesday in January, 1868, and Mrs. Todd became the purchaser of all the tracts at \$600 each. The return of sales, sworn to, was filed on February 6, 1868, and on the twenty-fourth of the same month the court approved them, and ordered deed made to the purchaser. The administrator, on April 10, 1868, made a deed to Mrs. Todd, fully reciting the applications to sell, the orders of sale, and order of court confirming the sale, and reciting the payment of the purchase money. This deed was duly acknowledged and recorded in Houston county, October 29, 1869, and in Kauffman county, November 29, 1869. The administrator filed his final account in the district court on February 7, 1872, and notice thereof was soon after given; but it does not appear that any action was taken thereon,

and in the original petition filed in this case it was alleged that the administration had not been closed. The appellants claim through conveyances made by Mrs. Todd.

This action was brought by some of the heirs of James Carter, on July 22, 1878, and the relief which they seek is thus stated in the prayers to their petition: "(1) That the pretended administration aforesaid, and the orders made therein affecting the title of plaintiffs to said land, and the sales of said lands therein, and the deeds made by the administrator, be set aside and held for naught, because of the want of jurisdiction of the county court of Houston county to grant such administration, and to make such orders, and to pass the title to said lands. (2) That in case relief be not granted on the grounds above prayed for, that the order of sale and sales and deeds made by said Martin be set aside, because of the fraud by which they were procured and executed. (3) That in case relief on either of the above grounds be denied, the claims asserted by the several defendants under such administration be removed as clouds on plaintiffs' title, and that the title to said lands be decreed to be in the heirs of said James Carter, and that plaintiffs be placed by the decree and process of the court in the possession and enjoyment of said lands. They also pray for costs and general relief in the premises."

As ground for the relief sought, the petition alleges that James Carter had his domicile in Nueces county at the time of his death, and that his principal estate was there situated; that the averment of nearest relationship of Martin's wife to Carter was untrue; that Carter owed no debts, and that there was no necessity for administration; that administration was taken out for the fraudulent purpose of acquiring title to the land; that the claims presented against the estate were fictitious; but, if once valid, were barred by the statutes of limitations before administration was granted; that Martin and Mrs. Todd fraudulently procured the orders of sale and confirmation; and that of all these things the plaintiffs had no knowledge until the year 1877. The petition was very full and specific upon all these matters. The most, if not all, of the defendants claiming the land in Kauffman county and Van Zandt and in Angelina counties were alleged to be residents of counties other than Houston.

The main purpose of the plaintiffs was to establish their title, and to obtain possession of three tracts of land situated in different counties. Their right is based on inheritance from James Carter, and the denial that the title thus vesting had been divested, through sales made by Martin, as administrator of the estate of Carter, in pursuance of orders of the probate court for Houston county. If the administration in that county was void, the sales made under it interposed no obstacle to a recovery; but, if such was not its character, it became necessary for the plaintiffs to have the sales in effect set aside by some appropriate proceeding before they could recover the land. If the administration was void, there can be no doubt of the power of the district court so to declare it, and to give the relief sought in so far as it had jurisdiction over the several defendants; but, if the administration was not void, and the orders of sale, sales, confirmation of sales and deed made by the administrator were only voidable, then the question arises whether the district court had jurisdiction to grant the relief asked in the second prayer.

These questions will be examined. Was it shown that the administration and proceedings under it were void? That the county court for Nueces county was a court of record of general jurisdiction over all matters relating to the administration of the estates of deceased persons, is not an open question. *Guilford v. Love*, 49 Tex. 716; *Giddings v. Steele*, 28 Tex. 750; *Lynch v. Baxter*, 4 Tex. 481; *Murchison v. White*, 54 Tex. 83. When a court of record, having such jurisdiction, has assumed to exercise it in a given case, all presumptions are in favor of the validity of its proceedings; and if the record of such a court shows that the steps necessary to clothe it with power to act

in the given case were taken, or if the record be silent upon this subject, then its judgment, order, or decree must be held conclusive in any other court of the same sovereignty when collaterally called in question. *Burdett v. Silsbee*, 15 Tex. 618; *Alexander v. Maverick*, 18 Tex. 197; *Withers v. Patterson*, 27 Tex. 492; *Lawler v. White*, 27 Tex. 254; *Murchison v. White*, 54 Tex. 78; *Guilford v. Love*, 49 Tex. 715.

The probate court for Houston county, in granting administration on the estate of James Carter, in effect declared that he was dead; that he left an estate subject to administration within its jurisdiction; that there was a necessity for an administration; and that the facts existed which gave to that particular court the power to grant and control that administration. That James Carter died prior to the grant of administration was alleged in the application, and is admitted to be true. That he left an estate, which, if necessary, some probate court in this state had power to cause to be administered, the application alleged; and this is also admitted to be true, and made the basis of the plaintiffs' claim. The decease of the person on whose estate administration is sought is a fact essential to the jurisdiction of a probate court to grant letters testamentary or of administration; for it is only over the estates of deceased persons that to such court jurisdiction is given by law. If the person on whose estate administration is sought be alive, power to inquire whether this be so or not does not exist; hence no declaration of the court to the contrary can be given any effect. If there be no estate, there is nothing on which the jurisdiction of such a court can operate; for the very purpose for which the power is conferred assumes the existence of a thing upon which it can operate. When a person dies, leaving within its jurisdiction an estate, then, and not before, has a probate court the power to inquire, and determine the existence or non-existence of every fact necessary to be determined in ascertaining whether it has jurisdiction in the particular case, and the extent to which it ought to be exercised. Such a court must determine whether the facts exist which make it lawful for administration to be granted in the county in which the court sits; and if, in this respect, having power to make the inquiry, it comes to an erroneous conclusion, its decree founded on such conclusion is voidable, but not void. *Lynch v. Baxter*, 4 Tex. 431; *Burdett v. Silsbee*, 15 Tex. 604; *Giddings v. Steele*, 28 Tex. 750.

The main ground on which it is insisted that the probate court has not jurisdiction, involves the proposition that there was no estate subject to administration. This proposition is not based on a denial that James Carter left an estate which might have been administered within proper time, but upon the proposition "that the liability to administration, with which the law at Carter's death incumbered the property which had belonged to him, had ceased to exist by lapse of time, and the property had become absolutely vested in the heirs." The act of March 20, 1848, was in force when administration was granted to Martin, and it did not in terms prescribe a time within which administration must be taken out. Cases arising under the Spanish law formerly in force, under the act of January 22, 1836, in effect adopting the laws of Louisiana in relation to successions, and under the act of February 5, 1840, can have but little, if any, bearing upon the question; but those cited by counsel supposed to bear upon it will be noticed.

In *Blair v. Cisneros*, 10 Tex. 35, it appeared that the intestate died in 1833, when the Spanish law was in force which permitted heirs to accept an estate without administration; that this was done; that there were no debts; and upon this state of facts it was held that administration taken out in 1849, was void.

In *Fisk v. Norvel*, 9 Tex. 15, it appeared that the intestate died in 1839; that administration was granted on his estate in the same year; and that this was continued until the year 1848, when the final account of the administration was approved and the estate closed. After this, administration was granted

on the estate, and it was held that the estate, having been administered, the last grant was void. After referring to the statutes applicable to the subject, the court said: "These provisions show that, when a succession has once been administered and closed, the effects are by operation of law restored to the heirs. In this case the power of the probate court over the estate had ceased. No such case could have been presented as would have authorized the grant. The estate had vested or been restored to the heirs in full ownership. They were as much proprietors as was the intestate in his life-time. Their rights were exclusive and incompatible with any power in the probate court to transfer their property to another; and any attempt to do so was beyond the jurisdiction of the court and a mere nullity." *Withers v. Patterson*, 27 Tex. 494, involved substantially the same facts as *Fisk v. Norvel*, *supra*.

In *Boyle v. Forbes*, 9 Tex. 36, it appeared that administration was granted in 1838; and it not being shown that it had been continued by order of court, the power of an administrator to bring an action in his representative capacity was denied. In the opinion it was said that, "independently of the statute fixing the precise period of one year to the administration, it would seem that, after the lapse of thirteen years, the presumption would be that all legal demands against the succession had been discharged."

In *Francis v. Hall*, 13 Tex. 189, it appeared that the testator died in 1837; that there was controversy about the probate of his will; that the heirs compromised it, and accepted and divided the estate; and it was held that an administration granted more than 10 years afterwards was void.

In *Wardrup v. Jones*, 23 Tex. 489, the facts were that the intestate died in 1837, and that, in the county of the domicile, letters of administration were taken out the year following. In 1852 administration was granted on his estate by the probate court of another county; and it was held that it would be presumed that the estate was administered under the administration properly taken out, and that the latter was granted without authority of law. It was shown that there were no debts due from or to the estate when the last administration was granted.

In *Cochran v. Thompson*, 18 Tex. 652, it appeared that the intestate died in 1837; that administration was taken out on his estate the following year, and that, in 1851, the plaintiff, who sued to recover land claimed to have been fraudulently disposed of by a former administrator, was appointed administrator *de bonis non*. On appeal the validity of the last grant of administration was questioned; but, while there is some discussion in the opinion of the question of the invalidity of such a grant after so great a lapse of time, it is evident that the court held that the question was not so brought before it as to authorize its decision. The court said: "As a general rule, grants of administration after so great a lapse of time should be regarded as nullities; but there may be special reasons which would even then support a grant, as, for instance, to recover a money demand or claim of the estate, which had lately fallen due."

In *Merrilweather v. Kennard*, 41 Tex. 273, the facts were that the intestate died in 1841, and no administration was granted on his estate until 1850, but, as said by the court, "there was then, according to appellees showing, in 1850, no estate of M. O. Merrillweather, deceased, to be administered upon, and none to give the probate court jurisdiction." The case was disposed of, however, on another point on rehearing.

Duncan v. Veal, 49 Tex. 604, was a case in which it appeared that the intestate was a volunteer soldier, killed in the year 1836, at Goliad, on whose estate administration was granted in 1838; but the administrator never qualified, and there was an order made in 1839 appointing another, which, however, was rescinded, and so remained the estate until November, 1850, when an administrator was appointed. In disposing of the case, it was said that,

in the absence of averment and proof of some special necessity for the grant of administration, it ought to be presumed that there were no debts due by or to the estate, or necessity for administration after the lapse of so great a length of time. It was also said that, if an administration was necessary, it should have been in Goliad, and not in Harris, county. It is evident, however, from the opinion that the sale under examination in that case was held invalid, because "the sale of the certificate under which the land in controversy in that case was held was in plain violation of the act of January 14, 1841, entitled 'An act to protect the rights of heirs and next of kin to the members of the Georgia battalion, and other volunteers from foreign countries, who have fallen in the battles of the republic, or otherwise died in the limits of the same.'" Pasch. Dig. art. 1398; *Harris v. Graves*, 26 Tex. 579. The law required the record to show the facts which it made necessary to the validity of such sales; and, in the absence of such showing, no presumption could be indulged that such facts existed.

These are the cases to which we have been referred to sustain the proposition that the administration on James Carter's estate was void. Some of these are cases where, under the former law, the heirs, as they might do, had accepted the estate, and the property thereby became their own, and not subject to administration; others were cases in which there had been administration, and the estate thereby freed from the further control of a probate court; others were cases in which administrators sought to exercise powers after the period to which the law restricted them had expired, without showing that the court which appointed them had continued the administration; another was a case in which there was no estate to administer; and the last was a sale made in open violation of law, which forbade it unless the authority was shown by the record. None of these cases assert the broad proposition that an administration will be deemed void on the sole ground that over 14 years elapsed after the death of the intestate before administration was granted, nor that it will be deemed void if granted after such period as would bar ordinary debts. If the period which would bar debts is to be deemed the period after which administration cannot be legally granted, when not regulated by statute, then the courts, certainly, in a collateral proceeding, ought not to declare an administration void if granted within 10 years, which is the longest period of limitation. In the case before us, excluding the time the running of the statutes was suspended, this period did not elapse.

In some of the cases to which we have referred it is stated that the administrations were nullities, unless it was averred and proved on the trial that the facts existed which made administration necessary. When, in a collateral attack, it is said that an administration is a nullity, unless some facts be then shown, the word "null" or "void" is used in the sense of voidable; for, if there be then a fact or facts, proof of which would make the administration valid, it cannot be void; and the legal presumption is that the very fact which would give validity was proved before the court which granted administration. The rule suggested in this respect in some of the cases, would be the rule in a proceeding appellate in character, if the cause be tried *de novo*; but it seems to us that no such rule can exist when the validity of an administration granted by a decree of a court of record having general jurisdiction is sought to be attacked or held for naught in a collateral proceeding; for, if it would be possible to prove facts sufficient to sustain the administration, it must be presumed, on such attack, that these very facts were proved before administration was granted. We understand the rule to be, when the judgment or decree of such a court is collaterally called in question, that it must be deemed valid, unless it appears that no facts could have been shown which would render it so. We know of no case in which it has been held, under the act of March 20, 1848, that a grant of administration was void because made after the lapse of as many years as transpired between the death of James

Carter and the grant of administration on his estate. The legislature had not deemed it necessary, at the time the administration was granted, to fix a period after which administration should not be opened; and it would seem that, in such case, courts ought not to assume to exercise a power which clearly belongs to another department of the government, and fix an arbitrary period for administration. That, in the absence of a limitation fixed by law, a probate court ought closely to scrutinize an application made after the lapse of many years, is true; and in such case it ought to be well satisfied that there is a necessity for administration before it grants one; but after it has acted and determined that a necessity existed, it certainly ought not to be held by any other court, not exercising an appellate jurisdiction, that its judgment or decree was void, or even erroneous.

The most that has been said in England in reference to grants of administration after the lapse of many years is that applications so made raise suspicion, which justifies the court to which they are made in calling for explanations. *In re Darling*, 3 Hagg. 561.

In *Ricard v Williams*, 7 Wheat. 115, it was said: "It does not appear that, at the time of granting administration on this estate, any statutable limitation of the period within which an original administration might be granted existed in Connecticut, though a limitation generally to seven years after the death of the party has been since introduced. And the present administration, though granted after the lapse of 28 years from the death of William Dudley, must be considered as valid; it having been allowed by a court of competent and exclusive jurisdiction, whose decisions we are not at liberty to review."

In *McFarland v. Stone*, 17 Vt. 178, it appeared that administration was granted 25 years after the death of the intestate; and, as here, it was claimed to be void; but the court held this not to be true, and the decree of the probate court conclusive of the validity of the administration in a collateral proceeding. The cases of *Whit v. Ray*, 4 Ired. 14; *Townsend v. Townsend*, 4 Cold. 80; and *Foster v. Com.*, 35 Pa. St. 149,—bear upon the question.

The grant of administration to Martin cannot be held void; and, in this proceeding, the district court had no power to inquire whether, on the ground claimed, the action of the probate court in granting it was erroneous. Any other holding would destroy the safeguards which the law designs to give to purchasers at sales conducted under decrees of tribunals empowered to determine when sales shall be made, and when they have been legally made, would lead to the sacrifice of estates by destroying confidence in such sales, and to incalculable evils. The petition was sufficient to invoke the jurisdiction of the court. *Kleinecke v. Woodward*, 42 Tex. 311; *Alexander v. Maverick*, 18 Tex. 194.

Claims were presented against the estate, which, upon their faces, were barred; but they were approved by the probate court, and stand as judgments. *Moore v. Hillebrant*, 14 Tex. 312; *Heffner v. Brander*, 23 Tex. 631; *Firebaugh v. Ward*, 51 Tex. 409. These claims may have been unreal,—may have been fraudulent,—but this would not open, in this proceeding, the decrees directing the sales of property to pay them, nor the decree confirming the sales.

This brings us to the inquiry whether the plaintiffs are shown to be entitled to the relief which they seek in their second prayer. It appears that the lands purchased at the probate sales have been sold by the purchaser, and that, through conveyances made by her, title to the land has passed to many purchasers, some of whom, at least, are innocent purchasers. The purchaser at the probate sales was the person who presented the claims which the lands were sold to satisfy; and if these claims were fraudulent, and the title to the land which she purchased still remained in her, there is no doubt that a court of equity would have the power to prevent her reaping any benefit whatever

under her purchases. While it is not strictly true that a court of equity never vacates a judgment rendered by a court of law, for the reason that it has no revisory power over such courts, and therefore cannot act upon them or their judgments, yet it is true that courts of equity, by acting upon the party who has obtained through fraud something to which he is not entitled, has the power in many methods to prevent such a person from reaping any advantage even from a judgment obtained by fraud. The remedy which equity gives, as has been well said, "reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice." A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord COTTENHAM's language, from his children and his children's children; or, as elsewhere said, from any persons among whom he may have parceled out the fruits of his fraud. There is one limitation. If the property which was acquired by fraud has come by transfer into the hands of a *bona fide* purchaser for a valuable consideration, and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed, and the remedy of the defrauded party, with respect to the property itself, is gone. His only relief must be personal against those who committed the fraud. Pom. Eq. 918; Story, Eq. 1571; Freem. Judgm. 489, 509; *Poor v. Boyce*, 12 Tex. 449; *Dancy v. Strickling*, 15 Tex. 564; *George v. Watson*, 19 Tex. 369. The qualifications to this general rule, if any, need not be considered under the facts of this case.

The plaintiffs are not entitled to any relief against any one of the defendants, who may be a purchaser for valuable consideration, without notice of the fraud charged against the administrator and the purchaser at the sales made by him, shall it be shown that the matters charged by the plaintiffs are true. The decrees of the probate court not being void, *bona fide* purchasers are entitled to rely upon them, and to esteem them as of absolute verity.

In view of the disposition that will have to be made of the case, it is not necessary to consider the claims of the several defendants. The purpose of this action is to recover three distinct tracts of land situated in different counties. The residences of the several defendants are stated in the petition. Those who claim the land in Kauffman county, or some of them, disclaimed as to all other lands, and denied the jurisdiction of the court as to them. Whether the demurrers of all of them were filed before pleas to the merit we cannot ascertain, except as to the defendants Huffman and Thomaston, who are shown to have called in question the jurisdiction of the court as to themselves at the proper time. The court overruled their pleas, and we are of the opinion that this was error. If the other defendants, who claimed, or were asserted to claim, only the land situated in that county, questioned the jurisdiction of the court in proper time, the action should have been dismissed as to them.

What has been said as to the defendants claiming the land in Kauffman county is applicable to the defendants who claimed only the land in Angelina county. At the time this action was brought, as now, those claiming land in one county could not, without their consent, be sued in a county other than that in which the land was situated. Pasch. Dig. art. 1423; Rev. St. § 1198. This is not a suit for partition. The fact that the plaintiffs rely upon the same facts for the recovery of three distinct tracts of land cannot entitle them to maintain this action, for land situated in three counties and in no way connected, in the county in which one of the tracts is situated, unless such defendants as only claim land in other counties have waived their rights to be sued only in the county in which the land they claim is situated.

The judgment will be reversed and the cause remanded.

HUBBY v. HARRIS and others.

(Supreme Court of Texas. February 15, 1887.)

1. CONDITIONAL SALE—CHattel MORTGAGE—PAROL EVIDENCE.

A written agreement appearing upon its face to be clearly a mortgage or a conditional sale, parol evidence is not admissible to change its character. But if the intention of the parties cannot be arrived at from the contents of the writing, then parol evidence may be resorted to in order to determine the question.

2. SAME—WRITTEN AGREEMENT HELD CONDITIONAL SALE.

A. executed a writing, agreeing to deliver possession of certain town lots when B. should pay him a sum of money and interest on the money for two months, and that his receipt for the money should make the deed executed to him for the lots void; and it appeared from parol evidence that B., having the right, at the time the writing was executed, to buy the lots from another within a certain limited time, applied to A. to pay the money and take title to the lots, agreeing that if he, B., did not repay the money within a specified time, the property should be A.'s, and the obligor having paid the money the writing was executed in pursuance of the agreement, *held*, the writing constituted a conditional sale, and not a mortgage.

Appeal from Waller county.

H. S. Hubby, pro se. T. S. Reese, for appellees.

GAINES, J. This is the third action brought by appellant for the recovery of the lots in controversy. The first was instituted in 1873, and was dismissed in 1875. Shortly after its dismissal, the second was brought, and resulted in a judgment for the defendant. Upon the theory that it was an action of trespass to try title, within 12 months from the rendition of that judgment the present suit was instituted against appellees, all of whom claim under the defendant in the former actions. The decision of the case now before us depends upon the construction of the following instrument executed and delivered to appellant by J. H. Noonan, under whom all of appellees claim:

"County of Austin, State of Texas: I, the undersigned, do herein promise, bargain, and agree, when H. S. Hubby shall pay to me the sum of six hundred dollars, and the interest on the same at \$25 per month, for two months, or sixty days, that I will deliver up to said H. S. Hubby possession of the block of ten lots in the town of Hempstead, Austin county, known as the Hubby property, which was deeded to me by Hunt & Holland, of Bellville, Austin county, Texas. My receipt for the said money shall be an acknowledgment from me that the said deed executed to me from the said Hunt & Holland shall be null and void.

"Witness my hand this thirtieth day of October, 1871.

"J. H. NOONAN."

Is this instrument a mortgage or a conditional sale? If the court below was justified in holding it to be the latter, the judgment must be affirmed. Conceding the proneness of debtors to exact of necessitous borrowers hard and inequitable bargains, the courts incline to afford relief to the latter, in this class of cases; and, in doubtful instances, are disposed to construe such instruments as mortgages only. It is admitted, however, that a conditional sale is neither against the justice or the policy of the law. If, therefore, it appears from the instrument itself, together with such other legal evidence as may be adduced, that it was the intention of the parties to make a contract of sale, it will be enforced according to its terms. *Conway v. Alexander*, 7 Cranch, 218. Much latitude has been indulged in by the courts in construing these instruments, and it seems impossible, therefore, to deduce from the decisions any rule that will be decisive of every case. This much, however, seems to be settled: if the face of the papers themselves show clearly a mortgage, no parol evidence will be admitted to vary their terms. This rule has also been recognized when the written instruments clearly express the inten-

tion of the parties to make a conditional sale; but it may be doubted if it has been universally followed. But if the true intention and meaning of the parties cannot be arrived at from the fact of the writings themselves, then parol evidence may be resorted to, in order to determine the question. It is settled law that, in order to constitute a mortgage, there must be a debt to be secured. Chief Justice MARSHALL says in *Conway v. Alexander*, *supra*: "It is therefore a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of his debtor." See, also, *Astugueville v. Loustanaunau*, 61 Tex. 233; *Ruffler v. Womack*, 30 Tex. 342; *Alatin v. Cundiff*, 52 Tex. 460.

Now, it is apparent that the instrument signed by Nooner, and delivered to appellant, makes no mention of any debt due by the latter to the former. There is nothing in it to justify us in inferring that any such obligation existed. Hence the appellant was compelled to resort to extraneous evidence in order to make out his case. This evidence showed that he had originally purchased the property of one Peebles, as trustee, and paid only a part of the purchase money; that a suit was instituted against him to enforce a lien for the balance of the money due upon the property, and a judgment rendered against him accordingly; that the lots were sold by virtue of an order of sale under this judgment, and that one Mrs. Peebles became the purchaser, and subsequently sold the lots to Hunt & Holland; that he claimed that the sale was invalid, and brought suit to set it aside, and that, pending this suit, he compromised with Hunt & Holland, agreeing to pay them \$600 within a certain time, in consideration of their contract that, if the money was paid within the time, they would convey the lots to him. It was also shown that the time being very nearly expired, and the money not having been paid, he applied to Nooner, and that Nooner paid the money to Hunt & Holland, they snaking him a deed to the property. This deed, which is evidently the same referred to in the instrument heretofore set out, is dated October 31, 1871,—it is presumed, by mistake, because they appear to have been executed at or about the same time. Appellant testified that he met Nooner on the train, and offered to borrow the money from him; but what occurred between them at that time is a blank, it may be because Nooner died before this suit was brought, and his heirs never made parties, and appellant could not have been permitted to testify. Now, it must be considered, in order to sustain this transaction as a mortgage, it was not necessary that appellant should have shown that there was any express provision, either written or oral, that he should repay to Nooner the money paid by the latter to Hunt & Holland. If Nooner advanced the money for him, agreeing to take the title for the benefit of appellant, with the understanding that it was to be held as a security merely for the repayment of the advancement, then the law would imply an *assumpsit*, and the transaction would be a mortgage. But, on the other hand, if it was merely the agreement that Nooner should avail himself of appellant's privilege of buying the land of Hunt & Holland, and that when this was done appellant should have the right to have the land reconveyed to him upon his paying Nooner within two months the \$600, and an additional amount of \$25 per month, then this only entitled appellant to claim the property in the event of his making the payment within the time specified. In this latter case there was no debt, and could be no mortgage.

A witness for plaintiff testified that he was present when the transaction took place; that Hubby got Nooner to pay the money to Hunt & Holland; and that Hubby had only a specified time in which to pay back the money; but, upon cross-examination, states that he had testified on a former trial of the case that Hubby was to have only a certain time in which to pay the money, and that, upon his failure to do so within the time, the property was to be Nooner's. On behalf of appellees, the deposition of appellee Harris, taken on the former trial, and before he acquired any interest in the property, was

read. His testimony was also to the effect that, at the time the instrument under consideration was executed, the agreement was that appellant was to pay the money named therein within the time named, and that, if he did not, the lots "should become the property of Nooner absolutely." He also testified that the wife of appellant, who was present at the time, remarked that she would rather Nooner should have the property than any one else. This witness did not think the cash value of the lots at the time more than \$600; but thought they would probably have sold for \$800,—easy payments. Several other witnesses testified that \$600 was a fair price, and one thought it worth only \$400 or \$500. But there was other testimony tending to show the property was worth considerably more. It was also shown that Nooner was a poor man, and that, when the transaction took place, he had accumulated about \$800, and was desirous of buying him a homestead with it; and that he had no money to lend. Three witnesses testified to the effect that, about the time of the negotiations between the parties, appellant applied to him respectively to pay Hunt & Holland and take a conveyance of the property, and to allow him until the first of January, 1872, to get it back on payment of the money; with the understanding that, if it was not paid for within the time, the property was to be held absolutely by the grantee.

The cause was submitted to the court below, without the intervention of a jury; and there being no finding of the conclusions of fact and law separately, we must affirm the judgment, if there be sufficient evidence to support it upon any issue made. There was ample evidence here, we think, to warrant the court in finding that the true intention of the parties to the transaction was that Nooner was to pay Hunt & Holland the \$600 to save a forfeiture of the right of purchase, and that he should extend this privilege to appellant for 60 days, but no longer; that Nooner did not lend appellant the money or advance it for his benefit, except in so far as to continue to him for a limited period the right to buy at a stipulated price. Nooner's not being a lender of money, the price paid by Nooner to Hunt & Holland being the value of the property, (as the court was authorized to conclude by the testimony,) and Hubby's having made application to other parties to advance the money and to take the title, with a limited privilege of repurchase reserved to himself, are all cogent circumstances going to establish the correctness of this conclusion. There is nothing upon the face of the instrument to be construed inconsistent with the theory that such was the real intention of the parties to it. The words, "when Hubby shall pay me the sum of six hundred dollars," are not qualified by any reference to any existing debt, or to any transaction in which that sum had been a factor. The word "interest" is used, but clearly in a way that indicated that it is not to be considered interest upon any obligation on part of appellant. Interest is usually expressed by a certain rate per cent., and not by a sum in gross for a definite period. Besides, is it to be supposed that a party making a loan of money for over 4 per cent. per month for two months (where that rate could be readily obtained as the evidence shows was the case here) would have limited the conventional rate to the two months, and omitted any agreement as to the rate of interest after that time. The instrument also shows that Nooner took possession under the arrangement, and was to deliver it up to appellant upon payment of the money in two months. Possession is not the usual accompaniment of a mortgage in this state; and the fact that Nooner had possession tends to rebut the idea that any mortgage was intended. *Reading v. Weston*, 7 Conn. 143; *Rich v. Doane*, 35 Vt. 125; *Thompson v. Chumney*, 8 Tex. 389; *Ruffler v. Womack*, 30 Tex. 332; *Astugueville v. Loustaunau*, 61 Tex. 233; *Alstin v. Cundiff*, 52 Tex. 453.

The instrument is not technically drawn, nor should it be technically construed. The evidence shows that it was written by appellant himself or by his direction. The judge below was bound to interpret it in the light of surrounding circumstances as disclosed by the testimony; and we cannot say,

from an examination of the facts shown by the record, that he erred in holding it a conditional sale, and not a mortgage.

No other action of the court being complained of in the assignments of error relied upon in the brief for appellee, the judgment will be affirmed.

KRAMER v. BREEDLOVE.

(*Supreme Court of Texas.* February 18, 1887.)

1. JUDGMENT—COLLATERAL ATTACK—PRESUMPTION AS TO JURISDICTION.

It must be presumed that a court rendered its decree after it had acquired jurisdiction over every person to be affected by it; and, in a collateral attack upon the decree, the fact that the record is silent upon some matter touching the jurisdiction over some of the defendants does not affect that presumption.

2. QUIETING TITLE—EFFECT OF DECREE—PLAINTIFF'S VENDEE NOT A PARTY TO THE SUIT.

Where one, after he had sold and conveyed land, brought an action in his own name to quiet the title, the decree rendered in the action in his favor inures to the benefit of his vendee, although the vendee was not a party to the action.

Appeal from district court, Burleson county.

This action was brought by C. R. Breedlove, appellee, against A. Kramer, appellant, to recover on a promissory note executed by defendant, and for foreclosure of the vendor's lien on land. On October 10, 1881, W. G. Wilkins conveyed to defendant, Kramer, two tracts of land in Burleson county, and Kramer executed to Wilkins two notes in part payment thereof; one of the notes being payable January 1, 1882, and the other on January 1, 1883. Both of these notes Wilkins transferred to plaintiff, C. R. Breedlove. There being some charge of fraud made against Wilkins in making the sale of one of the tracts, known as the Evans tract, to Kramer, it was agreed between Wilkins, Kramer, and Breedlove that Kramer should pay the first note, and that Wilkins should bring suit in the district court of Burleson county, against the heirs of B. D. Evans, to clear up the title to that tract, and make all necessary and proper parties thereto, and prosecute the same to final judgment at his own proper cost, and Breedlove agreed to indorse on the second note that it should not be transferable until Wilkins had brought suit as agreed. In May, 1882, Wilkins brought suit in his own name against Evans and his children to clear up the title. The petition alleged that Wilkins was the owner of the land, when in fact he had sold it to Kramer, and was not the owner of it. Judgment was entered, however, confirming the sale made by Evans to Wilkins, and that judgment was affirmed on appeal to the supreme court. Breedlove, claiming that Wilkins had performed his part of the agreement, thereupon brought suit against Kramer on the second note; but Kramer defended (1) on the ground that Wilkins having sold the land before the suit was brought, he had no such interest as made him a proper party, and therefore the judgment in his favor in that action would not be available as *res adjudicata* to Kramer, if the children of Evans should thereafter sue him for the land; and (2) because it does not affirmatively appear in that case that the minor children of Evans were served with process. The court rendered judgment for Breedlove, and Kramer appeals.

Sayles & Bassett, for appellant. *C. R. Breedlove*, for appellee.

STAYTON, J. From the agreed facts, we see no reason to doubt the correctness of the findings made in the district court. If B. D. Evans was wanting in power to sell the land, this does not appear from the wills under which he was acting. The decree of the district court must be presumed to have been rendered after it acquired jurisdiction over every person to be affected by it; and that the record brought before us may be silent upon some matter touching the jurisdiction over some of the defendants, does not affect

that presumption. Wilkins having sold to Kramer by a deed with general warranty, the judgment inures to his benefit, and will protect him as fully as though he had been a party to the suit. The note sued on became due January 1, 1883, and bore interest, by its terms, from October 10, 1881. The agreement between the parties postponed its payment; but then there was no agreement that it should not bear interest during the suspension of the right of its holder to collect it. There is nothing in the transaction to indicate such an intention. The inference is that its maker was having the use of the land for which it was given while its holder's right to enforce it was suspended. No question was raised in the court below as to necessity for demand of payment, after the suit instituted by Wilkins was decided, before action could be brought; and no such question can be raised here for the first time. Had the question been raised, we are of the opinion that demand was not necessary. There is no error in the judgment, and it will be affirmed.

JUNEMAN v. FRANKLIN.

(Supreme Court of Texas. February 18, 1887.)

1. FORCIBLE ENTRY AND DETAINER—RECOVERY OF POSSESSION BY SUIT IN DISTRICT COURT.

A statute giving the landlord a summary remedy to recover possession of the premises by writ of forcible entry and detainer, issuing from a justice's court, does not deprive him of his right to sue in the district court to recover possession. The statutory proceeding is cumulative, not exclusive of the right of action.

2. LANDLORD AND TENANT—ESTOPPEL—ATTORNEYS TO ANOTHER.

A tenant cannot repudiate the title of the landlord under whom he originally entered, and claim to hold the premises under another, until he has first surrendered possession to his original landlord.¹ It is not enough that he has abandoned the premises for a time, and afterwards entered under the new title, unless he has given notice of such abandonment to the original landlord.

Appeal from district court, Galveston county.

Waul & Walker, for Juneman, appellant. *Ballinger, Mott & Terry*, for Franklin, appellee.

WILLIE, C. J. This was a suit by Joseph Franklin to recover of Charles Juneman possession of a lot of ground on Galveston island. He claimed possession because he had rented the land to Juneman, and the time for which it was rented had expired, and Juneman refused on demand to deliver to him the premises. The property was alleged to be worth \$2,000.

The defenses were a general demurrer; a special exception, setting up that there was no act of trespass alleged; pleas to the jurisdiction of the court, which alleged that the suit was one for forcible entry and detainer, and was exclusively within the jurisdiction of a justice of the peace; also that the amount in controversy was less than \$500, and it could not be brought in the district court. He also claimed by special demurrer that the suit was one of trespass to try title; yet the interest of the plaintiff in the land was not set forth; that it was not indorsed so as to show that fact; that it did not allege a trespass upon the land by the defendant, or the amount in controversy, or any averment of damages. The plea of not guilty was also entered, and a special defense to the effect that defendant held the property, not as tenant of the plaintiff, but of Leroy Brewer, who was the true owner of the land, and the plaintiff had no title thereto. In a supplemental petition the plaintiff set forth the lease in full, and alleged that the defendant, by reason of his having entered and held the premises as tenant of the plaintiff, was estopped from denying his title. Upon the trial, the plaintiff proved that he had leased the

¹See *Rector v. Gibbon*, 4 Sup. Ct. Rep. 606; *Killoren v. Murtaugh*, (N. H.) 5 Atl. Rep. 769, and note; *Pengra v. Munz*, 29 Fed. Rep. 830.

premises to Juneman for 12 months, beginning seventh July, 1884, and ending seventh July, 1885, with the privilege granted Juneman to keep it another year if Franklin did not want the use of it himself; that early in July, 1885, plaintiff and defendant had some conversation about the lease for another year, which ended by plaintiff telling defendant to call at his office, and he thought they could arrange the matter. Juneman did not come, and, as soon as Franklin heard that he had taken a lease from Brewer, Franklin in writing demanded possession of the premises.

The land was proved by plaintiff to be worth \$900. Juneman testified that, about the time his lease expired, he tried to renew it; but he and Franklin could not agree upon terms. He lived adjoining the premises, which were used by him as a pasture, being separated from his own place by a division fence; that, from the time his lease expired, he exercised no control over the lot, put no cattle upon it, left the outside gate open, and the place free to be trespassed upon by anybody's cattle. After his lease expired, he made inquiries as to the ownership of the lot, and found it belonged to Brewer, and on August 8, 1885, rented the place from him. He never made any formal surrender of the land; but it was at Franklin's disposal at any time after the lease expired.

The court below overruled all the demurrers of the defendant; held that it had jurisdiction of the cause; and gave judgment for the plaintiff for a recovery of the land and \$10 rents, and awarded a writ of possession. From this judgment the present appeal is taken.

Our constitution provides that district courts shall have jurisdiction of all suits, complaints, or pleas whatever, where the matter in controversy shall be valued at or amount to \$500. It is not contended in this court that the matter in controversy was not of sufficient amount to confer jurisdiction on the district court; but it is claimed that the suit is in effect one of forcible entry and detainer, and should have been prosecuted before a justice of the peace. It cannot be doubted that the cause of action set forth in the petition was one which entitled the plaintiff to relief in a court of justice. He was deprived of the possession of his land by the unlawful acts of the defendant. For this wrong he was entitled to an appropriate remedy, and one which would restore to him the land, as well as give him damages for its detention. It did not matter whether or not the common law had devised any form of action suited to the case, or allowed a landlord to proceed in its courts to eject a tenant, or compelled him to oust the intruder by force. We are not bound by the common law as to its forms of action, or the remedies it may have provided. The right to recover possession, under the circumstances, did exist at common law. The method of doing so under our system of jurisprudence is to set forth the facts constituting the cause of action, and the relief required, and our courts will give it, if the claim is just and proper. Hence the plaintiff could have instituted this suit in the district court, had there existed no action of forcible entry and detainer, for his benefit. The statute giving this remedy does not purport to deprive the district court of the jurisdiction it already had in such matters, if, indeed, the legislature had such power. It is merely cumulative of other remedies. It gives landlords a summary method of ousting tenants unlawfully holding over, but does not compel them to resort to such stringent process, in case they are willing to abide the delay of an ordinary suit for possession. This court has frequently passed upon the effect of statutory remedies prescribed for special cases, and held that they did not abolish others to which the plaintiff would otherwise be entitled. An information in the nature of a *quo warranto* is provided by statute to be used to recover an office; but we have held that an office may be recovered in an ordinary suit to which the state is not made party. *McAllen v. Rhodes*, 65 Tex. 348.

Our statute both gives a lien and prescribes a remedy for a landlord to receive and recover rent from a tenant. We have held that this statutory lien

might be enforced, as in case of other liens, without resorting to the statutory remedy. *Bourcier v. Edmondson*, 58 Tex. 675. We have also held, notwithstanding the remedy of forcible entry and detainer is provided by statute to enable a landlord to recover his land from a tenant improperly holding over, yet the relief may be had through an action of trespass to try title. *Thurber v. Conners*, 57 Tex. 96; *Andrews v. Parker*, 48 Tex. 94.

It is clear that the legislature did not attempt to give justices of the peace exclusive jurisdiction of actions of the present character; and the court did not err in holding that it had jurisdiction of this case. This action was not brought to try title, and there was no necessity for the plaintiff to set up that he had title to the land. Had he done so, production of his lease would have established the fact as against the defendant, his lessee. *Tyler v. Davis*, 61 Tex. 674. He alleged the lease, and that was sufficient to entitle him to maintain the action. *Id.* In this case, Juneman could not deny the title of the plaintiff, or set up the lease which he had received from Brewer. He had been let into possession by Franklin, and at the time this suit was brought was holding over after the expiration of the first year of the lease. His possession had not been disturbed by Franklin, and he had not notified the latter that he wished to surrender the possession. For aught that appears from the record, Franklin had every reason to believe, and did believe, that Juneman was holding the premises under him, down to the time when he was informed of the attornment to Brewer. He then immediately gave Juneman notice to quit, and commenced this suit. Juneman's conduct in abandoning the use of the land, and leaving it so that Franklin could take possession if he wished, does not affect the question. Franklin was in utter ignorance of the supposed surrender that Juneman was making all to himself. If Juneman wished to attorn to another, and to place himself in a position to dispute the landlord's title, it was his duty to first restore the latter to possession, and place him in the same position as he was before the entry under the lease was made. He should have given up the advantage he derived from the tenancy by being let into possession in order to remove the estoppel to which he was subjected. These principles are so well known that it is useless to discuss the matter further. *Wood, Landl. & Ten.* § 236, and authorities cited.

The writ of possession was the proper process adapted to the judgment recovered by the plaintiff. Because it is authorized to be used in cases of trespass to try title, is no reason why it cannot be used in a suit like this when precisely the same object is to be attained, viz., a possession of the land recovered by the party entitled to it against a trespasser. There is no error in the judgment, and it is affirmed.

GULF, C. & S. F. RY. CO. v. FORT WORTH & N. O. RY. CO.

(*Supreme Court of Texas.* February 18, 1887.)

1. STATUTES—REVISION—EFFECT ON PREVIOUS JUDICIAL DECISIONS.

Where the legislature revises the statutes of the state after a particular statute has been construed, without changing that statute, the presumption is that the legislature intend that the same construction should be continued on that statute.

2. INJUNCTION—DISMISSAL—APPEAL—CONTEMPT.

Under Rev. St. Tex. art. 1380, providing that an appeal or writ of error may be taken to the supreme court from every final judgment of the district court in civil cases, held that, although a complainant voluntarily dismisses his bill upon the dissolution of his preliminary injunction, he may afterwards prosecute an appeal from the order of dissolution; and, upon executing *supersedeas*, the injunction will be continued in force pending the appeal, and defendant disobeying it may be punished for contempt.

On motion for rehearing.

The appellant, the Gulf, Colorado & Santa Fe Railway Company, obtained a preliminary injunction, restraining the appellee, the Fort Worth & New

Orleans Railway Company, from laying its track across appellant's tracks and along appellant's right of way. The preliminary injunction being subsequently dissolved, appellant dismissed its bill, but gave notice of appeal, and immediately filed its *supersedeas* bond. This proceeding is a motion by appellant to punish appellee for contempt of court in having disobeyed the injunction granted in the court below. The appellees appeared, and admitted the acts complained of, but objected to the motion on the ground (1) that the judgment was not one from which an appeal would lie; (2) the appeal did not keep in force the injunction. For the original opinion of the court upon the motion, see 2 S. W. Rep. 199.

Pendleton, Chapman & Powell, for the motion. *Ballinger, Mott & Terry*, *contra*.

GAINES, J. The motion for a rehearing in this case asks a reconsideration by the court of two questions passed upon adversely to respondents, in the opinion heretofore delivered at the Tyler term. We have endeavored to give to these questions the careful review which is demanded, as well by the able and exhaustive argument which has been filed in support of the motion, as by their intrinsic importance, and the large interests involved in their decision; but the demands upon the time of the court are such that we can only state briefly a few additional reasons for adhering to our previous decision.

In the first place, it is urged that the rule laid down in *Williams v. Pouns*, 48 Tex. 141, that an appeal from a final judgment dissolving an injunction suspends the dissolution pending the appeal, is against the better reason and the weight of authority, and should therefore be overruled. But this decision cannot be overruled without violating a leading principle applicable to the construction of legislative enactments. Since the statutes bearing upon the question were construed in that case, a revision of our entire statutory law, prepared by a commission of able and careful lawyers, has been adopted by the legislature. The Revised Statutes substantially re-enact the former laws upon this subject. If it had been the will of the legislature to abrogate the rule established in the case cited, it is to be presumed that, in revising the laws, they would have clearly expressed that intention in some special provision upon the subject. Having adopted in the new laws substantially the same provisions in regard to appeals that were found in the old, the inference is that they intended the same construction should be put upon them. *Ennis v. Crump*, 6 Tex. 34. This alone is sufficient to preclude us from disturbing the ruling of *Williams v. Pouns*, *supra*.

The other point to which our attention is called in the motion, is as to the right of appeal from the judgment in this case. We have been cited in the argument to a number of additional authorities upon the question, and shall briefly review them. As we construe the cases referred to, the only one which sustains the doctrine contended for, namely, that, if a plaintiff take a nonsuit or dismisses his cause, he cannot so appeal as to confer jurisdiction upon the higher court, is *Ewing v. Glidwell*, 3 How. (Miss.) 332. There the writ of error was dismissed, upon the ground that the plaintiff in error had taken a voluntary nonsuit. The court cited in support of their opinion the cases of *Kempland v. Macauley*, 4 Term R. 436, and *Box v. Bennett*, 1 H. Bl. 432. These causes are authority for holding that, when a party who has taken a nonsuit comes to be heard on a writ of error from the judgment, he cannot obtain any relief. They do not hold that the writ of error is unauthorized and void. *Kempland v. Macauley*, *supra*, came up on a rule to stay execution on a judgment for costs, where plaintiff in error had taken nonsuit. The rule was discharged on the ground, as shown by the opinions both of Lord KENYON and Mr. Justice BULLER, that a *supersedeas* was never granted when it could be shown that a writ of error was sued out for delay, and that, since the judgment complained of was one of nonsuit, the purpose of delay was ap-

parent upon its face. There is not a word in either opinion to indicate that the court considered that the writ was illegally issued. On the contrary, it is to be implied that they held it valid.

In *Bax v. Bennett*, *supra*, the court said "that, although error might be brought on a judgment of nonsuit, it did not follow the execution ought to be set aside;" and they put it upon the ground of delay, which, under the English practice, was a sufficient reason in every case for refusing a *supersedeas*. We think it clear that these two cases do not sustain the opinion of the court in the Mississippi case just cited.

In the case of *U. S. v. Evans*, 5 Cranch, 280, the plaintiff in error, having become dissatisfied with the ruling of the court below, took his bill of exceptions and nonsuit, and then moved to set the nonsuit aside. The court below refused his motion, and he sued out his writ of error. The cause was submitted to the court, and Chief Justice MARSHALL said "that, when there had been a nonsuit and a motion to reinstate overruled, the court could not interfere," and judgment was affirmed. There the court evidently entertained jurisdiction.

But we are also cited to *Huston v. Berry*, 3 Tex. 235. In that case there was a nonsuit, but no final judgment. The cause was stricken from the docket for want of jurisdiction. That this was solely upon the ground that the judgment was not final is apparent from the opinion of Judge LIFSCOMB, who says: "There should have been a judgment rendered for costs on plaintiff's taking a nonsuit. This would have been sufficient to sustain the appellate jurisdiction."

This disposes of the cases to which we have been referred upon this branch of the motion. None of them sustain respondent's position, except *Ewing v. Glidwell*, *supra*, and we think that decision stands alone in holding that, in cases of appeal from voluntary nonsuit or dismissal, the appellate court does not obtain jurisdiction.

In the previous opinion our decision upon this point was placed upon the ground that our statutes provided for an appeal from every final judgment in the district court. In this we are well sustained by the well-considered case of *Brewer v. State*, 9 Ohio, 189. The statute of Ohio allowed an appeal from every final judgment or decree in chancery; and the court in that case held that the statute authorized them to entertain an appeal from a decree taken by consent, although, according to the general chancery practice, this was not allowed. The opinion also conceded that in Ohio an appeal from a voluntary nonsuit was not allowed at law, but showed that this was upon the ground that their statutes expressly authorized an appeal from an enforced nonsuit, without mentioning those taken voluntarily. Hence the latter were held to be impliedly excluded.

We are of opinion, therefore, that our former conclusions in this case are correct, and the rehearing will be refused. The time granted on the former judgment for obedience to the mandatory injunction therein ordered will be extended 90 days from this date.

DE EVERETT v. HENRY and others.

(Supreme Court of Texas. February 18, 1887.)

TRUSTS—TRUSTEE SELLING TRUST PROPERTY TO HIMSELF—RIGHTS OF PURCHASER.

A trustee, with power to sell, cannot sell the trust property to himself, so as to divest the *cestui que trust* of title; and in an action to recover the land so sold, if there are any circumstances connected with the sale which validate it, they are matters of proof on the part of the trustee, or of the purchaser from him. And in such action, where the trust was created by an instrument of record, it is not necessary to allege that the purchaser of the trustee knew of the trust, or that he knew the trustee had improperly sold the property to himself, those facts being directly in the line of his title, so that he could not trace back without being informed of them.

Appeal from Duval county.

Bryant & Coyner, for appellant. *McC Campbell & Stevens*, for appellees.

WILLIE, C. J. The petition of the appellant alleged that Perez and Collins, two of the appellees, were, by the district court of Nueces county, appointed trustees for the heirs and assigns of Julian and Ventierro Flores, to sell and dispose of certain lands, including lots 7, 8, and 9, in block 49, in the town of San Diego, belonging to said heirs. It further alleged that appellant was one of said heirs, and as such entitled to a thirty-sixth interest in said lots. The trustees were to make titles to the purchasers of said lands, and account for the purchase money to the heirs and assigns of Julian and Ventierro Flores; that on the twenty-ninth of November, 1875, Collins and Perez, as such trustees, fraudulently pretended to convey to said Collins the above lots, by making him a deed therefor, for the nominal sum of \$70, which was a cloud upon appellant's title; that Collins entered upon the lots, and disposed appellant of her interest therein; that about the first of November, 1876, Collins sold the lots to Paul Henry, for \$2,400, who took possession of the same, and withheld them from appellant. Appellant further alleged that she had not discovered the fraud of the trustees till a few months before the commencement of this suit, as she reposed entire confidence in them. She claimed to recover of Henry her interest in the lots, together with rents; and, in case Henry should have purchased without notice of her rights, that she recover of the trustees her interest in the purchase money received from Henry. A general demurrer was filed to the petition; also special demurrers, setting up the statute of limitations of two, four, and ten years; non-joinder of the other beneficiaries of the trust; and that the petition was multifarious. The court sustained all the demurrers, both general and special, and, the plaintiff declining to amend, the cause was dismissed. From this judgment of the court the present appeal was taken.

That a trustee, with power to sell, cannot sell to himself, so as to divest the title of the *cestui que trust*, is an acknowledged principle in equity, and need not be discussed. If he does purchase from himself, he becomes a constructive trustee, made such by his own fraud; and equity will treat him, and all purchasers from him with notice, as holding the property in trust for the original beneficiary. 1 Perry, Trusts, §§ 195-200; 2 Perry, Trusts, § 787. If there are any circumstances connected with the sale which validate it, these are matters of proof on the part of the trustee or purchaser. If not proved, and nothing appears but the fact of sale to himself by the trustee, and of purchase by a third party from him with notice, the sale must be held void, and, if the purchaser asserts title against the *cestui que trust*, the latter may recover the property from him. The facts made apparent by the petition in this case are the trust character of the property, its sale by the trustees to one of their number, and its purchase from him by the defendant Henry. There is no allegation that Henry knew of the decree which created the trust, and appointed his co-defendants trustees for disposing of the trust property by sale, and that he knew that these trustees had sold the trust property to one of their number. But these facts were in the line of Henry's title, and he could not trace it back to its source without being directly informed of their existence. To allege the title under which Henry claimed was therefore to charge him with notice that he had bought from a trustee, with power to sell, who had purchased the trust property from himself. It was to charge him with knowledge of the fraud committed by Collins that rendered the latter a constructive trustee for the plaintiff, and to place Henry in the same position after his own purchase. The plaintiff had the right to have the property taken from the hands of this involuntary trustee, who was claiming it against the equitable owners. We think the petition showed a good cause of action against Henry, and that his general demurrer should not have been sustained. This

renders it unimportant whether the special exceptions of the same defendant should have been sustained or overruled. If they were well taken, it would not have served any good purpose to amend the petition to meet the objections raised; for the court, having held the petition bad on general demurrer, would necessarily have dismissed it, though every special demurrer had been met, and its force discharged, by a proper amendment. *Porter v. Burkett*, 65 Tex. 383. It may be that the facts to which we have referred would not entitle the plaintiff to any relief of a pecuniary nature against Collins and Perez. She cannot recover the land from Henry, and its purchase money from Collins and Perez; but she was entitled to recover the land from Henry, if he had notice of the fraud of the trustees; and, if not, she was entitled to recover the purchase money from Collins, or, at least, her interest in the land or money, as the case might be. Admitting that the petition showed no grounds for recovering a moneyed judgment against the trustees, this furnished no reason for dismissing the suit. It could proceed against Henry and the trustees for the purpose of having the conveyances to Collins and to Henry set aside, all the defendants being necessarily parties to such a suit. Story, Eq. Pl. §§ 207, 210.

We think the general demurrer was improperly sustained; and for this error of the court below, the judgment must be reversed, and the cause remanded.

FRENCH and others v. OLIVE and another.

(Supreme Court of Texas. February 18, 1887.)

1. TITLE—PRESUMPTION—PAYMENT OF TAXES.

In an action to recover possession of land, upon the ground of plaintiff's use and occupancy and payment of taxes thereon for more than five years, evidence that the land was assessed for taxation against plaintiff, and the tax-roll marked "paid" for three years, and that it was the invariable custom of the tax collector, when taxes were paid, to so mark on the roll, did not show, but rather tended to repel, the fact of payment for the other two years.

2. SAME—ACTION TO TRY—JUDGMENT FOR DEFENDANT.

In an action to recover possession of land, plaintiff failing altogether to make out his title, the court adjudged that he take nothing, and added that "plaintiff's claim upon the land was removed as a cloud upon defendant's title, and that defendant be forever quieted in his right." *Held*, the addition was immaterial, as the judgment would have had that effect anyhow, without expressly so declaring.

Appeal from Hardin county.

Tom J. Russell, for appellants. *Douglass & Lanier*, for appellees.

GAINES, J. The appellants, who were plaintiffs below, set up title to the land in controversy, by virtue of the statute of limitations of five years. The cause was tried without a jury, and the judge's special findings of law and fact do not appear in the record. The evidence disclosed in the statement of facts shows that appellants wholly failed to make out their case in one essential particular. In our opinion, their evidence was not sufficient to show a payment of taxes for the term of five years. They claimed that the title was perfected by virtue of the adverse possession of one B. S. Holland, who held under a deed from the tax collector of Jefferson county, dated in 1850, which county then embraced the land now in controversy. Holland's possession extended, it seems, over a period of eight years, beginning about the year 1850. A certified copy of the tax-rolls was produced for the years from 1851 to 1858, inclusive. All the rolls showed that the land was assessed to Holland. Upon each of the rolls for the first three years was written the word "paid," opposite the assessment in question; but this did not appear upon the roll for any subsequent year. A witness testified that the tax collector of Jefferson county for 1852, and for several years afterwards, was one Wortly Patridge, and that he was often with Patridge when he was collecting taxes, and that it was

his invariable custom when taxes were paid to give a receipt, and to write the word "paid" in a blank column of the roll opposite the assessment. This may be evidence to show that the taxes were paid by Holland during the first three years; but, if that be so, it does not show any payment for the subsequent years. On the contrary, it tends rather to repel that conclusion. There being no other evidence introduced to establish this essential fact, the court was authorized to give judgment for the defendant.

But the defendants introduced their chain of title, and the court adjudged, not only that plaintiffs take nothing by their suit, but also that their claim upon the land was removed as a cloud upon defendants' title, and defendants forever quieted in their right. There are several assignments of error, complaining of the action of the court in admitting evidence, over appellants' objection, offered by appellees in proof of their title. We think it unnecessary that these should be considered. If the court erred, the error was immaterial. When appellants failed to make out their case, it was a matter of no concern whether appellees could show any title or not. They were entitled to a judgment, forever conclusive of all claim of appellants to the premises in controversy. This would have been the effect of an entry in the usual form that the plaintiffs take nothing by their suit, etc. The additions removing cloud and quieting defendants' title added nothing to the former part of the judgment. *Houston & T. C. Ry. Co. v. McGehee*, 49 Tex. 481; *Blessing v. Edmonson*, Id. 339. Appellees have been adjudicated that to which they were entitled by reason of appellants' failure to establish their title, and no more. There is no error in the judgment and it is affirmed.

ROGERS v. TREVATHAN and others.

(Supreme Court of Texas. February 18, 1887.)

HUSBAND DISPOSING OF COMMUNITY PROPERTY BY WILL—WIFE ELECTING TO TAKE UNDER WILL.

Where a husband disposes by will of an entire tract of land owned by himself and his wife jointly as community property, allotting to the wife a certain portion including the homestead, which she would not have been entitled to except under the will, and she subsequently conveys the portion so allotted her, *held*, conclusive evidence that she knew of the disposition made by the will, and elected to take under it.

Appeal from Trinity county.

J. P. Stevenson and L. T. Robb, for appellant. *J. R. Burnett*, for appellees.

STAYTON, J. The trial court found that the property in controversy was of the community estate of John C. and Sarah Gallion; that the former died testate in the year 1852; and that, by the terms of his will, the appellee was to have the land in controversy after the death of her mother. It was further found that Mrs. Gallion recognized the will, and consented to take under it, and that all the beneficiaries under it did the same. The records of the county court having been destroyed by fire, the court also found that the acts of the parties in interest under it, in connection with all the evidence in the case, required a finding that the will was properly probated soon after the death of John Gallion. We are of the opinion that these findings were justified by the evidence, or, at least, that it cannot be said that the findings are without evidence to sustain them. The entire tract of 640 acres, of which the land in controversy is a part, was community property, and of that Mrs. Gallion owned one-half. By the terms of the will, as proved, the testator gave of that tract to each of his five children 108 acres, and the remaining 100 acres, embracing that part used as homestead, he gave to his wife during her life, with remainder to Mrs. Trevathan. This clearly evidenced the intention of the testator to dispose of property which was not his own, and at the same

time to confer upon his wife a right which she would not have if his estate was solvent; for, under the law then in force, the homestead belonging to a solvent estate would have been subject to partition as other real property.

This presented a case in which the wife was called upon to elect whether she would take under the will. Having only an undivided interest in the land, were the terms of the will ambiguous, the testator would be presumed to have intended to devise only his interest in the entire tract; but the specific devises of a certain number of acres to each of his five children, and of the named residue to his wife for life, with remainder to Mrs. Trevathan, leave no doubt of his intention to dispose of the entire tract. The subsequent partition between the several devisees in accordance with the will, and the subsequent conveyance by Mrs. Gallion to Mrs. Rogers of the 100 acres, leaves no doubt that the former knew that the will, in terms, disposed of the entire tract, and of the further fact that Mrs. Gallion elected to take under it. The evidence tends strongly to show that Mrs. Trevathan was a child of John C. and Sarah Gallion, though born out of wedlock. There was evidence tending to show that Mrs. Gallion conveyed the land, reserving a life-estate to herself, to Mrs. Trevathan, before she made the conveyance to Mrs. Rogers; but the court made no specific finding in this respect, and based the decision on the will, and it therefore becomes unnecessary to inquire whether the evidence was sufficient to have required a finding that such a deed was made. The declarations of Mrs. Gallion, proved by the witness Wormack, were admissible, if for no other purpose, to show that she knew the terms of the will. The declarations of Mrs. Gallion, testified to by Lena and T. L. Trevathan, were admissible, and no other objection than that such evidence was hearsay was urged, and none other can now be considered. In so far as they testified to the making of a deed to Mrs. Trevathan by Mrs. Gallion, they were testifying to facts which become unimportant in view of the ground on which the case was disposed of. The other assignments need not be considered further than they are embraced in what has already been said.

The judgment will be affirmed.

WILLEY and another v. STATE.¹

(Court of Appeals of Texas. November 24, 1886.)

1. CRIMINAL PRACTICE—SEVERANCE.

Severance upon the request of any one of plural defendants jointly indicted is a matter of right, when the application therefor has been made in conformity with the statutes.

2. LARCENY—CHARGE.

Charge of the court instructed the jury that, "upon the trial of any person charged with the theft of any animal of the horse, ass, or cattle species, the possession of such stolen animal by the accused, without a written transfer or bill of sale containing a description of such animal, shall be *prima facie* evidence against the accused, and that such possession was illegal." *Held* erroneous, as being a charge upon the weight of evidence.

3. SAME—EVIDENCE.

See the statement of the case for a special instruction *held* to have been erroneously refused, in view of the evidence tending to show an innocent connection with the stolen animal on the part of one of the defendants.

4. EVIDENCE—DECLARATIONS OF CONSPIRATOR.

Confessions or declarations of one conspirator, made after the consummation of the conspiracy, and not in the presence of his co-conspirator, cannot be used in evidence against the latter.

Appeal from district court, Orange county.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

The conviction of the joint defendants in this case was for the theft of a cow, the property of Oliver Bland. A term of two years in the penitentiary was assessed against each of the appellants.

The case for the state is stated substantially in the evidence of Robert Meyers, who testified that some time in the summer of 1884 he was at the residence of the defendant John Willey, sitting on the gallery, talking with John Willey and his father, old man B. Willey. While thus engaged on the gallery, the witness saw the defendant Henry Willey, and John Jett, and perhaps some one else, drive a herd of 10 or 12 cattle past the house. John Willey remarked to his father that there was the Craft cow they were going to kill. Witness looked at the animal indicated by John Willey, and told him that that cow belonged to Oliver Bland. John Willey and his father insisted that the animal was the Craft cow; the one they were looking after for Mrs. Craft. Witness, John, and old man Willey then went to the pen in which meanwhile the cattle had been placed, and witness identified the animal to them as Oliver Bland's cow. She was a red cow, with a white face, and white flecks on her flanks, and branded "H." Witness told John Jett at the pen that the cow was the one Henry Reese sold Oliver Bland. After some dispute the cow was turned out, and Henry Willey then bought a beef from his father, old man B. Willey, and butchered it, turning the other animals out of the pen. A month or more later the witness saw the defendants, John and Henry Willey, driving a small bunch of cattle across the prairie towards their house. That bunch included the same cow which he had pointed out to them as the Oliver Bland cow. The defendants, with that bunch of cattle, were about six hundred yards from their house, going in that direction. The witness never afterwards saw that cow, but two or three weeks later he saw the defendant John Willey at his home, and asked him about the cow. John said that she had been butchered. At this point the record recites, in brackets, as follows: "Defendants' counsel here objected to witness stating anything about Henry Willey, he not being present, which was by the court excluded." Continuing, the witness stated that John Willey said he helped to skin the cow, and that Henry Willey bought her from Jack Ochiltree. Cross-examined, the witness stated that the conversation with John Willey, last mentioned, took place at John Willey's yard fence, no one being present but the witness and the said John. If old man Jake Cochran was then at the Willey house the witness did not know it. Witness could easily distinguish the cow by her flesh-marks when he last saw her in the herd of 10 or 12 driven by the defendants. He was absolutely certain that cow was the Bland cow. Re-examined, the witness said that he had never seen the Bland cow on the range since he saw the defendants driving her towards their house in the fall of 1884. In the same conversation in which John Willey said that the cow was purchased from Jack Ochiltree, and that he helped to skin her after she was killed, he said that the R. H. Smith brand showed on the under-side of the hide. He did not admit that the animal was the Bland cow. Nobody ever pointed out the Bland cow to the witness.

Jack Ochiltree was placed on the stand by the state, and testified that he had never, at any time, sold a cow, of any description, to either of the defendants.

One Lewis testified, for the defense, that he and Henry Willey were partners in the butcher business. Henry Willey furnished and butchered the beef, and witness sold it, knowing nothing more about it. John Willey was in the employ of witness and Henry Willey throughout the first eight months of 1884.

A Mr. Graham testified, for the defense, that he was present, and witnessed the purchase of a pale red cow branded "H" by Henry Willey from Jack Ochiltree, and saw that cow butchered.

The special instruction, which is the subject-matter of the third head-note

of this report, reads as follows: "If the jury believe from the evidence that, at the time of the taking, the defendant John Willey was a hired hand in the employ of the defendant Henry Willey and one Jeff Lewis, and assisted the said Henry Willey in taking possession and killing of said cow alleged to have been stolen, and that he did so under the instructions and by direction of the said Henry Willey, and at the time of the said taking the defendant John Willey believed that said cow was the property of the said Henry Willey, or of the said Henry Willey and Jeff Lewis in partnership, and had no knowledge of any criminal intent on the part of the said Henry Willey in the alleged taking, you will find the defendant John Willey not guilty."

J. T. Hart, for the appellant, maintaining the legal propositions announced by the opinion.

Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. Appellants were jointly indicted for theft of a cow, the property of Oliver Bland. When the case was called for trial after their motion for continuance had been overruled, defendants presented to the court an application for a severance as follows, viz.: "Now come defendants in the above-entitled cause, and ask a severance upon the trial thereof, and defendants agree and ask that defendant Henry Willey be placed first on trial," which application was subsequently amended as a separate application of John Willey, and by the addition that "said severance is requested for the purpose of obtaining the evidence of said Henry Willey jointly indicted with him; that such evidence is material to his defense; and that he (John Willey) verily believes that there is no evidence against said Henry Willey." A severance was refused by the court. The learned judge, in his explanation appended to the bill of exceptions saved to the ruling, among other reasons for his action, says the application was overruled, "the court not being satisfied that it is a matter of absolute right that the defendants had to sever, and thinking that if it is true that it is a matter of absolute right, that it ought not to be," etc.

Articles 669 and 670 of the Code of Criminal Procedure, before they were amended, provided for a severance of defendants jointly indicted; and, where an application therefor was made in the terms of the law, a severance was a matter of right. *Rucker v. State*, 7 Tex. App. 549; *Myers v. State*, Id. 640; *Allison v. State*, 14 Tex. App. 402. These two articles of the Code have been amended, and, as amended, now read:

"Art. 669. When two or more defendants are jointly prosecuted, they may sever in the trial, upon the request of either.

"Art. 670. When a severance is claimed, the defendants may agree upon the order in which they are to be tried, but, in case of their failure to agree, the court shall direct the order of trial." Gen. Laws Eighteenth Leg. (Reg. Sess.) 9. In our opinion there can be no question as to the intention of the legislature to confer upon such defendants the right to demand a severance, and, where they come within the terms of the *statute*, and demand such right, it is manifest error to refuse or deprive them of it.

One of the instructions thus given the jury in the charge of the court was as follows: "Upon the trial of any person charged with theft of any animal of the horse, ass, or cattle species, the possession of such stolen animal by the accused, without a written transfer or bill of sale containing a description of such animal, shall be *prima facie* evidence against the accused, and that such possession was illegal." This charge is upon the weight of evidence, and this court has condemned similar charges as vicious and erroneous. *Garcia v. State*, 12 Tex. App. 336; *Flores v. State*, 13 Tex. App. 665; *Schindler v. State*, 15 Tex. App. 394.

In so far as defendant John Willey was concerned, in addition to his plea of not guilty, another theory in his behalf raised by the evidence was that, if he was implicated at all in the driving or killing of the cow, then he was a

hired hand; and in his connection with the driving or killing he acted, in whatsoever he did, under the honest belief that the animal was the property of his co-defendant Henry Willey, or of the butchering partnership composed of Henry Willey and Jeff Lewis. Upon this phase of the case the special requested instruction asked by the defendant was the law, and it was error to refuse it, especially since the charge given contained no enunciation of the law pertinent to this portion of the facts. *Ivey v. State*, 43 Tex. 425; *Taylor v. State*, 5 Tex. App. 529; *Allen v. State*, 42 Tex. 518; *Anderson v. State*, 8 Tex. App. 542.

Looking to another trial of the case, we call attention of the court to certain testimony allowed over objection, as shown by exception noted in the statement of facts. The witness Myers was allowed to testify to statements made by defendant John Willey to him when his co-defendant, Henry Willey, was not present. Such confessions or admissions would be legitimate as evidence against John, but not as against Henry. After the consummation of a conspiracy, the declarations of one conspirator cannot be used against his co-conspirator. *Cow v. State*, 8 Tex. App. 254; *Holden v. State*, 18 Tex. App. 92; *Ricks v. State*, 19 Tex. App. 308; *Smith v. State*, 21 Tex. App. 108. A man's confession of guilt can only be used against himself. *Draper v. State*, 22 Tex. 400.

For the errors discussed, the judgment is reversed, and the cause remanded.

NEIDERLUCK v. STATE.¹

(Court of Appeals of Texas. February 2, 1887.)

1. BURGLARY—INDICTMENT.

It is not essential to the sufficiency of an indictment for burglary with intent to commit larceny that it shall describe the property intended to be stolen.

2. SAME—CHARGE OF THE COURT—NEW TRIAL.

The entry was alleged to have been effected by force, threats, and fraud. Notwithstanding the total absence of evidence to establish the element of fraud, the charge of the court limited the jury to an entrance effected by fraud. *Held* error, and such error as demanded the award of a new trial.

3. SAME—ENTRY BY SERVANT.

To constitute a burglarious entry, if made by a servant *alone*, the building must be entered by an *actual*, and not a constructive, breaking. This doctrine cannot, however, be extended to include those acting with the servant; nor will it operate to protect a servant who, in furtherance of his conspiracy with others, opens the building, without an actual breaking, to admit his co-conspirators. See the opinion on the whole question.

Appeal from district court, Bexar county.

The opinion sufficiently discloses the case. The penalty assessed was a term of nine years in the penitentiary.

Gerald Griffin, for appellant, maintained that the court erred in refusing to quash the indictment, and, in view of the facts, refusing to charge the law applicable to a breaking by a domestic servant.

Asst. Atty. Gen. Burts, for the State.

HURT, J. This is an appeal from a conviction for the offense of burglary. The indictment charges that the appellant, with others, entered in the nighttime the house of Tom Wing, by force, threats, and fraud, with intent to steal the corporeal personal property of the said Wing. Because there was no description in the indictment of the property intended to be taken, appellant moved the court to quash. This motion was overruled, and this action of the court is here assigned as error. We hold that in this the court did not err. Whart. Crim. Law. § 820. The prosecuting witness, Tom Wing, on the night of the burglary, was the keeper of a restaurant on Houston street, in the city of

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

San Antonio, the house fronting on said street. The front door of the premises was locked, and the back door closed and latched. This is positively declared by the witness Wing. Levy and Hyatt, domestic servants of Wing, were sleeping on the back gallery of the house. Though the back door was latched, the fastening could easily be lifted from the outside, through a crevice. About 2 o'clock of the said night two men came to the back part of the house, Levy at the time being on a bed on the back gallery, and near the door. The two men went up the back steps, when Levy arose from the bed, and commenced to shake Hyatt; then went into the house, the two men before mentioned following after him. The record shows that Hyatt was not an accomplice or *particeps criminis*. Condensing and applying: There was a conspiracy between Levy, appellant, and others to commit the burglary. Levy was servant to Wing. He it was that opened the door by lifting the latch from the outside, and led the way into the house, appellant and others following.

The indictment charged an entry by force, threats, and fraud. The learned trial judge so framed his charge as to hinge the guilt of the appellant upon an entry effected by fraud, ignoring force altogether. Do the facts of this case show an entry by fraud? Upon this subject Mr. Bishop says: "The meaning of the verb 'to break,' as employed in the law of burglary, was discussed in the author's work on Statutory Crimes. It does not require any separation of the particles of things, as where one breaks a stick; but if one, for example, lifts a latch and opens the door, or presses the door open without removing the fastenings, or with his hand raises an unfastened window, or thrusts himself down the chimney, or, by fraud practiced upon the occupant, *procures him to open the door*, he breaks the dwelling-house. On the other hand there is no breaking where one enters through an open door or other aperture." The foregoing is cited for the purpose of presenting the author's remarks on fraud. It will be seen that the fraud must be practiced upon the occupant, and must be the means of inducing him to open the door.

Mr. Wharton illustrates entry by fraud thus: "In cases where the offender, with intent to commit a felony, for the purpose of affecting it, gains admission by some trick, the offense is burglary, for this is constructive breaking. Thus, when thieves, having intent to rob, raised the hue and cry, and brought the constable, to whom the crowd opened the door, and when they came in robbed the owner and bound the constable, this was held a burglary. So, if admission be gained under pretense of business, or if one takes lodgings, with a like felonious intent, and afterwards robs the landlord, or gets possession of a dwelling by a false affidavit, without any color of title, and then rifles the house, such entrance, being gained by fraud, is burglarious. Whart. Crim. Law, § 765.

These examples suffice to show the statutory meaning of fraud as a means of entering a house. If the entry is by trick or device, whether perpetrated upon the occupant, or a servant authorized to give permission to enter, it would be burglarious. We have seen, however, that Levy was not induced to open the door by any trick or fraudulent device. He was not the dupe, but the willing assistant, of his co-conspirators, fully cognizant of their felonious intent, if not the master and controlling spirit. There is no pretense either that Wing was duped or misled into opening the door of his house to the conspirators. The record leaves it beyond question that neither Wing nor Levy was induced by fraud to permit the entrance. Levy, at the time of opening the door, showed every intent and purpose of his companions in crime. There being nothing in the testimony to show an entrance effected by fraud, the court erred in instructing the jury upon a case made by that character of evidence. After having limited the jury to a conviction upon the theory of fraud alone, a new trial should have been granted, there being no evidence to support the theory.

With a view of ascertaining if there is a theory upon which the appellant can be legally convicted, provided the witnesses be credible, and their testimony sufficiently strong, let us examine the record. Though a co-conspirator, Levy, under the evidence in the record, cannot be convicted. Being a domestic servant, he must, under the statute, have entered the house by an *actual* breaking. Penal Code, art. 714. The lifting of the latch was not such *actual*, though it was *constructive*, breaking. If it be conceded, however, that the facts would not, under the article cited, support a conviction as to Levy, the same conclusion does not follow as to his associates. Without question, if the breaking by Levy had been *actual*, all engaged with him would have been guilty with him. But it may be urged that, since Levy is not guilty, the house was not entered in such manner (the door being opened by him who is innocent in law) as to constitute burglary. This is ingenious and plausible, but at the same time, fallacious; for, if Levy cannot be punished,—is in law not guilty,—his acts, the parties being co-conspirators, and acting together, are nevertheless the acts of each conspirator; and hence, since Levy opened the door in furtherance of the common design of all, though not punishable, he was the agent, means, and instrument of all parties concerned. Article 77 of the Penal Code provides that "if any one by employing a child, or other person who cannot be punished, to commit an offense, * * * or by any other indirect means, causes another to receive an injury to his person or property, the offender, by the use of such indirect means, becomes a principal." *Smith v. State*, 21 Tex. App. 107, and authorities cited.

Now, if Levy is guilty, there is no doubt that appellant is guilty as a principal, all being present and acting together; but, if Levy is merely the means used,—the instrument by which the entrance was affected,—each and all, save Levy, would be guilty as principals, Levy's breaking being the breaking of all.

We have been considering this subject upon the assumption that there was not such a breaking as would justify a conviction of Levy, he being a domestic servant. If the domestic servant is acting alone, there must be an *actual* breaking to render it burglarious. But does it follow that there must be such breaking when the servant is acting with others who are not servants? We have given this subject a most careful consideration, and are led to conclude that such breaking is not necessary. Mr. Russell on this subject says: "The breaking may also be by conspiracy. Thus, where a servant conspired with a thief to let him into his master's house to commit a robbery, and in consequence of such agreement opened the door or window in the night-time, and let him in, this, according to the better opinion, was considered to be burglary in both the thief and the servant. And this doctrine is confirmed by a subsequent decision. Two men were indicted for burglary, and, upon evidence, it appeared that one of them was a servant in the house where the offense was committed; that in the night-time he opened the street door, let in the other prisoner, and showed him the side-board, from whence the other prisoner took the plate; that he then opened the door, and let the other prisoner out, but did not go out with him, but went to bed. And, upon these facts being found specially, all the judges were of opinion that both the prisoners were guilty of burglary, and they were accordingly executed." 2 Russ. Crimes, 910. Upon a similar state of facts Lord HALE said: "It seems to be burglary in both, for, if it be burglary in the thief, it must needs be so in the servant, because he is present, and aiding the thief to commit a burglary."

We hold, therefore, that a domestic servant, conspiring with those who are not servants, may be guilty of burglary, though the breaking be not actual, and such as, if committed by the servant acting alone, would not be burglarious.

For the error indicated in the charge the judgment will be reversed, and the cause remanded.

PLESS v. STATE.¹*(Court of Appeals of Texas. February 9, 1887.)*

1. CRIMINAL PRACTICE—CHARGE OF THE COURT.

Special charges are properly refused when the general charge comprehends all of the law of the case.

2. ASSAULT TO RAPE.

See the opinion *in extenso* for a *resumé* of evidence held insufficient to support a conviction for an assault to rape.

Appeal from district court, Bell county.

The conviction was for assault to rape, and the penalty assessed was a term of four years in the penitentiary. The opinion states the effect of the evidence.

Jas. Boyd and *J. D. McMahon*, for appellant, assailed the evidence as insufficient.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. We find no error in the charge of the court, but regard it as a clear and admirable exposition of the law of the case. There was no error in refusing the special instructions requested by the defendant, as the whole law applicable to the evidence had been correctly given in the general charge of the court. We are not satisfied with the sufficiency of the evidence. We do not think the conviction is supported by it with that strength and conclusiveness which law and reason in such cases demand. The testimony of the alleged injured female conflicts in some particulars with that of her father, and in other respects is not free from suspicion. While she states that she did not consent to the alleged outrage upon her person, her conduct on the occasion, as detailed by herself, is somewhat inconsistent with a want of consent on her part, and rather leads to the conclusion that she was not an unwilling victim. Her testimony is but very slightly corroborated. Her father testified that he found blood upon her underclothes the next morning after the alleged outrage, but we are not informed whether these blood-stains were recent or old, or whether other causes than the alleged outrage may not have produced them. No examination of the girl's private parts was made until five weeks after the alleged crime, and the evidence discloses no reason why such an examination was not sooner made. It occurs to us that, if the defendant is guilty of the offense of which he has been convicted, his guilt can be more satisfactorily established than has been done. There appear to exist some sources of information which were not explored and developed on the trial. It seems that one T. M. Moore must have possessed some knowledge concerning the transaction, and yet he was not produced as a witness, and his non-production was not accounted for by the state.

Again, about five weeks after the alleged crime, the person of the female was examined by two physicians, with a view to ascertaining whether or not she had been outraged. When their testimony was offered by the state, the defendant objected to it, and the court sustained the objection. In this ruling we think the court erred. It is true that this testimony would be, in point of time, rather remote, but still it might throw much light upon the transaction; and in cases like this we do not think any testimony should be excluded which tends, in the least degree, to aid the jury in arriving at the truth. Upon another trial this testimony, if offered, should be admitted.

Because, in our opinion, the evidence is not sufficient to support the conviction, the judgment is reversed, and the cause remanded.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

PECK v. CHOUTEAU and others.

(Supreme Court of Missouri. February 28, 1887.)

1. TRIAL—OBJECTIONS—EVIDENCE.

General objections and exceptions to the rulings of the trial court upon the admission or exclusion of evidence cannot be reviewed on appeal. The objections should show the *specific* grounds upon which they are made.

2. APPEAL—PRESUMPTION—EVIDENCE.

Before a judgment can be reversed because of the admission of immaterial evidence, it must clearly appear that the evidence was immaterial. The presumption is in favor of the ruling of the court.

3. MALICIOUS PROSECUTION—EVIDENCE—INDICTMENT.

Plaintiff having been indicted, along with A., for a fraudulent conspiracy, was acquitted, and subsequently brought an action for malicious prosecution. In that action, *held*, that evidence of a previous indictment against A. for a similar offense was incompetent, as it did not tend to prove plaintiff guilty upon the indictment complained of, or disprove malice or show probable cause on the part of defendant.

4. SAME—WITNESS—CREDIBILITY.

But A. having appeared as a witness in the action for malicious prosecution, evidence of the indictment found against him previously to the one complained of is admissible to affect his credibility, it appearing that he had entered a plea of guilty to that indictment, but the government had dismissed the proceeding without entering judgment on the plea.

5. SAME—MALICE.

Mere dislike or ill will towards one by another does not constitute malice in the legal sense. There must be some act done by defendant with intent to injure plaintiff, and such act must be wrongful, and done without legal justification or excuse.

6. SAME—ATTORNEY'S LIABILITY.

An attorney is not liable to an action for malicious prosecution, unless, in conducting the litigation complained of, he knew that there was no cause of action, and knew also that his client was acting solely from illegal or malicious motives; and, in forming his opinion upon these matters, he has a right to act upon such information as his client imparts, and is not bound to inform himself elsewhere.

Appeal from St. Louis circuit court.

Bowman, Lindley & McDonald, for appellant. *Herman & Reyburn* and *G. H. Shields*, for respondent.

BLACK, J. This was an action for malicious prosecution, in which Charles P. Chouteau, John M. Glover, and Joseph H. Livingston were made defendants. The cause was dismissed as to Livingston. Verdict and judgment for the defendants, from which the plaintiff appealed. The substantial averments of the first count are that on the eighteenth July, 1882, the plaintiff was indicted upon a charge of fraudulent conspiracy with Engelke and Barret to defraud Alice Livingston and others interested in a corporation known as the Windsor Hotel Company; that he was arrested on the twenty-sixth July, 1882, and tried and acquitted on the twenty-first December, 1882, in the court of criminal correction of St. Louis; that Chouteau was a member of the grand jury which returned the indictment, Livingston a witness upon whose false statements the indictment was procured, and Glover assisted in its procurement; that the defendants maliciously and without probable cause procured the indictment, and caused the plaintiff to be arrested and prosecuted thereunder. The second count, omitting the various charges of malice and want of probable cause, states that defendants procured the arrest of the plaintiff on the twenty-second December, 1882, upon a false charge of conspiring to defraud Alice Livingston; that this charge was withdrawn on the fifteenth January, 1883, but before it was withdrawn, and on the same day, another one was lodged against him, upon which he was arrested; that he was tried in the same court, acquitted and discharged on the sixteenth March, 1883. The

answer of Chouteau is a general denial, with the averment that at and prior to the alleged grievances the general reputation of the plaintiff for honesty and integrity was bad. Glover made a like answer, with the additional averment that whatever he did was done as a duly-enrolled and practicing attorney, and not otherwise.

Very little of the evidence offered on the trial, which was hotly contested, lasting for at least two weeks, is preserved. The record recites that plaintiff offered evidence tending to prove the allegations of the petition, and there was evidence tending to sustain the issues on behalf of the defendants, and to disprove the averments of the petition. The records from the court of criminal correction are in evidence, and they show that the plaintiff was arrested, tried, and acquitted on the indictment and on the information as stated in the petition. They show, however, that Barret and Bernard H. Engelke were also included in the same prosecutions with plaintiff, and were also acquitted.

1. Various errors are assigned in the admission of evidence over the objections of the plaintiff. And, first, in the cross-examination of Engelke, and the direct examination of Dyer, a witness called by the defendants, general objections were made by the plaintiff, of which the following will serve as an example: "Counsel for the plaintiff objected. Objection overruled, and plaintiff excepted." The ruling of the trial court on such general objections cannot be reviewed here. The objections must show the specific grounds on which they are made. *Shelton v. Durham*, 76 Mo. 496. The rule has been so often asserted and well understood that there can be no hardship in its enforcement. Unless adhered to with rigor, we must reverse causes upon points of evidence not called to the attention of the trial court, and often not intended to be raised on the trial at all. The various objections of the character before noted need not be specially mentioned. What is here said will suffice as to all of them.

2. Again, the bill of exceptions states that Bernard H. Engelke, a witness for the plaintiff, and one of the persons named in the indictment and information, was fully examined as to all the matters relating to the controversy, and as to the circumstances connected with making the alleged fraudulent loan; that he testified that the money was paid to the hotel company, and to other material facts in the case; that on cross-examination by defendant he testified as follows: "Did you ever before decline a proposition to turn state's evidence, and betray your friends?" The plaintiff objected on the ground of immateriality. The objection being overruled, he excepted, and the witness answered: "I never had such a proposition made to me by any man until this offer." The question and the answer both plainly indicate that something had been said previously in the examination in respect of a proposition to turn state's evidence,—whether in the first or cross-examination is not stated; but, as the bill of exceptions is made out, it does not show any previous cross-examination, and the only inference is that it was a matter brought out on the direct examination. That being so, the cross-examination was not beyond the bounds of legitimate inquiry. Before a judgment can or will be reversed because of the admission of immaterial evidence, the record must not only show that objections were made and exceptions taken, but it must clearly appear that the evidence was immaterial. The presumption is in favor of the correctness of the ruling of the trial court until the contrary is made manifest from the record. *McMillen v. State*, 13 Mo. 30; *Holmes v. Braidwood*, 82 Mo. 613; *State v. Tucker*, 84 Mo. 26.

3. The same witness, in further cross-examination, stated that no proposition to turn state's evidence was made to him in certain prosecutions instituted by the United States; that he testified on those trials; that in one of those cases he pleaded guilty to a misdemeanor, not to a felony. The indictment being shown to him, he was asked if he pleaded guilty to it, and he said he did; but at the same time counsel for the plaintiff objected to any further inquiry in

that behalf until the indictment should be put in evidence. It was then offered, when an objection was made on the ground that the record showed Mr. Engelke's acquittal and discharge. The record was then read, to which exceptions were taken. The record shows that Engelke and his partner in business were, seven or eight years before this trial, indicted in seven counts for feloniously removing distilled spirits on which the tax had not been paid for the purpose of defrauding the government; that he pleaded not guilty; that four months thereafter he pleaded guilty as to three of the counts, and some six months later, by leave of the court, he withdrew the plea of guilty, and the prosecution was dismissed as to him. It is strongly urged by the defendants that as Mr. Glover, one of the defendants, and counsel for the other, knew of these whisky prosecutions, and that Engelke had pleaded guilty to a charge of conspiring to defraud the government, the circumstance would naturally and of right lead him, and, through him, his client, to believe that Engelke would be likely to engage in another conspiracy to defraud. As both malice and want of probable cause are essential elements to be made out by the plaintiff in a malicious prosecution, evidence tending to disprove malice or show probable cause is competent on behalf of the defendant. The defendant may show the general bad reputation of the plaintiff; and authorities are cited to show that the defendant may offer evidence to the effect that the plaintiff had been guilty of other similar offenses about the same time, knowledge of which had come to the defendant before he instituted the prosecution. 3 Suth. Dam. 708, and cases cited by counsel for defendants. But, while Peck and Engelke were held jointly prosecuted, Peck was not a party to the whisky prosecutions, and it is not claimed that he had anything to do with them. Even if the evidence was competent as against Engelke in a suit by him, which we do not affirm, still the fact that Engelke had been engaged in a conspiracy to defraud the government six or seven years before is no evidence showing, or tending to show, that Peck would be likely to be guilty of such an offense as that with which he is charged. The reception of the evidence cannot be justified on the ground that it tends to disprove malice or show probable cause.

4. The indictment, and the proceedings had thereon, if admissible for any purpose, could only be received to affect the credit of the witness. When it is proposed to exclude the witness because he has been convicted of some infamous crime at the common law or made so by statute, a verdict of a jury or plea of guilty is not sufficient. It is the judgment, and that only, which is evidence of the party's guilt for the purpose of rendering him incompetent to testify. Whart. Ev. (2d Ed.) § 567; 1 Greenl. Ev. (14th Ed.) § 375. With us a conviction for a crime no longer renders the defendant incompetent to testify, but it may be read as affecting the credit of the witness. Mr. Greenleaf says, at the section last cited: "If the guilt of the party should be shown by oral evidence, and even by his own admission, (though in neither of these modes can it be proved, if the evidence be objected to,) or by his plea of guilty which has not been followed by a judgment, the proof does not go to the competency of the witness, however it may affect his credibility." The intimation, if not the statement, here made, is that a plea of guilty may be shown as affecting the credibility of the witness. The above quotation was approvingly cited in *State v. Rockett*, 87 Mo. 668. In that case no question was made but that a conviction for a misdemeanor might be read as going to the credit of the witness. While a plea of *nolo contendere* in a criminal case is an admission only for that trial, a plea of guilty, in a criminal case, may, in a civil suit involving the same subject-matter, be used as an admission. Whart. Ev. § 783; 1 Greenl. Ev. § 179. Here there was a solemn plea of guilty made after due time for deliberation. If the verdict of a jury, followed by a judgment, will affect the credit of a witness, no reason is seen why this solemn admission should not have the same effect. If it is the com-

mission of the crime that affects the character, then the confession is certainly of equal weight with the verdict and judgment. Though the government saw fit and proper to dismiss the prosecution without entering a judgment on the plea, still we hold the record was properly received in evidence. There are other objections to the evidence drawn from this witness, but they are subordinate to the question just determined, and need not, therefore, be considered.

5. For the plaintiff the court instructed the jury that malice means a wrongful act done intentionally, without legal justification or excuse. This definition is taken from *Sharpe v. Johnston*, 59 Mo. 557; that is to say, from instructions which were given in that case. The plaintiff cannot, and of course does not, complain of the definition, for it was given at his request; but he does object to an instruction given upon the same subject, at the request of the defendant, which is as follows: "Mere dislike or ill will towards one by another does not constitute malice in the legal sense. There must be some act done by defendant with intent to injure plaintiff, and such act must be wrongful, and must be done without legal justification or excuse; and unless," etc. We do not see that this instruction modifies or weakens the force of the definition previously given. It evidently was designed to and does assert the proposition that dislike or ill will, so long as it remains a feeling only, unaccompanied with any act, does not constitute malice in the sense in which the word is used in the instructions; that such feeling must be embodied in some act. That is what is meant by the plaintiff's instruction when it said: "Malice means a *wrongful act*, done intentionally," etc. Cooley says: "Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown." Cooley, Torts, 185. Substantially the same thing is said in *Alexander v. Harrison*, 38 Mo. 259, and *Barron v. Mason*, 31 Vt. 189. If, then, the instruction had the effect to withdraw from the jury the motives with which the defendants instituted the prosecution, it could not be sustained, but we do not see that it could have had that effect. Other instructions show that the purpose of the defendants in commencing and carrying on the prosecutions was kept prominently before the jury.

6. Objection is also made to an instruction which in substance is that the finding and return of the indictment is *prima facie* evidence of probable cause, "and, unless this proof is overcome by evidence either that said indictment was procured by false or fraudulent testimony, or that, notwithstanding the finding of said indictment, said defendants did not believe the plaintiff to be guilty of the offense for which he had been indicted, the jury will find for the said defendant on the first count." This instruction has the sanction of at least two former rulings of this court. *Sharpe v. Johnston*, 76 Mo. 670; *Vansickle v. Brown*, 68 Mo. 627. The statement that the finding and return of the indictment is *prima facie* evidence of probable cause is no more than to say the burden of proof to show want of probable cause is upon the plaintiff. The latter part of the instruction is to be taken in connection with another, whereby the jury was properly told that probable cause must have been the belief by defendants of the guilt of the plaintiff, based on facts and circumstances sufficiently strong to have induced such belief in the mind of a reasonable and cautious man. The instruction, considered in the light of the one just alluded to, is not objectionable. It is to be observed, the instructions under consideration relate alone to the first count. That Chouteau was a member of the grand jury does not make the instruction vicious. That fact was a circumstance, however, which the jurors had a right to consider.

7. The sixth instruction for the defendants, and to which objection is made, does not more than say that if Chouteau's connection with the prosecution ended with the trial upon the indictment, and that neither he, nor Glover for him, took any part in the prosecution upon the information, then the finding

should be for him on the second count. This is clearly its only fair meaning, and it embodies a correct proposition of law.

8. Finally, as to the plaintiff's refused instructions. These relate to Glover only as the attorney of Chouteau. The fact that the client is actuated by malice, and the attorney knows it, cannot make the attorney liable; for malice alone would not even make out a case against the client. If there is probable cause for the prosecution, then the suit for malicious prosecution must fail, though malice be clearly shown; and it must follow that knowledge on the part of the attorney that the client is actuated by malicious motives is not sufficient to make the attorney liable. But if the attorney knows that the client is actuated by malice, and also knows that there is no cause for the prosecution, the dictates of common honesty require that he also should be made accountable. As said in *Burnap v. Marsh*, 13 Ill. 538: "Where the client will assume to dictate a prosecution upon his own responsibility, the attorney may well be justified in representing him so long as he believes his client to be asserting what he supposes are his rights, and is not making use of him to satisfy his malice. But when an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party." The rule is more favorably stated for the defendant in *Bicknell v. Dorion*, 16 Pick. 478, where the following conclusion is reached: "In order, therefore, to charge an attorney upon this ground, [a conspiracy to bring a groundless suit,] it must not only appear that there was an agreement to bring an action which was in fact groundless, and which the attorney supposed to be groundless, but that it was agreed to bring an action understood by both parties to be groundless, and brought as such." We are not prepared to go further than is indicated in the extract from *Burnap v. Marsh*, and think it asserts a salutary and reasonable rule. Now, in this case, it is to be observed that in so far as it can be said, in any view of the case, that Mr. Glover acted outside of or beyond his professional capacity, the instructions given are full and favorable to the plaintiff, and no other instruction should have been given upon that branch of the case. The instructions do not predicate a right to recover upon the fact that Mr. Glover knew that the action was groundless, and that he knew that Chouteau acted in the matter from malicious motives, but they say that if he knew, "or by the exercise of reasonable diligence might have known, that there were no facts sufficient to constitute probable cause," etc. The attorney has a right to advise and act upon the facts which he gets from his client, and it is not his duty to go elsewhere for information. According to these instructions, an attorney could not with safety advise the arrest of any criminal until he has exhausted reasonable diligence in the search for information as to whether a crime had been committed. He would stand on no other or different ground from that of the client. The statement of such a proposition is enough to condemn it. We state again that the attorney has a right to advise and act upon such information as the client reveals to him. Nothing short of complete knowledge on the part of the attorney that the action is groundless, and that the client is acting solely through illegal or malicious motives, should make him liable in these actions. As said by Mr. Justice BRADLEY in *Campbell v. Brown*, 2 Woods, 350: "If attorneys cannot act and advise freely and without constant fear of being harassed by suits and actions at law, parties could not obtain their legal rights."

The judgment of the circuit court is affirmed, in which all concur.

BERRY and others v. HARTZELL.

(Supreme Court of Missouri. February 28, 1887.)

SPECIFIC PERFORMANCE—VERBAL CONTRACT—EVIDENCE.

In an action by the vendee for the specific performance of a verbal contract for the sale of land, he cannot recover upon the loose declarations and admissions of the vendor as to the existence of the contract, unless corroborated by evidence of a character so cogent as to leave no room for reasonable doubt in the mind of the chancellor.

Appeal from circuit court, Bates county.

Parkinson & Abernathy, for respondent.

SHERWOOD, J. Plaintiffs brought suit for certain lands in Bates county, claiming it as their homestead under A. J. Baskin, the late husband of Mrs. Berry, and the father of the minor plaintiffs. The legal title was admitted to have been in Baskin, acquired by deed in 1874, and he "farmed the land as a home." The defense set up in the answer alleged a purchase of the land from Baskin in his life-time, and a delivery of possession by Baskin; a payment by defendant of the purchase money in full, which was used by the deceased in buying another homestead in Cass county, now occupied by plaintiffs; and that a promise by the decedent to execute a general warranty deed to defendant was made, which promise was not kept. The answer concludes with a prayer which is tantamount to a prayer for specific performance; *i. e.*, that the title be divested out of plaintiffs, and vested in the defendant, in accordance with the contract. The main question before the trial court, therefore, was whether such a contract was entered into by the deceased and the defendant. Of course, his testimony could not establish it; but, while being examined on other matters, he stated: "I did not pay any money for that land, nor was anything given for the payment." This admission went to the extent of showing that he had not performed the contract, if contract there was, on his part. And, besides, the testimony of Mrs. Berry, who was a competent witness in her own behalf, and in behalf of her minor children, (*Moore v. Moore*, 51 Mo. 118; *Joice v. Branson*, 73 Mo. 28, and cases cited; *Owen v. Brockschmidt*, 54 Mo. 285; *Evers v. Life Ass'n*, 59 Mo. 429; *Harriman v. Stowe*, 57 Mo. 93; *Steffen v. Bauer*, 70 Mo. 404,) shows that the \$450 which was paid to Barber for the Cass county place was paid out of the \$1,000 raised by Baskin by a mortgage he gave on the premises in controversy shortly before he died; and on this point there is no conflict in the testimony. The case of *Holman v. Bachus*, 73 Mo. 49, does not apply in this instance, because Mrs. Berry was not testifying to conversations had with her husband, but in relation to facts. And, at all events, it is too late to make the point here that she was incompetent to testify when no such objection was made in the court below.

No error was committed in rejecting defendant as a witness to prove the contract with the Baskins. *Chapman v. Dougherty*, 87 Mo. 617; *Meier v. Thiemann*, 2 S. W. Rep. 435. The contract remained unproven, except by the loose declarations and admissions of Baskin said to have been made shortly prior to his death, which evidence was entirely insufficient unless strongly corroborated by evidence of so cogent a character as to leave no room for reasonable doubt in the mind of the chancellor who heard the cause. There was no such corroboration. The rule just announced as to the cogency of testimony necessary in cases of this sort, in respect of resulting trusts, is firmly established in this state, (*Johnson v. Quarles*, 46 Mo. 423; *Ringo v. Richardson*, 53 Mo. 385; *Kennedy v. Kennedy*, 57 Mo. 73; *Forrester v. Scoville*, 51 Mo. 268;) and no good reason is perceived why the same cogency of testimony is not necessary to establish a similar implied trust, or trust by operation of law, which has its origin in a contract between a vendor and a vendee, such as is claimed to exist in the present instance, (Adams, Eq. *128; 2 Story, Eq. Jur. §§ 789, 790,

1201, 1212,) since, in either case, the effect of the claim, if successful, will be the divestiture of the legal title of the adverse party, and the accomplishment of the transfer of that title to the claimant.

Upon this point, Judge BLISS aptly remarks: "The insecurity of titles and the temptation to perjury are among the chief reasons demanding that contracts affecting lands should be in writing; also imperatively require that trusts arising by operation of law should not be declared upon any doubtful evidence, or even upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon." *Johnson v. Quarles, supra.*

Touching this subject, Judge STORY says: "In order to take a case out of the statute upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract, but the contract should also be established, by competent proofs, to be clear, definite, and unequivocal in all its terms. If the terms are uncertain or ambiguous, or not made out by satisfactory proofs, a specific performance will not (as, indeed, upon principle, it should not) be decreed. The reason would seem obvious enough, for a court of equity ought not to act upon conjectures; and one of the most important objects of the statute was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts." 2 Story, Eq. Jur. § 764.

That eminent jurist, Lord REDESDALE, has very forcibly observed: "The statute was made for the purpose of prevention of perjuries and frauds; and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity than that the relaxation of that statute has been the ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing; whereas, it is manifest that the decisions on the subject have opened a new door to fraud, and that, under pretense of part execution, if possession is had in any way whatsoever, means are frequently found to put a court of equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. And I remember it was mentioned in one case, in argument, as a common expression at the bar, that it had become a practice to *improve gentlemen out of their estates.*" *Lindsay v. Lynch*, 2 Schoales & L. 4, 5, 7. See, also, *Ells v. Railroad Co.*, 51 Mo. 200.

Again, it is our practice to defer somewhat to the conclusion reached by the trial court on matters of fact, where much depends on the demeanor of the witnesses. *Chouteau v. Allen*, 70 Mo. 336; *Erskine v. Loewenstein*, 82 Mo. 301.

Holding these views, judgment affirmed.
(All concur.)

DOUGHERTY v. HARSEL.

(*Supreme Court of Missouri. February 28, 1887.*)

FRAUDULENT CONVEYANCES—VOLUNTARY CONVEYANCE—CONSIDERATION.

In an action by a creditor to set aside a conveyance made by the debtor to his son as voluntary, it appeared that the debtor, being at the time in affluent circumstances and out of debt, promised his son, if he would improve and make a farm on the land in controversy, he would make him a deed to it; that the son entered, cleared off the land, and planted an orchard on it, and the father, concluding to divide his estate among his children in consideration of their agreement to support himself and his wife as long as they lived, and feed his stock which he retained, deeded the land to the son,—held not a voluntary conveyance.

Appeal from circuit court, Clay county.

Simrall & Sandusky, for appellant. *Allen, Fraher & Wilson*, for respondent.

NORTON, C. J. On the fourth of September, 1873, James N. Jones, with Anthony Harsel, executed and delivered to A. T. Litchfield their note for \$850, payable in 90 days. On the first of August, 1879, this note was assigned to John A. Dougherty, who on the thirteenth January, 1883, instituted suit thereon in the Clay county circuit court, and on the eighth day of March, 1883, recovered judgment thereon for \$1,456.32. Failing to make the money on execution, Dougherty instituted this suit in the said circuit court on the sixth day of December, 1883, against defendant, John Harsel, to set aside a certain deed made to him by Anthony Harsel, his father, on the twenty-sixth day of May, 1874, conveying to him 160 acres of land in Clay county particularly described in the petition, and praying that said land be subjected to the payment of his debt. The deed is assailed on the alleged ground that it is a voluntary conveyance made in fraud of creditors, and that at the time it was made Anthony Harsel was insolvent. Upon a trial had, the court found for defendant, and dismissed the bill, and from this action of the court plaintiff has appealed.

It appears from the record that Anthony Harsel came to Clay county in 1826, and up to 1860 had acquired a landed estate of about 760 acres, and was at that time in affluent circumstances, and out of debt; that in that year he promised the defendant, who is his son, then 20 years of age, that if he would improve and make a farm on the land in controversy it should be his, and that he would make him a deed when demanded. The evidence of Anthony Harsel, who was 81 years old at the time he testified, and the evidence of defendant and other witnesses, tended to show that, in pursuance of this promise, defendant went to work on the land in 1860, cleared two and a half or three acres, cut out a fence row, built one-quarter mile of fence, and made some rails; that during the war defendant entered the service, and did not return till 1865 or 1866; that in 1866 or 1867 defendant resumed work on the land, under the promise that the land should be his, and that his father would make him a deed when demanded; that, in one or the other of these years, he cleared three or four acres, on which he set out an orchard of 150 apple trees, 20 pear trees, and 30 peach trees; that in 1868 defendant cleared 20 acres of heavy timbered land, and that it required six or seven thousand rails to fence it; that in 1869 he cleared the brush off from 40 acres, and made 10,000 rails; that in 1870 he built a corn-crib and some out-buildings; that during this time defendant lived at the mansion of his father; that in 1871 defendant married, and during that year, or the year 1872, built a granary, hewn log smoke-house, and a frame dwelling-house at a cost of from \$800 to \$1,000, and in 1872 moved onto the place, and has occupied it ever since; that he also dug a well at a cost of two or three hundred dollars; that, after such occupancy, he continued to make other permanent improvements on the land. Defendant testified that he had no knowledge of the existence of plaintiff's debt till suit was brought on it, in 1883; that he did not call on his father for a deed till in 1874, because he had confidence in him, and believed that he would comply with his agreement when called on. The evidence also tends to show that in 1867 the claim of defendant to this land was somewhat notorious in the neighborhood, and also that in 1867 Anthony Harsel, who was suffering from palsy, and not involved in debt, concluded to divide his remaining land among his four other children, on the condition that they would take care of him and his wife as long as they lived, and raise, feed, and care for his stock, (which he retained,) and pasture them; that the parcels for each of the children were designated, though not surveyed till 1872, when the parties interested procured a surveyor, and had the lines run off, and the corners established; that deeds were made to these children, respect-

ively, on the twenty-sixth of May, 1874, pursuant to the above agreement, three of which—one to defendant, one to Thomas, and one to Joseph Harsel—were filed for record in 1876; the deed to Peter Harsel was filed for record in 1884, and the deed to Mary F. Dryden, a married daughter, in 1880. At the time these conveyances were made, according to the finding of the jury, to whom the questions were referred, Anthony Harsel owed, including plaintiff's debt, \$1,420, and, aside from the property conveyed, owned \$1,480 of personal property, and \$500 worth of real estate. The evidence would have justified the jury in finding that the personal property owned by him was worth over \$2,000, and the real estate worth \$750. These facts are, however, unimportant to a proper disposition of the case, inasmuch as under the evidence we do not regard the deed in question as being voluntary, but as one made for valuable consideration, and which, under the facts in evidence, it was the duty of Anthony Harsel, to make and which a court of equity would have decreed him to make had he refused to make it. *West v. Bundy*, 78 Mo. 407; *Anderson v. Shockley*, 82 Mo. 250, and cases cited.

At the time the debt to plaintiff was contracted, defendant in equity was entitled to a deed, and in the eye of the chancellor the land was then his. The facts in evidence above detailed bring the case within the operation of the principles enunciated in the above-cited cases, where it is held that an agreement for the gift of lands will not be enforced against the donor upon mere proof of the promise to give, whether it be oral or written. As long as the obligation is executory, and rests only on the declarations and promises of the donor, he may revoke it, and equity will not compel its performance. But when the promise had been accepted in good faith, and the donee, on the strength of it, has changed his condition, entered into possession of the land, made valuable and permanent improvements, incurred obligations, and expended time, labor, and money on account thereof, equity will compel the donor to keep his agreement and perfect the gift. Under these circumstances, it is held that such acts of the donee take the promise, where it rests in parol, out of the operation of the statute of frauds. And, whether the promise be written or verbal, it ceases, under the circumstances above detailed, to be any longer a voluntary agreement; such aforesaid acts of the donee constituting a valuable consideration to support the promise and call for its enforcement.

Giving force and efficacy to these principles, which have been established law in this state since the case of *Halsa v. Halsa*, 8 Mo. 303, we hereby affirm the judgment, in which all concur.

COX v. COX and another.

(*Supreme Court of Missouri*. February 28, 1887.)

1. FRAUDULENT CONVEYANCE—HUSBAND AND WIFE—TRUSTS.

Where a husband receives his wife's money, not by virtue of his marital rights, but as her trustee, evidencing the trust by entries made in a memorandum book produced at the trial, and uses it to buy lands, taking the deed to her, his creditors cannot set aside the deed as fraudulent, and subject the property to the payment of their debts.

2. CREDIBILITY OF WITNESS—JUDGMENT OF CHANCELLOR—DEFERRED TO UPON APPEAL.

Where the finding of the lower court rests largely upon the credibility to be given to the evidence of a particular witness, the judgment of the chancellor, who heard the witness face to face upon the matter, will be deferred to upon appeal.

Appeal from circuit court, Greene county.

Massey & McAfee, for appellant. *Thrasher, Young & Travers*, for respondent.

RAY, J. The petition in this case is in two counts, the general nature and object of which is the same, which is to subject the property described in the

first count, and spoken of, for brevity, as the "Boonville-street Property," and the property described in the second count, and for the same reason, spoken of as the "Jefferson-street Property," both in Springfield, Missouri, and held in the name of the defendant Sarah Cox, to the payment and satisfaction of a certain judgment, for debt and damages, obtained by plaintiff against the defendant Thomas H. Cox, who is the husband of his said co-defendant, Sarah. The petition charges, in each of said counts, that the defendant Thomas Cox, being indebted to divers persons, including plaintiff, in sundry amounts, at the date of the purchase of said two pieces of property, bought and paid for the same, with his own money, but that, for the purpose of hindering and delaying his creditors, including plaintiff, and of defrauding plaintiff out of his debt, procured the deeds therefor to be made out to and in the name of his said wife and co-defendant, and asks that the title, legal and equitable, be divested out of said defendants, and vested in plaintiff. The answer of defendant Thomas Cox is a general denial, except as to his indebtedness. The answer of defendant Sarah to both counts denies the material allegations in the petition, and sets up purchase of the property by her, with her own individual money, received and inherited from her father's estate, and money arising from rents and profits of real estate inherited from her father's estate.

During the trial the court called and submitted to a jury, as special issues, whether the consideration paid Robberson for the Boonville-street property, and that paid Switzer for the Jefferson-street property, was the money of Thomas H. Cox, or of the wife, Sarah Cox; but, upon the conclusion of the testimony adduced in plaintiff's behalf, directed the jury to find the issues for defendant, and rendered its judgment dismissing plaintiff's bill. No objection has been urged or pointed out to the sufficiency of the evidence to support the judgment as far as the Boonville-street property is concerned; and this part of plaintiff's claim is, we think, practically abandoned in this court.

As to the Jefferson-street property, it appears by the testimony of defendant Thomas H. Cox, sworn at plaintiff's instance, that the money used in the purchase thereof was money belonging to the wife, Sarah F. Cox, and received and inherited by her from her father's estate, and derived more immediately from the sale of her real estate to Robberson. It further appears from his testimony, and from receipts, entries, or *memoranda* made at the time the money came to his hands, that he took and held possession thereof, not for himself by virtue of his marital rights, but in trust and to the use and benefit of his wife. *Hammons v. Renfrow*, 84 Mo. 342. One of said entries or *memoranda* made by him in the book produced at the trial was as follows: "Thos. H. Cox received in trust from Mrs. Sarah F. Cox, in current funds, \$250, February 13, 1873." Another was: "Thos. H. Cox received from his wife, Sarah F. Cox, in trust, February 27, 1873, \$675." Similar entries and declarations of trust were made as to other amounts. Both of the sums above specified were thus received during the first month after his intermarriage with said Sarah Cox, and the first payment of the \$200, on the purchase price, which was \$800, was made by him out of the said sum of \$250; received from her, in trust, as aforesaid; and the second and final payment was made by the wife to Clough, the agent of said Switzer, out of the said sum of \$675. The means which the wife derived and inherited from her father's estate, and from the sale of the land to Robberson, and from the rentals of the real estate, exceeded in amount the sums required for the purchase of said lot, and the construction of the dwelling-house and the entire outlay in this behalf. As to the \$2,960 received by defendant Thomas H. Cox from the sale of the interest in the stock of goods to said Wengler, it is sufficient to say that it was fully and fairly accounted for in his testimony, which shows that the whole amount was applied on his debts; \$1,000 being

paid, as was admitted, to plaintiff, and the rest to merchants in St. Louis and New York, whose receipts were produced.

The case manifestly turned largely, and perhaps mainly, upon the evidence of said defendant Thomas H. Cox, and upon the credit given his testimony. His evidence was, it seems, indispensable to the plaintiff, who in making out his case, was, it seems, obliged to call him in his own behalf. True, he was examined by plaintiff in the first instance only as to the payment made at the time the title bond was taken, but this involved, at least in part, the material and vital questions and issues in the case. The fact, thus shown, or attempted to be shown, was that this payment of a part of the purchase money was made by the witness, and this was the main object of the examination; the amount of the payment, which was \$200, being of secondary consideration and importance. The examination as to this, by plaintiff, invited and properly led to the cross-examination as to whether the part of the purchase money thus paid was his own, or money belonging to the wife, and how and in what capacity he held the same. Upon re-examination the witness was taken over the whole subject as to whose money it was, and how derived and held, and fully questioned as to his financial condition and resources, and the application and use made of his own funds, with the results previously indicated. It is conceded that his testimony, if true, shows that the purchase money was the wife's, and not his, or under his control, except in trust for the uses mentioned; and, even if the rule that a party calling a witness vouches for his credibility be not applicable in strictness under these circumstances, his credibility could, nevertheless, be best determined by the chancellor, having the witness present, in person, before him at the time. We see no controlling reason in the case requiring us to depart from our established rule of deferring somewhat to the finding of the chancellor in cases of this sort.

Plaintiff, manifestly, was not prejudiced by the direction given the jury to find the issues for the defendant. Virtually this was a finding to the same effect by the chancellor of his own motion, and such as he was authorized to make. *Snell v. Harrison*, 83 Mo. 657; *Bevin v. Powell*, Id. 965. In *Snell v. Harrison*, *supra*, a finding and judgment by the chancellor "*non obstante veredicto*" was deferred to and approved by this court.

We perceive no error in the record calling for reversal or modification of the judgment, and we therefore affirm the same.

(All concur.)

STATE v. FRISBY and another.

(*Supreme Court of Missouri. February 28, 1887.*)

ASSAULT—EVIDENCE—VERDICT.

Upon an indictment for felonious assault, it appearing that the accused had taken the prosecuting witness, and hung him up to the limb of a tree in order to obtain information from him as to the whereabouts of horses that had been stolen from accused, *held*, this evidence was sufficient to sustain a conviction. The *alibi* in the case was not sufficiently proved.

Appeal from circuit court, Mercer county.

Appellants, George and Thomas Frisby, were indicted for a felonious assault upon George Chance, and upon trial were convicted and sentenced to pay a fine of \$100. Their motion for a new trial and in arrest of judgment being overruled, they appealed.

The Attorney General, for respondent. *Alley & De Bolt*, for appellant.

BLACK, J. Appellants have filed no brief or statement of the points relied upon for a reversal, and hence we have only the motion for new trial as a guide in that respect. The point there made, that the verdict is against the evidence, is not well taken. The evidence for the state shows that defendants and several other persons called at the house of Mr. Malone, where

the prosecuting witness, Chance, was stopping, and requested him to go with them, and identify an alleged horse-thief. When a half mile from the house, they insisted that he should tell them where the stolen horses were, but he disclaimed any knowledge of the whereabouts of the property; and, to compel him to give the desired information, they suspended him by the neck with a rope to the limb of a tree until unconscious, and then took him down, and with some trouble restored him to sensibility. It is true there is evidence that defendants were not present; but the jurors did not believe their evidence. The direct evidence and the circumstances all point to the guilt of the defendants. The second count of the indictment is prepared to meet the facts of the case, and is well drawn under section 1264, Rev. St.

The instructions for the state are full, and for the most part repeated in those given at the request of the defendants. No objections were taken to any of the evidence.

We see no debatable question in the record, and the judgment is affirmed.
(All concur.)

STATE v. BERNING.

(*Supreme Court of Missouri. February 28, 1887.*)

CRIMINAL PRACTICE—VERDICT—DEGREE OF CRIME—ASSAULT.

Rev. St. Mo. § 1927, requiring a verdict to state the degree of the offense of which defendant is found guilty when he is convicted of a degree inferior to that charged in the indictment, applies only to those offenses which are by statute divided into degrees, and does not require a verdict upon an indictment for an assault with intent to kill to determine whether there was or not malice aforethought, as the existence or non-existence of such malice does not divide such assaults into different degrees.

Appeal from St. Louis court of appeals.

The Attorney General, for respondent. *C. C. Simmons*, for appellant.

BLACK, J. The defendant was indicted and convicted of an assault with intent to kill Joseph Klatt. The indictment is based upon section 1262, Rev. St. Instructions were given on the theory that the assault was made with malice aforethought, and also on the theory of the subsequent section, that the assault was without malice aforethought.

1. The contention that the verdict is against the evidence cannot be sustained. That defendant cut Klatt, who was a buggy-washer at Mayer & Strattman's stables, with a knife, inflicting an ugly and dangerous wound, is not denied. The defense is that Klatt attacked defendant with a horseshoe. The right of the defendant to protect himself by way of self-defense was fairly submitted to the jury. It is quite evident the jury did not believe the defendant's version of the difficulty. There is abundant evidence to sustain the verdict.

2. It is next urged that the verdict is insufficient, in that it does not show of what grade of the offense defendant was convicted. The verdict is: "We, the jury, find the defendant guilty of assault with intent to kill, and assess the punishment at two years in the state penitentiary." It is to be observed the verdict does not simply say the defendant is guilty as charged, but it describes the offense of which he is found guilty. It is thus clear that the jury intended by their verdict and do show that he was found guilty of an assault with intent to kill, but not with malice aforethought. Read in the light of the instructions, this is its evident meaning. But section 1927, Rev. St., has no application here. The verdict, by force of that section, must specify the degree of the offense only where the statute in terms divides an offense into degrees, and the defendant is found guilty of a degree inferior to that charged. An assault with intent to kill, with malice aforethought, and without malice aforethought, are not designated as different degrees of an offense, and the

verdict need not specify the offense of which the defendant is convicted. *State v. Burk*, 2 S. W. Rep. 10; *State v. Robb*, Id. 1.

3. Finally it is insisted that the court erred in requiring defendant, when a witness in his own favor, to answer certain questions on the cross-examination. The evidence for the state tends to show that defendant hired and paid for a horse and buggy, to be returned at 9 o'clock P. M. of the same day; that the horse and buggy were not returned until 12 o'clock that night, when one of the proprietors of the stable demanded additional pay, and out of this the controversy arose. The defendant testified in chief that he hired and paid for the use of the horse and buggy until 11 o'clock, and that he returned them to the stable at 20 minutes past 11. He also testified: "I took the girl in the buggy at her house, drove out to the western part of the city, came back, and left the girl at her house, took up my brother, and drove right down to the stable." In answer to questions propounded by the circuit attorney, and to which the objections were made, he stated that he did visit two saloons that night before returning the buggy. We do not see for what purpose the defendant detailed where he had been during the evening ride, unless it was to give support to his statements as to how long he was out, and when he returned to the stable. If offered for this purpose,—and we cannot see for what other purpose the evidence could have been offered,—then it was certainly competent to show that he stopped at other places. The cross-examination was within the bounds of the matters testified to in chief, and we see no violation of section 1918, Rev. St. Complaint is made of some other evidence elicited from the defendant on cross-examination, but it does not appear that objections were made or any exceptions saved, and for these reasons we cannot notice the complaint. Judgment affirmed.

(All concur.)

GASTON v. KELLOGG and others.

(*Supreme Court of Missouri*. February 28, 1887.)

PARTNERSHIP—RIGHTS OF PARTNERS INTER SESE—SERVICES.

One partner is not entitled to compensation from the partnership for his services in attending to the partnership affairs, unless there is a contract therefor express or implied.

Appeal from circuit court, Chariton county.

Smith & Mullins, for respondent. *W. W. Bricker*, for appellant.

NORTON, C. J. This is a suit instituted in 1881 for dissolution of a partnership and an accounting. The petition states that in July, 1875, the parties, by written contract, entered into partnership under name and style of "Chariton County Mining Company," and the partners purchased a mine in Summit county, Colorado, and that by employment by said defendants, as such company, plaintiff began work in said mine, known as the "Battel Tunnel Mine," in said county, on August 9, 1875, and continued to thus work until November 9, 1886; that his labor and services therein were reasonably worth five dollars per day; that said parties were to share equally all expenses and liabilities incurred by said company in said business; that his services were greatly in excess of the sum due from him as one of the partners in said mining company; that there has been no dissolution of said partnership or settlement of the accounts thereof; that defendants are indebted to plaintiff. He therefore asks for a dissolution of the partnership, and for an accounting thereof. The answer of defendants was a general denial.

The case was referred to a referee to take the account, and report, who, on the eighteenth of June, 1888, made the following report, with the evidence taken by him: "That there were nine parties in the partnership as alleged; that each of said partners, except John Gaston, put in cash to the amount of

\$1,093.15; that John Gaston, the plaintiff, put in 390 days' labor, worth \$4 per day, \$1,560; that the total amount put into said partnership in work and labor was \$10,305.20; that the whole amount put in was an entire loss; that the proportion of loss to each man in said partnership was \$1,145; that the excess of Gaston's loss above his proportion was \$415; that Gaston received from the company in cash, \$160; that there is now due Gaston on settlement, \$255; that each of the other parties to the partnership should pay of this amount, \$31.87½."

Exceptions were taken to this report, and the report was confirmed, and judgment entered accordingly, from which action of the court defendants have appealed, and insist that the report was against the evidence, which it is claimed showed that plaintiff was to put in his time and work in the mining venture as an offset to the money put in by defendants in developing it; and, further, that if Gaston, the plaintiff, was entitled to wages, the referee erred in allowing him for 390 days at four dollars per day.

It appears from the evidence that one Leal was the original owner of the mine, and that under the original agreement he was paid \$500 for the property, and that an additional sum of \$2,500 was to be expended in developing the mine; that said Leal, plaintiff, and seven others composed the partnership; that plaintiff was to pay his proportion of the said sum in labor. He put in no money. It appears that the mine was operated under this agreement, and that by December, 1875, the whole sum of \$2,500 and more had been exhausted without making a paying development, and it was then agreed to expend further sums in developing the mine. These sums were expended without resulting in any practical success, and the venture proved to be a total loss of all that was put in it.

The original contract, which provided for the expenditure of \$2,500, contained the stipulation that \$500 of the last-named sum was to be paid by Gaston in work performed by himself, and that all other expenditures of money should be borne equally by the parties to the agreement. The above stipulation only bound Gaston to put in labor equal in value to the sum named. While we give full recognition to the principle invoked by defendants, to the effect that ordinarily one partner cannot recover of the partnership compensation for his services rendered unless there is a contract therefor express or implied, or an agreement for such compensation, we are of opinion that there is evidence tending to show such agreement, and that a fair construction of the contract leads to the inference that, if the plaintiff put in labor exceeding in value the amount of cash put in by each of the other partners, he is entitled to compensation for such excess.

Plaintiff testified, and other evidence shows, that he acted as foreman of the mines, and worked under the direction of Leal, who was mining engineer; that he was working for the company by the day; that defendant Bean, of Denver, who, according to the evidence of defendant Mackay, was the representative of the company, received money from its members to pay miners, expenses, etc., and who had control and direction of affairs, and was the representative of the parties in interest, promised plaintiff that he should receive \$4 per day for his services, and at one time paid plaintiff \$110, and at another \$50, both of which sums are charged against the plaintiff by the referee. The report of the referee, being in the nature of a special verdict, will not be set aside on exceptions thereto, unless there is a clear preponderance of evidence against the finding, which we are unwilling to say exists in this case; especially so in view of the fact that, as all the nine parties concerned in the partnership were to have equal interests, it would be inequitable to give the contract, and the action of the parties under it, such a construction as to require one to sustain a greater loss than another.

The finding of the referee as to the number of days plaintiff worked, is supported by the evidence of plaintiff and of defendant Bean, the representative

of the company at Denver, and the finding in reference to what the work was worth per day is supported by three witnesses.

Under the ruling of this court in the case of *Reinecke v. Jod*, 56 Mo. 386, the judgment might well be affirmed on the ground that the bill of exceptions does not show that exceptions were filed within four days after the report of the referee was filed, and only shows that exceptions were taken to the action of the court in confirming the report.

Judgment affirmed, in which all concur.

LOUISVILLE & N. R. CO. v. RITTER'S ADM'R.

(Court of Appeals of Kentucky. March 15, 1887.)

1. RAILROADS—CARE IN RUNNING PASSENGER TRAINS—KEEPING TRACK CLEAR.

Railroads do not insure the absolute safety of their passengers, but they do bind themselves to exercise the utmost degree of human care, diligence, and skill in order to carry their passengers safely; and for the slightest negligence against which human prudence, diligence, or skill can guard, and by which a passenger is injured, the railroad is liable in damages. A railroad is bound to keep its track clear of obstructions, so that the engineers of locomotives may have a clear view ahead in running their trains.¹

2. SAME—ACCIDENT—PRESUMABLY NEGLIGENCE.

Prima facie, where a passenger, being carried on a train, is injured by an accident occurring to the train, the legal presumption arises that the accident and consequent injury was caused by the negligence of the railroad; and the *onus* of disproving the presumption of negligence, by showing that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, is on the railroad.²

3. WITNESS—CONTRADICTING.

In action against a railroad to recover for negligence causing the death of plaintiff's intestate, it was improper to ask a witness if he had not heard another witness, A., say that, if the railroad could find a witness who would swear that the decedent had been fishing or wading after the accident, money would be no object. Such evidence tended to cast a cloud on the integrity of all the railroad's evidence, and was incompetent except for the purpose of contradicting A.

Appeal from circuit court, Barren county.

Wm. Lindsay and Porter & McQuown, for appellant. *W. P. D. & F. F. Bush and Leslie & Botts*, for appellee.

BENNETT, J. In May, 1876, the appellant's passenger train, while *en route* to Louisville, came in collision with a cow which was on the railroad track. The collision threw one of the passenger coaches from the track. The appellee's intestate was in this coach as a passenger, having paid his fare as a passenger from Glasgow to Louisville, and was injured by reason of the collision and throwing of the coach from the track. The trial of appellee's action against the appellant for the injuries received by his intestate in the collision resulted in a verdict and judgment for \$1,500 in damages. Appellant has appealed from that judgment.

Railway-passenger carriers, in legal contemplation, do not insure the absolute safety of their passengers; but they do bind themselves to exercise the utmost degree of human care, diligence, and skill in order to carry their passengers safely. It is meant by this rule (1) that the highest degree of practicable care and diligence should be exercised that is consistent with the mode of transportation adopted; (2) that competent skill should be possessed, which should be exercised in the highest degree. Tested by this rule, for the slightest neglect against which human prudence, diligence, or skill can

¹ As to the degree of care required of common carriers, see *Moore v. Des Moines & F. D. R. Co.*, (Iowa,) 30 N. W. Rep. 51, and note.

² As to the presumption arising from an accident to a passenger on a railroad train, see *Louisville, N. A. & C. Ry. Co. v. Jones*, (Ind.) 9 N. E. Rep. 476, and note.

guard, and by which injuries accrue to passengers, the carriers will be liable in damages. This high degree of care, diligence, and skill extends, not only to the running of passenger trains, with a view to the safety of passengers, but to providing against defects in the road, cars, or machinery, or any other thing that can and ought to be done in order to carry passengers safely. Among these duties is that of keeping the track clear of obstructions, and of removing timber and bushes along the track on the land of the company, so as to keep the engineer's view of the track, in running the train, unobstructed. A failure to do this, or any of the duties above mentioned, is negligence.

Prima facie, where a passenger, being carried on a train, is injured by an accident occurring to the train, the legal presumption arises that the accident and consequent injury was caused by the negligence of the carriers; and the *onus* of disproving the presumption of negligence, by showing that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, is on them; or that, in actions for ordinary neglect, although negligent themselves, the injury to the passenger would not have occurred but for his own negligence. Of course, where death ensues to a passenger by the willful neglect of carriers, they are not allowed to rely upon the contributory negligence of the passenger as a defense. The foregoing views are sustained by the following authorities and leading cases: 2 Redf. Rys. 229; Story, Bailm. § 601; *Jamison v. San Jose & S. C. R. Co.*, 55 Cal. 597; *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 142; *Pennsylvania Co. v. Roy*, 102 U. S. 456; *Railroad Co. v. Varnell*, 98 U. S. 480; *Railroad Co. v. Pollard*, 22 Wall. 347; *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 226; *Ohio & Memphis Packet Co. v. McCool*, 8 Amer. & Eng. R. Cas. 394; *New Orleans & G. N. R. Co. v. Albritton*, 38 Miss. 274; *Baltimore & O. R. Co. v. Worthington*, 21 Md. 284.

The three instructions given by the lower court on behalf of the appellee accord with the foregoing view of the law, except in this: The burden of proof was on the appellee to establish the accident, and his intestate's injury by it. This being done, then the burden of proof was shifted to the appellant to show that the accident and consequent injury was not the result of its negligence. These instructions, taken alone, mean this; but the fourth instruction, given at the instance of the appellant, which puts the burden of the proof on the appellee all the way through, gives them a different meaning. This instruction should not have been given except in the manner above indicated.

On the trial of the case the appellant introduced as a witness J. T. Mansfield, who testified that he saw Ritter, soon after he was hurt, attending to business, riding to town, and playing croquet. On cross-examination the witness was asked: "Did you or not say to Melvin Lowery, since the death of Ritter, that money would be no object to the railroad company if it could find some person to state that Ritter was fishing and wading in the creek in bad weather before his death?" The answer was: "No, sir; I never said that to Mr. Lowery." Melvin Lowery was afterwards introduced by the appellee, but he made no reference whatever to Mansfield, or to his evidence. Lawrence Lowery was introduced by appellee, and was asked "if he had ever heard Mansfield say that if the railroad company, or Porter, their attorney, could find a man who would say Ritter had dabbled in the water or gone fishing, that money would be no object with them?" The witness was permitted to answer, notwithstanding the objection of the appellant. The answer was that he "had heard Mansfield make that statement." Then follows: "To all of which the defendant excepted." Mansfield had not testified in reference to Ritter's having gone fishing or dabbling in the water. Therefore his statement to Melvin Lowery could not be used as impeaching evidence, because it contradicted no fact that he had sworn to prejudicial to the appellee in refer-

ence to that matter. Again, if his statement to Melvin Lowery was competent as impeaching evidence, it should have been proven by Melvin Lowery, and not Lawrence Lowery, because he was not asked if he had made the statement to Lawrence Lowery. The evidence was clearly incompetent, and highly prejudicial to the appellant, because it tended to convict the appellant of a willingness, at least, if not of the fact, of resorting to foul means to procure evidence, and to throw a cloud upon the integrity of the evidence that the appellant did introduce relative to Ritter's having gone a-fishing, and exposing himself while fishing. The bill of exceptions shows that the exception, "To all of which the defendant excepted," follows the testimony of Lawrence Lowery, instead of immediately following the overruling of the objection to the competency of Lawrence Lowery's evidence. The appellant did object to the competency of the evidence before it was delivered; the objection was overruled; and the expression, "To all of which the defendant excepted," follows the evidence, when, technically speaking, it should have immediately followed the ruling of the court. But we think that it sufficiently appears from the record that the appellant did except to the ruling of the court at the time; the bill of exceptions, in this particular, being simply awkwardly arranged.

For this error the case is reversed, and remanded, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

SAMS and others v. SAMS' ADM'R and others.

(Court of Appeals of Kentucky. March 19, 1887.)

BASTARDY—LEGITIMATION—PARENT AND CHILD.

Gen. St. Ky. c. 31, § 6, providing that if a man, having had a child by a woman, shall afterwards marry her, such child, or its descendants, if recognized by him before or after marriage, shall be deemed legitimate, does not apply to the children of a married man begotten and born of another woman than his wife during his wife's life.

Appeal from the circuit court, Estill county.

C. P. & A. R. Burnam, for appellants. Riddell & Fluty, for appellees.

PRYOR, C. J. Leroy Sams died, in the county of Estill, in the year 1885, intestate, leaving surviving him his widow, Ann Sams, who was his second wife, and four children by his first marriage. He owned land of considerable value, and personal estate valued at twenty-five or thirty thousand dollars. His last wife, at the time of their marriage, was the mother of seven children, all of whom were born out of wedlock, she never having married until her marriage with the intestate. Fannie and Nancy, two of these illegitimate children, asserted a claim to an equal interest in the estate with the children by the first wife, upon the ground that they were the children of the intestate, and were so recognized by him during his life-time, and that the marriage consummated between him and their mother rendered them legitimate under the statute, and entitled them to share in the distribution of his personality and in the division of his land. The statute provides: "If a man, having had a child by a woman, shall afterwards marry her, such child, or its descendants, if recognized by him before or after marriage, shall be deemed legitimate."

This action was instituted in the court below by the administrator of the estate and the children of the first wife, against the widow and the two children who are claiming to be heirs of the intestate, for the purpose of having distribution, and determining the right of these children to an interest in the estate. The widow seems to have made a contract with the administrator and heirs by which she agreed to take one-seventh of the personality as her full interest in the distribution. That, upon a proper state of pleading, was set aside, and the widow left to take such an interest in the personal and real

estate as she was entitled to under the laws of descent and distribution. Her rights as widow, however, are not here involved. The chancellor adjudged that the two children, Fannie and Nancy, were not entitled to any part of the estate, and that question is the only one presented.

It appears that these two children were born, the one about eight and the other some ten years prior to the death of intestate's first wife. They were recognized by the intestate as his children during the life of the first wife, and always after her death. The name of *Fannie Ann Green*, one of the children, was changed, by an order of the Estill county court, to *Fannie Ann Sams*; the record reciting that *Leroy Sams, the father of the child, consents to the same*. It is also shown that the intestate, on his death-bed, expressed a wish that each of the two children should inherit from him as much of his estate as any one of his children by his first wife. Their mother states that the intestate was the father of the two girls, and the fact of the recognition by him of them as his children is clearly established, and their right to inherit from the intestate must depend upon the construction given the statute by virtue of which it is maintained they are legitimate.

It is insisted by counsel for the appellants that the meaning and intention of the statute is so plain that but one interpretation can be given it; and, although the children were begotten by the intestate when he was the lawful husband of another, his adulterous practices with an unchaste woman, and unfaithfulness to his own wife and children, cannot be considered in determining the rights of those who were not participants in the wrong, and whose rights the statute was enacted to protect. If the case before us, or that class of cases where the husband has violated his marriage vows, and become the father of children by an adulterous sexual intercourse with another woman during the marital relation, had been the subject of legislative thought, it can scarcely be supposed that any law would have been enacted by which the children of the adulterous intercourse would be made legitimate, that they might inherit, with the children of the lawful wife, equal parts of his estate. Such a statute, if so construed, would only invite the husband to desert his wife, and the woman of easy virtue to encourage the violation of his marriage vows, that she might some day become his lawful life, and her children the rightful heirs of his estate. The motive to supplant the love of a true woman by the lewd practices of degraded women would be found in such a statute; and the law, instead of securing to the innocent offspring an interest in the estate of the father, and encouraging the latter to make reparation for the wrong committed, by marrying the mother, would invite the commission of great moral wrong, and hold out an inducement to the guilty parties to remove those who stood in the way of legitimatizing their children by the consummation of the contract of marriage.

Where the offspring is the result of an illicit intercourse between unmarried people, the legislature saw the necessity of enacting some statute by which the children, in a certain state of case, might be made legitimate, and therefore the law has said to the parties: "If you will marry, your children shall not be bastardized, but will be, under the law, your legitimate offspring." And to say that this law applied to cases where married men were being guilty of adultery, and as an encouragement to them to do better, and to relieve their offspring from the position in which they are placed by the law, would be an absurd construction of this statute.

It is a well-settled rule of construction that the letter of a statute will not be followed where it leads to an absurd conclusion; but, on the contrary, the reason for the enactment must enter into its interpretation, so as to determine what was intended to be accomplished by it. It is true, the statute provides that "if a man, having had a child by a woman, afterwards marry her, and recognize the child as his, it shall be held legitimate." The language might be applied to any man, whether single or married; but was such the

legislative purpose? The statute provides that "*a man shall not marry his mother, grandmother, daughter, or granddaughter, nor shall a woman marry her father, brother,*" etc. This statute was not intended to apply to those who are married, by saying to them: "You cannot leave your lawful wife, and marry your near kindred, because such a marriage to any woman would be unlawful, and the party guilty of bigamy;" but the language is addressed to those who are single, and are not, at their second marriage, the lawful husband or wife of another. It was not to encourage those who had entered upon the marital relation to forsake their marriage vows, and cohabit with others, in anticipation of a future marriage, with a view of making their offspring legitimate, that this statute was enacted, but to make the illegitimate children, begotten by one unmarried, legitimate upon his marrying the mother. Where a marriage is contracted in good faith, under the belief by both parties that the former husband or wife is dead, then the children born of such marriage are made by our statute legitimate. The mistake is made to apply to both parties. But where a married man is living in open adultery with another than his wife, with offspring in existence, the result of the unlawful association, no statute or rule of policy should be adopted by which such children should become legitimate, and inherit, with the children of the lawful wife, the father's estate, because he happens, after the death of his wife, to marry his concubine. No such construction should be given the statute before us.

1. The statute, if construed to apply to a man who is married at the time he begets the illegitimate children, its literal meaning would also apply to children begotten by a woman who was at the time the lawful wife of another, as well as to an unmarried woman. The statute provides: "If a man, having had a child by a woman, shall afterwards marry her," etc., making no distinction between a single woman and one married; and to follow the strict interpretation, or rather the language used, if the child was born of a married woman whose husband should thereafter die, and she marry the reputed father, then his recognition of the child would make it the lawful heir of the last husband. This would be a novel construction, and lead to a conclusion directly opposite to that intended by the legislature.

The father, if he so regards himself, may provide for such children by a last will and testament, or a statute has been enacted, and is now the law, by which one may render another capable of inheriting as his heir at law, by adopting him as such by petition filed in the circuit court of the county of his residence; under this statute, however, the party proposing to make another his heir, if married, cannot do so unless his wife join in the petition; so that every opportunity is afforded parties who are bound to others by natural ties to provide for them either by last will, or by adopting them as heirs at law. To construe the statute by its letter in this case would not only conflict with the legislative intent, but would encourage the faithless husband to pursue his immoral practices, and invite his concubine to terminate, by intrigue, and, perhaps, crime, the existence of the marital relation.

The judgment below is affirmed.

BLAND v. THOMAS and others.

(Court of Appeals of Kentucky. March 19, 1887.)

COVENANTS—WARRANTY—PLEADING.

In an action by a grantee of land against his grantor to recover for a breach of warranty, the nature of the paramount claim under which the grantee has been evicted, and that the claim was such an incumbrance upon the land, as the grantor, by reason of his covenant of warranty, was bound to discharge, must be alleged.

Appeal from circuit court, Nelson county.

C. T. Atkinson and J. A. Fulton, for appellant. *J. D. Wickliffe*, for appellees.

BENNETT, J. The appellant's petition and amended petition disclose that on the first day of January, 1875, the appellee, Josiah W. Thomas, by deed, with warranty of title, sold to V. B. Styles a tract of land lying in Nelson county, Kentucky; that on the ninth of June, 1876, V. B. Styles mortgaged this land to Mat E. Styles for the purpose of securing a debt of \$676; that the mortgage contained a covenant of warranty of title; that on the tenth of June, 1878, Mat E. Styles, for a valuable consideration, assigned said note and mortgage to appellant; that, V. B. Styles having been adjudged a bankrupt by the United States district court, said land was sold by his assignee, and the appellant became the purchaser thereof, and on the tenth day of June, 1878, the assignee in bankruptcy made appellant a deed to said land; that Sarah Bray, in 1873, instituted suit in the Nelson circuit court against the appellee Josiah W. Thomas and Ward & Rodman for the purpose of recovering said land, or enforcing a claim against same; that they obtained a judgment in the Nelson circuit court for the sale of the land to satisfy said lien, and the land was sold by the court commissioner on the tenth day of July, 1882, to satisfy the lien; that C. W. Bush purchased the land at the commissioner's sale at the price of \$1,000; that the sale was confirmed, and Bush thereafter assigned his purchase to the appellant; and that appellant paid the purchase price of the land. The appellant then sought by this action to recover from the appellee the purchase price of the land, and to subject to the payment thereof appellee's homestead, he being insolvent. The lower court sustained a demurrer to appellant's petition and amended petition. He declined to further amend, and has appealed to this court.

The petition is defective. It alleges that Sarah Braysought by her petition to recover said land, or to enforce a claim against the same, and that the land was sold by the judgment of the court to satisfy said lien. No description of Mrs. Bray's claim to the land is set up, nor the character of the claim that she held against it. It is not shown that the claim of Mrs. Bray was such an incumbrance upon the land that the appellee was, by reason of his covenant of warranty of title, bound to discharge in order to protect the remote vendee. The petition fails to show this. For aught the petition discloses, V. B. Styles might have been bound to discharge and satisfy Mrs. Bray's claim against the land. Nor does the petition show that the claim of Mrs. Bray rested upon the covenant running with the land. The amended petition does not cure these defects.

The judgment of the lower court is affirmed.

JULIAN v. STEPHENS.

(Court of Appeals of Kentucky. March 22, 1887.)

PLEADING—AMENDMENT—DEMURRER—LAW AND EQUITY.

Plaintiff having improperly brought his action to recover land in equity, it was transferred to the ordinary docket. Plaintiff then filed an amended petition stating a cause of action in ejectment, and defendant filed an answer to it. *Held*, that it was open to plaintiff to prove any facts alleged in the amended petition additional to those contained in the original petition, and not inconsistent with the allegations of the latter, and that a demurrer to the amended petition was improperly sustained.

Appeal from circuit court, Franklin county.

G. W. Craddock and W. H. Julian, for appellant. *W. H. Posey*, for appellee.

LEWIS, J. This action was instituted by appellant to recover a tract of land purchased by him at a sheriff's sale for the payment of taxes due by the

owner; was at first improperly placed on the equity docket; and in the petition, to which a demurrer was sustained, the plaintiff undertook to set out the proceedings had by the sheriff in making the sale. But subsequently the action was transferred to the ordinary docket, and an amended petition in the nature of an action in ejectment was filed, in which we think was contained a statement of facts sufficient to constitute a cause of action; but, although an answer to it was filed, a demurrer was sustained, and the action was dismissed.

Notwithstanding the previous pleadings by the plaintiff, he might, upon the trial of the case as an ordinary action, have given in evidence, under the general issue raised by his last petition and answer thereto, any additional facts in support of his cause of action, not being precluded from doing so by anything before alleged by him. As, therefore, the last amended petition was sufficient under the Civil Code, and the issue made by it was joined by appellee, it was error to cut off a trial of that issue by the jury. Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

FICENER v. FICENER.

(Court of Appeals of Kentucky. March 22, 1887.)

DIVORCE—NEW TRIAL—PRACTICE—JUDGMENT.

Civil Code Ky. § 344, providing for a new trial in cases where the grounds therefor are discovered after the term at which the decision was rendered, but declaring that the section shall not apply to divorce cases, does not prohibit setting aside the judgment in a divorce case during the term at which it was rendered, and while the conditions of both parties remain unchanged.

Appeal from Louisville chancery court.

Richards & Hines and *A. C. Rucker*, for appellant. *O'Neal, Jackson & Phelps*, for appellee.

PRYOR, C. J. In this case, the appellee, who is the wife of the appellant, filed her petition for a divorce *a vinculo*, and obtained a judgment after proper service and proof heard. In a few days after the judgment was rendered, the same was set aside at the instance of the wife, leaving the parties still husband and wife. This seems to have been done without notice to the husband, who afterwards came in and moved to set aside the order by which the judgment for a divorce was set aside. His motion was overruled, and the wife then offered an amended petition, praying for a divorce from bed and board, and asserting some property rights as against the husband by reason of certain conveyances made by him to her, and also asking that she be permitted to retain the custody of her children. The husband answered this amended petition, making his answer a cross-petition against the wife, and asked for a divorce from her on the ground of adultery, and a restoration of the property he had conveyed to her. The wife joined issue with the husband as to the existence of the charges made against her; and upon the hearing below the chancellor dismissed the petition of the wife and the cross-petition of the husband, leaving them as husband and wife, without any order as to the custody of the children or a judgment as to the property conveyed by the husband.

It is plain that after the term at which a judgment for a divorce has been rendered, that the grounds for setting aside ordinary judgments at law or in equity do not apply to judgments for divorce, but they become final, as is provided by the Code. During the term, however, and while the conditions of both parties remain unchanged, we perceive no reason why the judgment may not be set aside at the instance of the complaining party. The wife in this case may have relented, or did not wish the separation to be final, and therefore asked that the judgment be set aside. This should not have been done,

however, without notice to the husband; and, if he had stood by his motion to set aside the order by which the judgment for a divorce was rendered ineffectual, a reversal would have followed, by which the appellee, the wife, would have been required to give some reason for setting aside the judgment. The husband, however, not only litigates the right of the wife to the property in controversy, but seeks to obtain a divorce from her on the ground of adultery; and in the investigation of the case it is made apparent that neither party is entitled to be heard by the chancellor, and certainly not the husband. The act of adultery is proven by one witness, who himself seems to have been a party to the crime, and whose testimony on its face is incredible, and was properly disregarded. Acts of adultery have been attempted to be shown from circumstances attending the association of the wife with one John McGwin; and, to establish these circumstances, witnesses have been introduced unworthy of credence, both from their general habits and their indisposition to tell the truth.

The conduct of the wife is not by any means blameless; for she seems to have lost in many respects that modesty that belongs to real womanhood, and mingled with those whose associations taught wickedness instead of virtue. She was, however, by reason of the dissipated habits of her husband, forced to enter the saloon, and play the man and bar-tender for the support of herself and family. She seems to have clothed and fed her children well, without the aid of the husband, and, so far as this record shows, the latter contributes nothing to their support, and is entirely indifferent to their actual necessities, or to their happiness in life. He would fight his own children, expose his naked person to his family, accuse his wife on all occasions with being too intimate with other men, and certainly presents no case commending him to the consideration of the chancellor in this vicious and dirty controversy. They are both in fault; the wife's conduct causing a suspicion of her virtue, and the husband's cruel treatment of his family and habits in life making him far worse than the wife. The husband has attempted to show some effort to reform, and may become a better man, and the wife a better woman. If so, they will then be in a condition to live together as man and wife, and the chancellor will have full power over the case both as to the property and the custody of the children.

Judgment below affirmed.

SCOTT'S EX'X v. SCOTT.

(*Court of Appeals of Kentucky.* March 19, 1887.)

1. JUDICIAL SALES—EXECUTION—RETURN.

It is the policy of the law to uphold judicial sales; and, where the return of the officer upon the execution is of doubtful meaning, the law will so construe it as to uphold his action.

2. EXECUTION—RETURN—CONSTRUCTION.

The entry of the levy upon an execution not explicitly stating when levy was made, but there being an entry as to when the execution came to the officer's hands, *held*, that the two entries, when read together, must be regarded as substantially stating that the execution was levied the day it reached the officer's hands.

3. SAME—WHAT SUBJECT TO—FRAUDULENT CONVEYANCE.

A debtor having conveyed away his land for the purpose of defrauding creditors, an execution creditor may disregard the deed, and, without waiting to set it aside, may levy his execution upon and sell the land for his debt.

4. EQUITY—CREDITOR'S BILL—FRAUDULENT CONVEYANCE—PRIORITIES.

A creditor who has brought an action to set aside the debtor's fraudulent conveyance, before levying an execution on the land, cannot hold the land as against another creditor who had previously levied on it, without first suing to set aside the fraudulent conveyance.

Appeal from circuit court, Jessamine county.

J. S. Bronaugh and Wm. Lindsay, for appellant. *Ben P. Campbell*, for appellee.

HOLT, J. John D. Scott was the owner of an undivided one-third of three separate tracts of land. He conveyed his interest in two of them to one Rogers on March 17, 1878; and, his interest in the remaining one having been sold under two executions,—one in favor of one Campbell, and the other in the name of Robert J. Scott,—and purchased by the latter at the amount of the two debts, the sheriff, on March 14, 1878, conveyed it to him. On June 18, 1878, an execution in favor of R. A. Buckner and against John D. Scott issued upon a judgment rendered upon a debt which was created prior to the conveyances to Rogers and Robert J. Scott. It came to the sheriff's hands on the following day; and in this controversy it is claimed, upon the one side, that it was levied upon that day upon the interest of the execution debtor in the three tracts of land, while, upon the other hand, it is urged that it does not appear that it was levied while alive, or before its return-day, which was the fourth Monday in July, 1878. The interest of the debtor in the larger and also in the smaller tract was sold under it on August 29, 1878, and purchased by the appellant, Hannah Scott, at a little over \$800; but, she failing to give bond for the purchase money, the execution was returned unsatisfied. No reason is assigned for this failure upon her part. A *vend. ex.* issued on October 21, 1878, and under it the debtor's interest in the three tracts was sold on December 16, 1878, and purchased by the plaintiff in the execution, R. A. Buckner, at the price of \$638.43. The sheriff conveyed it to him on September 17, 1880; and he, on August 22, 1881, and for \$741, conveyed it to the appellee, Edward S. Scott. Prior to October 21, 1878, Thomas B. Scott had obtained a judgment for a considerable sum against John D. Scott, upon which an execution had issued, and been returned, "No property." The creditor having died, his executrix, the appellant, Hannah Scott, instituted an action, on the day last named, against John D. Scott, Robert J. Scott, and Charles W. Rogers, seeking to have the conveyances to them declared fraudulent, and the property embraced by their deeds subjected to the payment of the judgment in favor of her testator. She obtained a judgment on August 18, 1881, declaring them void as to the creditors of John D. Scott, and subjecting the landed interests named in them to sale for the payment of her debt, save that Robert J. Scott was allowed a lien upon the interest he had purchased at sheriff's sale for the Campbell execution debt paid by him, and for a portion of his execution debt found by the court to be just; because, although the debtor, John D. Scott, had procured the Campbell and Robert J. Scott judgments to be rendered, yet the plaintiffs in them were not shown to have participated in the fraudulent purpose.

As the suit by Thomas B. Scott's executrix was not brought until after the issual and levy of the Buckner execution, it did not operate as a *lis pendens* as to it. Under her judgment the lands were sold; the interest of John D. Scott in two of the tracts being purchased by Robert J. Scott, and the interest in the other by Robert S. Perry. Neither Buckner, nor his vendee, Edward S. Scott, were parties to her suit. The present action was brought by the latter to quiet his title, and for a division of the land. Hannah Scott, executrix of Thomas B. Scott, Robert J. Scott, Robert S. Perry, Charles W. Rogers, and the other joint owners of the land were made defendants.

It is urged, first, that the appellee has never had the actual possession of the land, and that this action is in the nature of a bill *quia timet*, and cannot, therefore, be maintained. If, however, his vendor, R. A. Buckner, acquired title by his execution sale, then, as it has by purchase vested in the appellee, the possession of the other joint owners inured to his benefit, and the possession of one was that of all. It is inconvenient, if not often impossible, for

several owners, who have the right to occupy the same tract of land, to do so at the same time. The actual possession of one, therefore, will not be considered adverse to his co-owners, but as the common possession of all. They are tenants in common, all being in law in the actual possession. The common ownership makes this rule necessary. Aside from this, however, this action not only seeks to quiet the appellee's title, but to obtain a division of the land.

It is next said that as the appellee is the plaintiff, and claiming title through an execution sale, that the *onus* is upon him to show the regularity of every step necessary to pass the title of the execution defendant, and that the record in this instance fails to show that the execution was levied while it was alive. Upon the other hand, it is urged that, even if this were so, yet the law presumes that the officer did his duty, and acted correctly; that it must be presumed that he would not have made a sale without a levy, or by virtue of one made when the execution was not alive; and that, therefore, it rests with the party denying the validity of the sale to show such irregularity. It is unnecessary to determine this question. It is the policy of the law to uphold judicial sales. If the return as entered by the officer be of doubtful import, it should be construed so as to uphold his action. The entry of the levy upon the execution in this instance does not expressly say *when* it was levied; but the entry as to when it reached his hands, although copied in the record after his indorsement of the levy, should be read first. It shows that it came to his hands the day after it was issued, and then he indorses upon it, "Levied this execution," etc. These indorsements, when read in the order in which the events occurred, and fairly construed, must, in our opinion, be regarded as substantially stating that the execution was levied the day it reached the officer's hands.

The objection mainly urged, however, to defeat the appellee, is that, when the Buckner execution was levied, the legal title to the land was vested in Rogers and Robert J. Scott by virtue of the deeds to them, and, not being in John D. Scott, it could not be believed on as his property. If the levy and sale under this execution were valid, then, manifestly, the title acquired by Buckner related back and took effect as of the date of the levy; and, when it was made, the appellant had no suit pending to operate as notice to the execution creditor. The conveyances to Rogers and Robert J. Scott were attacked as actually fraudulent, and so adjudged in the suit brought by Thomas B. Scott's executrix. It is true that neither R. A. Buckner nor the appellee were parties to it; and it is now urged that, as they were not bound by it, they cannot, therefore, avail themselves of the result of it, and that the appellee must avoid those deeds by a direct attack upon them.

Waiving the question whether he has not in effect done so in this action, yet, if the deed of a debtor to his land be actually fraudulent, then his execution creditor may disregard it, and, without attacking it, levy his execution upon and sell it for his debt. He has a right to treat it as a nullity. This is so because the law regards the title as still in the debtor, and will not consider it as having passed from him by means of a fraud. It is suggested, however, that while Buckner had the right to have his execution levied upon the land, and to sell it in disregard of the Rogers and Robert J. Scott deeds, that yet, having done so, he himself, or his vendee, must then by an action attack them as fraudulent, and cannot rely upon the fact that they were so adjudged in a suit to which he was not a party. As against the fraudulent transferee, however, the creditor may seize the property as that of the fraudulent debtor, and the title that may be thus acquired is not a mere equity or right to control the legal title, and have the fraudulent sale vacated by an appropriate proceeding, but it is the legal title itself, against which the fraudulent transfer is no transfer at all. The legal title remains in the debtor as to his creditors, notwithstanding the fraudulent transfer, and the possession of

the fraudulent transferee may properly be regarded as that of the debtor. *McConnell v. Brown*, 5 Mon. 484.

Both the appellee and Scott's executrix were creditors of John D. Scott; and in the suit by her these conveyances were decided fraudulent as to his creditors. The parties to this suit, who are contesting the appellee's right, were either parties or privies to that action. The executrix was the plaintiff in it, Robert J. Scott was a defendant, and he and Perry were the purchasers at the sale made under the decree obtained in it. Indeed, the only party now complaining by this appeal is the very one who obtained that judgment. The deeds, being fraudulent, affected neither the title nor the possession. The grantees under them did not enter into the actual possession of the land; and the appellant, having procured a decree declaring them fraudulent as to the creditors of John D. Scott, is not in a position to deny the appellee's right to relief, because they have not been set aside for a like reason at his instance in an independent proceeding. The land may have been purchased by Buckner at a sacrifice. Mere inadequacy of price does not, however, authorize us to set aside the sale. It is our duty to ascertain the law, and then declare its mandate, without regard to any seeming hardship. There is no intimation of any fraud upon his part.

The levy of his execution antedated any *lis pendens* of the appellant, and his title relates back to it, and the judgment below must be and is affirmed.

BARNES v. JACKSON, Adm'r.

(Court of Appeals of Kentucky. March 24, 1887.)

1. PLEADING—AIDER—VENDOR AND PURCHASER.

In an action by a vendor against the vendee to recover the purchase price of the land sold, the plaintiff should allege that he had a good title to the land, and should set it out. But the error is cured by defendant's answer admitting plaintiff had good title, and taking issue only on the question of the number of acres contained in the tract.

2. JUDICIAL SALES—NOTICE.

Under Civil Code Ky. § 696, providing that every sale under an order of court must be public, and shall be made after such notice of time, place, and terms of sale as the order may direct, *held*, that a judgment directing commissioner, before making sale, "to post notices of the time, place, and terms of sale, as sheriffs are required to do before selling land under execution," is sufficient; the duties of the sheriff in selling land under execution being specifically prescribed by statute.

Appeal from circuit court, Laurel county.

W. O. Bradley, for appellant. J. M. Unthank, for appellee.

BENNETT, J. Jarvis Jackson instituted suit in the Laurel circuit against the appellant to recover judgment for the purchase price of a tract of land which he had sold to the appellant, and to enforce a lien thereon for the satisfaction of the judgment. Jackson alleged in his petition that he sold to Barnes, the appellant, by title bond, which Barnes held in his possession, a boundary of land supposed to contain 1,000 acres at the price of 50 cents per acre. The boundary of the land is designated by other tracts of land which adjoin it. Jackson also alleged that he was able, willing, and ready to convey by deed said boundary of land according to the terms of the bond, less 420 acres thereof, which he had conveyed to John Hash at the request of the appellant, and a little over 100 acres in said boundary held by R. Wilburn, which was to be excluded from appellant's purchase as soon as the purchase money was paid for the remainder of the land. Jackson also asked that the appellant be compelled to produce the title bond in court, so that the land could be surveyed, and the true quantity ascertained. By an amended petition, Jackson alleged that, since filing his original petition, he had caused the

land to be surveyed, and, after deducting the Hash tract and the Wilburn tract, there remained 699 acres, the metes and bounds of which are set out in the amendment. The appellant demurred to the petition and amended petition. The demurrer was overruled. Appellant then filed an answer to the petition and amended petition.

The answer was not pertinent to the allegations of the petition and amended petition, because the transaction set up in the answer related to the purchase of a different tract of land, which was in no way connected with the transaction sued on. The boundary of land sold to appellant, and the number of acres therein, and the price per acre that he agreed to pay, are sufficiently set out in the petition and amended petition. Jackson also alleged in his petition that he was able, willing, and ready to convey the boundary of land, according to the terms of the title bond, as soon as the purchase money was paid. But the character of title that Jackson, by his title bond, covenanted to convey, was not alleged, nor was it alleged that he had title to the land. These were necessary allegations. Therefore the demurrer should have been sustained.

But the appellant, by his amended answer, cured the defect, and thereby waived his right to a reversal on account of the error in overruling the demurrer; for he admitted in his amended answer that Jackson owned said boundary of land which he bought by title bond, but, differing from Jackson as to the quantity, thought that boundary contained something near 600 acres which he acquired; and, after deducting the Hash purchase of 420 acres, he was willing to take and pay for the remainder, whatever the quantity, at 50 cents per acre. Therefore, the appellant, having admitted Jackson's ownership of the quantity of land contained in the boundary not otherwise disposed of, and having consented to take the quantity, whatever it was, in discharge of the title bond, cured the defect in the petition and amended petition; and the surveyor's report of survey and the proof in the case having shown that there were 699 acres of land in the boundary outside of the excluded portions which belonged to Jackson, and which were conveyed by the title bond, the lower court did right in giving judgment against the appellant for \$349.50, the price of the land at 50 cents per acre, with interest thereon, etc., and for a sale of the land to satisfy the judgment.

The objection that the judgment fixed no time or place for making the sale is not well taken. Section 696 of the Civil Code provides that "every sale made under an order of court must be public, upon reasonable credits to be fixed by the court, not less, however, than six months for real property, and shall be made after such notice of time, place, and terms of sale as the order may direct, and, unless the order direct otherwise, shall be made at the door of the court-house of the county in which the property, or the greater part thereof, may be situated." The judgment directed the commissioner to sell so much of the land as was necessary to satisfy the debt, interest, and cost on a credit of six months, and to take bond from the purchaser for the price, with approved security, payable to himself, etc. The judgment also directed the commissioner, before making the sale, "to post notices of the time, place, and terms of sale, as sheriffs are required to do before selling land under execution." As the duty of sheriffs in making sales of land under execution is fixed by statute, the direction to the commissioner was equivalent to directing him to sell the land at the court-house door in Laurel county, on the first day of some county or circuit court for that county, to be fixed by the court, after having advertised the time, place, and terms of sale by written notices set up at the court-house door, and three other public places in the vicinity of the land, for 15 days next preceding the sale. Besides, the section of the Code, *supra*, provides that, unless otherwise directed in the judgment, the sale shall be made at the court-house door of the county in which the property, or the greater part thereof, may be situated.

After the death of Jarvis Jackson, the case was revived in the name of his administrator, by the consent of the appellant.

The judgment of the lower court is affirmed.

PARRISH and others v. CHRISTOPHER.

(Court of Appeals of Kentucky. March 24, 1887.)

MECHANIC'S LIEN—RIGHTS OF SUBCONTRACTOR—CLAIM AGAINST CONTRACTOR.

Under Gen. St. Ky. c. 70, § 5, providing, in reference to the lien of a mechanic or material-man, that, if the labor performed or materials furnished be for a contractor or subcontractor, no lien shall attach for the same unless notice in writing be given the owner that a lien will be claimed, and in such case it shall be the duty of the owner, if he is at the time indebted to the contractor or subcontractor, to withhold a sufficient amount to satisfy the claim of the party so notifying him, provided his indebtedness be enough to pay such person, but no lien shall exist in favor of such person in case the contractor himself is not entitled to a lien, *held* that, if the principal contractor is liable to the owner in damages for a breach of contract in putting up the building, and for an amount greater than the balance of the contract price due, he has no lien, and consequently a subcontractor under him can have none.

Appeal from circuit court, Madison county.

S. D. Parrish, for appellants. *A. J. Reed*, for appellee.

LEWIS, J. This is an action by a subcontractor against the owner to recover the value of labor performed and materials furnished in the erection of a dwelling-house, and to enforce an alleged lien thereon, the contractors being made parties defendants. Section 5, c. 70, Gen. St., under which the action was brought, is as follows: "If the labor performed or materials furnished shall not be performed or furnished by contract with the owner, but for a contractor or subcontractor, no lien shall attach for the same, unless notice in writing be given to the owner that a lien will be claimed; and in such case it shall be the duty of the owner, if he, at the time of receiving such notice, is indebted to the contractor or subcontractor, to withhold a sufficient amount to satisfy the claim of the party so notifying him, provided his indebtedness be enough to pay the same, and, if not, then he shall pay to the extent of his indebtedness. * * * If the owner shall fail to pay, upon notice, as required in this section, the property shall be in lien for the amount he ought to pay as prescribed in the first section of this chapter: provided, that no lien shall exist in favor of such person in case the contractor himself is not entitled to a lien, nor shall the liens authorized by this chapter have effect if security shall have been taken for the labor performed or materials furnished."

The notice in writing required in such cases appears to have been given, and there is no controversy about the labor performed, materials furnished, nor the value thereof, as averred in the petition. But a recovery is resisted, and the existence of the alleged lien controverted, upon the ground that he, the owner, was not, at the date of the notice, indebted to the principal contractor on account of the erection of the house, which he averred had not been completed according to the contract entered into between them, and that he had fully paid him all he owed him under the contract. If the principal contractor has either taken from the owner security for the labor performed and material furnished, has been paid in full, or is liable in damages for a breach of contract for an amount greater than the balance of the contract price due, he has of course no lien; and consequently a subcontractor, between whom and the owner there is no privity, can have none. It is not, nor attempted to be, definitely shown how much the alleged claim of the owner against the principal contractor, for failure to complete the house, amounts to, nor, although the latter is a party defendant to the suit, does the owner make his answer a cross-action against him.

The issue whether the owner was or not, at the date of the notice, indebted to the principal contractor, under the contract between them, in an amount sufficient to satisfy the subcontractor's demand, was made by the pleadings, and, upon the proof heard before him, the master commissioner, to whom the case was referred, reported in favor of the plaintiff, and that report was confirmed by the lower court, and judgment rendered directing a sale of the house to satisfy the debt of the plaintiff. The evidence is conflicting; but the subcontractor, who is a painter, swears that the owner informed him, before he finished the painting and after, that there was enough money in his hands due the principal contractor to pay the amount he, the subcontractor, was entitled to; and he is corroborated by other witnesses. And, besides, the evidence tends to show that the subcontractor was induced to continue his labor, which he had intended to abandon, by the assurance of the owner that he would be paid by him out of what was going to the principal contractor.

In view of the impartial report of the commissioner, the judgment of the lower court, and the evidence in support of the plaintiff's claim, which seems to us of equal if not greater weight than that offered by the defendants, we do not feel authorized to disturb the judgment, and it is affirmed.

PERKINS and another *v.* TOWERY and others.

(Court of Appeals of Kentucky. March 26, 1887.)

WILL—MARRIED WOMAN—EJECTMENT.

Husband and wife brought suit to recover possession of an undivided one-half of a tract of land alleged to belong to the wife as *general estate*. The wife dying during the pendency of the action, the husband claimed the one-half interest in his own right as devisee under his wife's will. *Held*, under Gen. St. Ky. c. 113, § 2, providing that every person of sound mind, not being under 21 years of age nor a married woman, may make a will, and section 4, providing that a married woman may by will dispose of her *separate estate*, that the will in this case was invalid, and passed no title to the husband, and the petition was properly dismissed.

Appeal from circuit court, Caldwell county.

G. W. Duvall, for appellant. Jas. R. Hewlett, for appellees.

BENNETT, J. The appellant, John V. Perkins, and his wife, P. E. Perkins, in her life-time, brought suit in the Caldwell circuit court for the purpose of recovering possession of an undivided half of a tract of land containing 800 acres, which they alleged the appellees were withholding from them without right. They also alleged that the undivided half of the tract of land belonged to Mrs. Perkins as her *general estate*. Appellees answered, denying Mrs. Perkins' title, and setting up title in themselves by adverse possession, etc. During the pendency of the action, Mrs. Perkins died, leaving a last will, by which she devised the land in controversy, together with her other property, to her husband, the appellant. He then filed an amended petition, setting up the death of his wife, the will, its probate, and that he was the owner of the land in controversy under and by virtue of the will, but in no other right. The lower court, upon the hearing of the case, dismissed appellant's petition. He has appealed from that judgment to this court.

If the will of appellant's wife conferred upon him title to the land, then the circuit court should not have dismissed the action; if it did not, then the dismissal was right. By section 2, c. 113, Gen. St., it is provided that "every person of sound mind, not being under twenty-one years of age nor a married woman, may by will dispose of any estate, right, or interest in real or personal estate that he may be entitled to at his death," etc. By section 4 of the statute, *supra*, it is provided that "a married woman may by will dispose of any estate secured to her separate use by deed or devise, or in the exercise of a written power to make a will." By section 2 of the statute, *supra*, a married woman is denied the power to dispose of her *general estate* by will.

The fourth section of the statute makes an exception as to any estate secured to the separate use of a married woman by deed or devise, and empowers her to dispose of such estate by will; also she may dispose of her estate by will in the exercise of a written power to make a will. It is not pretended that Mrs. Perkins owned the estate in controversy as separate estate, or that she made a will in the exercise of a written power to make a will. On the contrary, it is alleged that she owned the estate as her general estate of inheritance. It follows, therefore, that the will was void, and passed to the appellant no estate, either legal or equitable, in the property in controversy; and, the appellant not claiming the property in any other right, the lower court did right in dismissing the case.

The judgment is affirmed.

WALTON and others v. RILEY and others.

(Court of Appeals of Kentucky. March 24, 1887.)

1. CONSTITUTIONAL LAW—COUNTY DEBT—ELECTIONS.

Const. Ky. art. 2, § 36, providing that no act of the legislature authorizing the creation of any debt on behalf of the commonwealth shall become effective until it has been submitted to the people at a *general* election, and shall have received a majority of all the votes then cast, does not include debts created by a county or other municipal division of the state. It is sufficient if such a debt is sanctioned by local vote at a *special* election.

2. CORPORATIONS—RECORDING ARTICLES—PRESUMPTION.

Under Gen. St. Ky. c. 56, § 3, relating to the organization of incorporated companies, providing that, before commencing business, they must adopt articles of incorporation, sign and acknowledge them, and have them recorded in the county clerk's office, in a book kept for that purpose, *held* that, where the articles have been filed with the clerk, it must be presumed that he did his duty, and recorded them in the proper book, although that fact does not affirmatively appear. And even if the articles were recorded in a deed-book, and not "in a book kept for the purpose," as required by the statute, the incorporators are not affected by the fact. They, having lodged the articles with the clerk for record, did all that was required of them, and had the right to commence business at once, without waiting for the record to be made, especially as section 6 provides that the corporation may commence business as soon as the articles are filed.

3. SAME—FILING ARTICLES—TURNPIKE COMPANY—TAXATION.

Under section 4, providing that corporations for the construction of any work of internal improvement shall, in addition, file a certified copy of its articles of incorporation in the office of the secretary of state, and have the same recorded in a book kept for that purpose, and section 6, providing that the corporation's acts shall be valid if the copy be filed with the secretary of state within three months from such filing in the county clerk's office, *held*, that the filing of the articles with the secretary of state within the prescribed time is not a condition precedent to the company's right to begin work, and the failure of a turnpike company to file such articles within the time does not invalidate a tax previously levied in aid of the turnpike; especially as section 17 declares that the legality of a corporation organized under this chapter is to be presumed, and that its franchise cannot be forfeited except in a regular proceeding brought for the purpose; and section 18 provides that no one sued for any injury done to the property of such a corporation, or for any wrong done to its interests, can rely upon the want of organization as a defense; overruling *Heinig v. Adams & Westlake Manuf'g Co.*, 81 Ky. 300.

4. TAXATION—EXERCISE OF POWER—TURNPIKE ROADS—JUDGE.

The Kentucky act of April 26, 1880, § 3, (2 Acts 1879, p. 686,) to provide for building turnpike roads in Todd county, directed the county judge to levy *immediately* a tax upon the district after the election voting it should have been had, and directed the county clerk to make out and deliver to the sheriff a list of taxable property for the district as shown by the returns of the assessor of the county for the *last annual assessment*. The tax not having been levied until December, 1883, *held*, that the power of the county judge to make it had not in the mean time lapsed. The list of 1883, being the last on file, was the proper one for the clerk to deliver to the sheriff under the requirement of the act.

Appeal from circuit court, Todd county.

Browder & Edwards, for appellants. *Ben T. Perkins* and *W. L. Reeves*, for appellees.

HOLT, J. The order of the judge of the Todd county court, submitting to the voters of magisterial district No. 6 of the county, the question whether a tax of \$8,000 and the cost of its collection should be levied upon the property of the district to aid in the building of the Elkton turnpike by the Elkton Turnpike Company, was entered on February 12, 1883. It was authorized by legislative enactment, and the requisite preliminary steps had been taken. The election was held on March 10, 1883, resulting in a majority of 69 votes for the proposition. The entire vote cast appears to have been a full one for the precinct, judging from its population. The vote was properly ascertained and certified, but no further proceedings in the matter were had until December 10, 1883, when the county court judge entered an order levying the tax, and appointing as collector the appellee J. W. Riley. The appellants then brought this suit to enjoin its collection. The grounds relied upon to sustain it are quite numerous; but we shall consider those only which are mainly urged in argument, because they appear to us to be *the* questions in the case.

Section 36 of article 2 of our state constitution provides that no act of the legislature authorizing the creation of any debt on behalf of the commonwealth shall become effective until it has been submitted to the people at a *general* election, and shall have received a majority of all the votes then cast, provided, however, that the general assembly may borrow money to pay any part of the debt of the state without such submission. It is true that former distinguished judges of this court have differed as to whether this provision includes debts created by a county or other municipal division of the state; but to our minds the construction which for years has been placed upon it by both the legislative and executive branches of the government must control. For a long period of time it has been the legislative practice to sanction the creation of such indebtedness when approved by the local vote at *special* elections.

The Elkton Turnpike Company was organized as a corporation under the provisions of chapter 56, of the general statutes. It provides:

"Sec. 3. Before commencing any business except that of their own organization, they [the corporators] must adopt articles of incorporation, which shall be signed and acknowledged by them as deeds are required to be acknowledged, and recorded in a book kept for that purpose in the office of the clerk of the county court of the county where the principal place of business is to be.

"Sec. 4. Corporations for the construction of any work of internal improvement shall, in addition, file a certified copy of such articles in the office of the secretary of state, and have the same recorded by him in a book kept for that purpose. * * *

"Sec. 6. The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk, and their acts shall be valid if the publication in a newspaper is made, and the copy filed in the office of the secretary of state, when such filing is necessary, within three months from such filing in the clerk's office. * * *

The appellants resist the collection of the tax, upon the ground, mainly, that the turnpike company, the business of which is not to operate, but merely to construct, the road, was never *in esse* as a corporation or legally organized; that it had no corporate existence; that it had not performed the conditions required of it under the statute in order that the franchise may vest, and therefore the subscription is void. The newspaper publication or notice required by the statute was properly given. This is not questioned. It is asserted, however, that the county clerk recorded the articles of incorporation in a *deed-book*, and not in "a book kept for that purpose." This,

however, does not appear from the record. They were acknowledged and filed for record on February 12, 1883; and the copy of them, which is made a part of this record, shows that the clerk certified that they were lodged for record and duly recorded. The presumption must be indulged that they were recorded in the proper record book.

But, conceding that they were recorded in a deed-book, yet this was the act of the clerk. The corporators lodged them for record, and had the right to presume that the clerk would properly perform his duty, and record them as directed by the statute. The requirement as to recording is for the purpose of giving notice, and preserving the articles of incorporation. Moreover, the statute provides that "the corporation may commence business as soon as the articles are filed for record in the office of the county court clerk." This would often be necessary, and this provision of the statute is not in conflict with section 3, *supra*, because, when the two are considered together, they should not be construed as requiring that the articles shall be recorded before beginning business, but only that they shall be adopted, signed, acknowledged, and filed for record. The copy of the articles of incorporation were, however, not filed in the office of the secretary of state within three months from the time when they were filed in the county clerk's office for record, and not until December 10, 1883.

As the order for the election was made on February 12, 1883, and it was held on March 10th following, and as nearly ten months had elapsed from the time of the filing of the articles of incorporation in the clerk's office before the copy was filed in the office of the secretary of state, it is urged that the imposition of the tax was illegal and void. This argument is based upon the ground that the corporation was not in being; that its existence was a condition precedent to the exercise of any power looking to a subscription in aid of the road; that the corporators failed to complete the organization begun on February 12, 1883, by not filing the copy in the secretary's office within three months from that day, and, having so failed, they could not do so thereafter. This involves the construction of a statute somewhat doubtful in meaning, owing to an apparent conflict in some of its provisions. It is only corporations for the construction of any work of internal improvement that are required to so file a copy of their articles of incorporation; and the sixth section, *supra*, therefore uses the words, "when such filing is necessary." The Elkton Turnpike Company, however, is a corporation of the class to which this direction applies; and the question therefore arises whether its existence depended upon this being done. In determining this question, the seventeenth and eighteenth sections of the statute should be considered in connection with the sixth. They are:

"Sec. 17. Persons acting as a corporation under the provisions of this act shall be presumed to be legally organized until the contrary is shown; and no such franchise shall be declared actually null or forfeited except in a regular proceeding brought for that purpose.

"Sec. 18. No persons acting as a corporation under the provisions of this act shall be permitted to set up or rely upon the want of a legal organization as a defense to action brought against them as a corporation; nor shall any person who may be sued on a contract made with such corporation, or sued for an injury done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his defense."

The statute evidently contemplates the transaction of business by the organization as a corporation as soon as the articles of incorporation are filed in the clerk's office. Indeed, the sixth section expressly gives this power: "*The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk.* * * *" By the seventeenth section the legality of its organization is to be presumed, and the franchise cannot be declared null or forfeited except in a regular proceeding instituted for that

purpose. These provisions recognize indisputably the existence of the corporation from the time of the filing of the articles of incorporation in the clerk's office. It is said, however, that the sixth section by implication declares its acts void, if the four-weeks notice by newspaper publication, required by the statute, is not given, and the copy of the articles of incorporation filed with the secretary of state, in cases where such filing is necessary, within three months from the time of filing them in the clerk's office. The eighteenth section, however, qualifies this, and provides that the persons so acting as a corporation shall not rely upon a want of legal organization as a defense to an action brought against them as a corporation, nor shall any one who may be sued on a contract made with "*such corporation*," or for any injury done to its property, or for any wrong done to its interests, rely upon such a defense. The legislature apparently intended, even if they did not do so, to provide by this section for every state of case which could arise; and to give it effect we must restrict the operation of the sixth section, *supra*, so far as it by implication declares the acts of the corporation invalid, to cases where it is sought to annul the franchise, as authorized by the seventeenth section of the statute. This construction is necessary to give effect to the entire law, and it appears to be in harmony with the legislative intent when the act is considered as a whole. Unless so construed, its provisions are irreconcilable.

We are aware that these views are in conflict with the case of *Heinig v. Adams & Westlake Manuf'g Co.*, 81 Ky. 300, where it was held that an organization under chapter 56 of the General Statutes could have no existence as a corporation unless it appeared that the notice by publication had been given, and a copy of the articles of incorporation filed in the office of the secretary of state, when such filing is necessary, within three months from the time of filing in the county clerk's office, and that these matters were conditions precedent to the validity of any acts by it as a corporation. It was a case where it did not appear that the notice by publication had been given, and it was there said: "Such corporations have no right to commence business or do any corporate act until the articles of incorporation are filed in the proper office for record, and the notice specified by section 5, *supra*, is published for the length of time and within the time named in sections 5 and 6." The latter part of this statement is directly in the face of the statute. Moreover, the court, in determining the case, does not appear to have considered sections 17 and 18, *supra*; and, not being in accord with the views above expressed, it is overruled. It results that the objection to the collection of the tax upon the ground that the corporation was not in being, cannot be sustained.

Some inequality of burden may arise from its imposition, but perfect equality of taxation is unattainable; it can only be approximated. The third section of the act of April 26, 1880, amendatory of "An act to provide for the building of turnpike roads in Todd county, Kentucky, and to authorize the different magisterial districts or election precincts to vote a tax for that purpose," provides that the county judge shall "*immediately*" levy the tax upon the district after the election, provided a majority of the votes cast are favorable thereto, and that "the clerk of said county court shall, as soon as practicable, make out and deliver to the sheriff of Todd county a list of the taxable property and titles of said district as shown by the returns of the assessor of the county for the *last annual assessment*." 2 Acts 1879, p. 686. The tax was not levied until December 10, 1883, although the election was in March preceding, and it is therefore urged that the power of the county judge to make the levy had lapsed. The list was made from the assessor's returns of 1883; and it is also insisted that it should have been taken from those of 1882. In our opinion, however, an unreasonable time had not elapsed after the election, before the levy was made, and the list is then to be made "as

soon as practicable." The act does not provide that it shall be taken from the assessment of the preceding year, but from the last annual assessment. This means the last one then on file. When the list, in this instance, was made, the time had expired within which the assessor must return his assessment. The last "annual assessment" then on file was that of 1883, and it was proper to make the list from it. Judgment affirmed.

AVERY and others v. MEIKLE and others.

(Court of Appeals of Kentucky. March 26, 1887.)

1. TRADE-MARK—INFRINGEMENT—MEASURE OF DAMAGES—PRODUCTION OF DOCUMENTS.

In a suit for an injunction to restrain the infringement of plaintiffs' trade-mark on certain plows, and for damages, the evidence showed that, although defendant had not actually appropriated plaintiffs' trade-mark, he had simulated it in such manner as to cause his plows to be bought by the public for plaintiffs' plows. *Held*, that defendant might be compelled to produce his books to show the number of plows thus simulated and sold by him, and the measure of plaintiffs' damages was the entire net profits made by defendant upon such sales. Plaintiffs are not confined to the recovery of the profits on such of the simulated plows as could be shown to have been actually represented and sold as the plows of plaintiffs.

2. SAME—ACCOUNT OF PROFITS.

The fact that plaintiffs claimed damages, *held* not to preclude them from electing to have an account of profits, as such an account constitutes in equity the true measure of damages in such a case.

3. LACHES—INFRINGEMENT OF TRADE-MARK.

It appearing that the infringement or simulation of plaintiffs' trade-mark complained of began in November, 1878, but was not made complete until some time in 1879, and that plaintiffs' action for an injunction and for damages was brought within five or six months thereafter, *held*, there was no such laches as would bar plaintiffs' right to relief.

Appeal from the Louisville law and equity court.

Muir & Heyman, John Mason Brown, Hargis & Eastin, and W. O. & J. L. Dodd, for appellants. *Jas. S. Pirtle, Wm. Lindsay, and Geo. M. Davie*, for appellees.

PRYOR, C. J. The original action was instituted in the court below by the present appellants, and an injunction obtained restraining the appellees from the use of appellants' trade-mark upon certain plows, and to prevent them, the appellees, from selling their plows as the plows of the appellants. The chancellor below having denied the relief, his judgment was reversed, this court upon the hearing holding that, while the appellees had not used the *trade-mark proper* of the appellants, they had so arranged and placed the letters and numerals used by the appellants on their plows, (the plows of the appellees,) and with the same coloring and staining had so imitated their manufacture, as to cause their plows to be taken and sold as those made by the appellants, and that an intentional violation of the latter's right of property was in this way made to deceive the public, and to enable the appellees to use their manufactures as that of the Averys, the appellants. This court said: "By skillful combination of legal particles taken one at a time, and in the aggregate leaving the mere trade-mark untouched, they have so combined its force and effect as to destroy its office and real efficiency to distinguish appellants' plows from all others." 81 Ky. 113. The right of the appellants to an injunction was finally determined, and the case remanded for further proceedings.

On the return of the case to the lower court, the appellants asked for a reference to the commissioner, with directions to hear proof, and state an account of damages between the parties, by reason of the wrongful acts of the appellees; that the appellees be compelled to state the number of plows that had been thus simulated by them that were sold, and the profits made on the sales; and that they be compelled to produce their books, etc. The court de-

clined to make such an order, and, the case having been transferred to the law and equity court, that court refused to instruct the commissioner to report what profits the defendants (appellees) had made, but held that, as the infringement of the property right had been committed by other means than the appropriation of the trade-mark itself, it was essential in equity as well as at law to show the fraudulent intent, and therefore the profits made by the appellees should not be the measure of damages, but the actual injury sustained by the appellants. Under this view of the law, as held by the chancellor and followed by the commissioner, the appellants were only entitled to recover when the proof showed that the plows of Meikle & Co. had been actually sold as the plows of the Averages; and, there being a failure in that respect, the damages were merely nominal, and no recovery except for nominal damages was allowed. The appellants maintain, as this court had determined, that the simulation was intentional, the wrongful appropriation of this property right of the appellants was consummated when these plows were sold by the appellees or their agents, and the profits realized constituted the criterion of damages in equity when no special damage was alleged or claimed by the appellants; while, on the other hand, the appellees insist that it was a mere tort, and the injury is limited to cases where the appellees have, in selling their plows, represented them in fact to be the plows of Avery. This is the real and only issue involved on the appeal.

We do not understand that in order to constitute a violation of the right of property in a trade-mark, that it is necessary that the trade-mark itself should be imitated; but when the simulation in every other respect is so made as to destroy the efficacy of the trade-mark, and to deceive and induce others to believe that the manufactured article is that of the real owner of the trade-mark, it then becomes as much a violation of the right of property as if the trade-mark itself had been appropriated. Such was the decision in this case on the former appeal, and the intention on the part of the appellees in violating this right of the appellants was then finally determined. The fraudulent intent with which the simulation was made having been already adjudged, it is not necessary, on the return of the case to the lower court, for the commissioner, under an order of reference, to hear, or the appellants to offer, proof on that subject, but a simple reference to the commissioner to state an account of profits upon proof adduced, which, when correctly ascertained, would give to the appellants all the relief to which they were entitled. In compliance with this order, the commissioner could call on the appellees to disclose the number of plows sold and the profits made, or appellants could establish the profits, if any, in some other mode. To require the appellants to show an actual fraudulent representation made by the appellees to those who purchased their plows would be impracticable, and result in permitting the wrong-doer to appropriate the property of another to his own use without rendering an account, as he would scarcely say to the purchaser: "These plows I am selling were made by the Averages." The law makes this representation for him when he has imitated the manufactured article that he is selling so as to destroy the trade-mark, and enable him to sell it as the product of another. While the profits made by the wrong-doer are not in a technical legal sense to be termed damages, still the text-books, as well as some of the reported cases, in fixing the *measure of damages* in a court of equity in a case like this, say that the plaintiff is entitled to the *profits*. But not so at law; he may there recover more, or he may recover less, than the profits realized. The fraud does not prevent a recovery of the profits in equity, as the plaintiff may not ask for more, or be satisfied with less. Mr. Upton, in his book on Trade-marks, in discussing the rights of the plaintiff in a case like this, says: "It is a violation of the right of property in a trade-mark, which, upon the principles established as the basis of the protection which the law extends to such property, will be suppressed by the extraordinary powers of a court of equity, and its fruits

intercepted and restored." Page 214. An example is given in this work of a case analogous in almost every feature to the one before us, where, to use the language of the author, "an elaborate simulation had been made, not to communicate the truth, but to escape the penalty of a falsehood."

In appropriating this trade-mark by such a close imitation as to render it difficult for an ordinary observer to distinguish the one plow from the other, and then disposing of the plows to the public, the appellees, according to a well-settled rule of equity, have applied the profits to their own use that justly belonged to the appellants, and it is not necessary to inquire, nor will the chancellor stop to inquire, whether or not the appellants could have sold their plows to the same parties. The trade-mark is their property; the manufacture, the result of their skill; and when one undertakes, by coloring, painting, and so arranging his manufacture as enables him to virtually destroy the trade-mark of another, and to sell his own as the product of the skill of the real inventor, it is as much a violation of the right of property in the trade-mark as if the mark itself had been used. The appellants' trade-mark is a Maltese cross, with the name or letters "Avery" distributed in its arms and center. It is not pretended that this trade-mark appeared on the plows made and sold by the appellees, but the simulation in every other respect is complete, and, as was heretofore decided, made with the intent to invade the right of property in the trade-mark of the appellants. If so, the appellants are entitled to an account of profits. It has, in effect, destroyed the trade-mark, and enabled one to sell his plows as the manufacture of the other.

This is not an action for damages by the Averys against Meikle & Co. by reason of the latter selling their plows as the plows of the Averys. If so, the ordinary rule in regard to the measure of damages resulting from the tort would apply. It is an action in equity to restrain the appellees from the use of appellants' trade-mark, and from making and selling plows which, by certain devices and colorable imitation, have been made to represent the plows of Avery & Co., and thereby destroyed their trade-mark, or the right of property in it. It is a matter of doubt whether the averments contained in this equitable action are sufficient to make it a good petition at law as an action on the case; the prime object being the injunction to prevent the wrong, and when, having the jurisdiction, the chancellor will order an account of profits. The rule as to the measure of damages, or the relief to which the plaintiff is ordinarily entitled in such a case as this when in a court of equity, is "to give as damages the amount of profits the defendant made by reason of his wrong." The rule generally recognized as the true one is to give as damages the amount of profits the defendant shall have made by the infringement. *Browne, Trade-marks*, 508.

In this case it has been adjudged that the imitation was made with the design upon the part of the appellees to make profit by the deception, and we perceive no reason why the appellants should not have the profits if they claim nothing more. This court cannot now, if so disposed, reconsider the question heretofore determined, by requiring the plaintiffs to establish a deception that has already been adjudged to exist. In equity the wrong-doer is treated as a trustee in respect to the property, and is considered as holding the profits for the rightful owner. This rule applies as to patents; and the elementary authors on the subject say: "In trade-mark cases the rule is much the same; but, in the latter, considerations are involved which do not enter into ordinary patent improvements, as, for example, loss of reputation, so that courts allow greater scope in ascertaining damages." *Browne, Trade-marks*. "In equity," says Mr. Sutherland in his work on Damages, "when there is ground for invoking its jurisdiction, and an infringement has been found and decreed, and there has been no unreasonable delay in commencing suit, an account of profits will be decreed, which means the net profits the infringer has actually realized." Mr. Upton on Trade-marks says: "The or-

der usually made by courts of chancery, that the defendant keep an account of the sales made by him, to the end that he pay over to the plaintiff the profits resulting from such sales, would seem to indicate a rule." While this author questions the wisdom of the rule, he substitutes no other for the guidance of the chancellor, and certainly, when the intention to violate appears, and the party charged is acting *mala fides*, he should not be heard to object to an account of profits.

The supreme court, in the case of *Root v. Railway Co.*, 105 U. S. 189, said: "When, however, relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid a multiplicity of suits and to do complete justice, the court assumed jurisdiction to award compensation for the past injury, not, however, by assessing damages, which was the peculiar office of a jury, but by requiring an account of profits, on the ground that, if any had been made, it was equitable to require the wrong-doer to refund them, as it would be inequitable that he should make a profit out of his own wrong." In the same case, citations are made from the opinions of Vice-chancellor WIGRAM in *Colburn v. Simms*, 2 Hare, 554, and of Sir J. LEACH in *Baily v. Taylor*, 1 Russ. & M. 73. In *Colburn v. Simms* it is said: "The court does not accurately name the damages, but, as the nearest approximation it can make to justice, takes from the wrong-doer all the profits he has made by his piracy, and gives them to the party who has been wronged." In *Baily v. Taylor*, *supra*, the ground for relief is laid down by the master of the rolls as follows: "The court [alluding to a court of equity] has no jurisdiction to give to the plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of the court by injunction, and in such case the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in case of any other injury to his property, must be at law. Unless that primary right to an injunction exists, this court has no jurisdiction with reference to a mere question of damages."

In the case of *Graham v. Plate*, 40 Cal. 593, the question as to the measure of damages was carefully considered, and hence has become a leading case. It was there argued that the entire profit should not be held to have originated from the wrongful use of the trade-mark, but that the intrinsic value of the article sold should enter into the question of value, and thereby lessen the profits. The court in response said: "Every consideration of reason, justice, and sound policy demands that one who fraudulently uses the trade-mark of another should not be allowed to shield himself from the liability for the profit he has made by the use of the trade-mark, on the plea that it is impossible to determine how much of the profit is due to the trade-mark, and how much to the intrinsic value of the commodity. The fact that it is impossible to apportion the profit renders it just that he should lose the whole."

The case of *Leather Co. v. Hirschfeld*, L. R. 1 Eq. 299, claimed by counsel for the appellees to be analogous to this case, was where the plaintiff sued in equity, as here, but elected not to take an account of the profits, to which by the decision in that case he was entitled, but elected to claim damages by reason of the invasion of his right, and, having done so, it was held that the burden was on him to show the extent of his injury, and the court would not assume, as a matter of law, that those purchasing of the defendant the simulated goods would have been the customers of the plaintiff. The appellants in this case did elect to have an account of profits, and asked for a reference that such an account might be taken. The fact that they claimed damages did not preclude them from electing to take the profits. This was in fact the true criterion of damages in equity, when no other special injury was alleged or claimed. In fact, the cases of *Neilson v. Betts*, L. R. 5 H. L. 1, and *De Vitre v. Betts*, L. R. 6 H. L. 319, referred to by counsel, estab-

lishes the rule that there cannot be an inquiry as to damages and also an account of profits. The plaintiff is not entitled, as said in those cases, "to an account of profits and also an inquiry as to damages. That principle applies generally, and without any distinction at all. It applies to every case of infringement, and therefore it must be taken to have settled conclusively that point that the patentee must, in all these cases where he has a decree, elect whether he will have an account of profits or an inquiry as to damages. He cannot have both."

In this case the chancellor refused to permit the plaintiffs to elect, but compelled an inquiry as to the entire damage the plaintiff had sustained when he was not asking for it. It is true, the appellants asked for damages in their equitable action, but this did not confine them to such damages as a jury could give in an ordinary action for fraud. The chancellor should have said: "All I can give you in the way of compensation is an account of profits; you may elect to claim such damages as you have sustained, or take an account of profits." The plaintiffs asked for an account of profits; they claimed nothing more. We have found no case, and been cited to no authority, where there has been a violation of the trade-mark, and an injunction granted, where the party wronged has been refused an account of profits, unless he had first elected to claim the actual damages he had sustained, or delayed the assertion of his claim. In the case of *Dobson v. Bigelow Car. Co.*, 114 U. S. 439, 5 Sup. Ct. Rep. 945,—a case, however, unlike this,—the plaintiff declined to take an account of profits.

In an action at law, the measure of damages would be as insisted on by counsel for the appellees; and the authorities adduced in support of their views all conduce to sustain the jurisdiction of a court of equity, and the right of the appellants to an account of profits. The plaintiff here had obtained his judgment or decree restraining the defendant from a further invasion of his rights. It was adjudged that he had violated the rights of the plaintiff by appropriating his right of property to his own use, and the only question left for future consideration was the damages sustained. The plaintiff says: "My damages, in the forum I have selected to grant the relief sought, is the net profits the appellees have realized by reason of their wrong." To these profits he is entitled. This is the doctrine of the text-books, and approved by the reported cases referred to by counsel on either side. "The net profits may be recovered in equity as profits made by the use of the plaintiff's property, and the defendant, as a constructive trustee, compelled to account for them; but at law only damages can be recovered, and they will be measured by the plaintiff's loss, and not the defendant's gain." 3 *Suth. Dam.* 631. The rule laid down by Sutherland, and clearly stated, is the correct doctrine as to the criterion of damages; and, while the general rule may not be applied to every case where there is an intentional appropriation by the one of the other's property by the use of the latter's trade-mark, or so simulating the manufacture of one as to make it resemble that of the other, so as to destroy the property in the trade-mark, we perceive no reason for denying an account of profits. The aid of a court of equity has been invoked to prevent the further appropriation of the plaintiffs' right of property to the use of the defendants. That relief has been granted, and the chancellor, at the instance of the plaintiffs, will require the trustee to settle his accounts, and account for the profits. The defendants occupy, in fact, the relation of trustees to the plaintiffs. The latter are the beneficiaries. It is upon this principle, long recognized by courts of equity, that enables the chancellor to adjust the accounts between the parties, and give to the complainant that character of relief that he could not obtain in a common-law court.

It is also urged by counsel for the appellees that the appellants have been guilty of such laches in the prosecution of their claim for profits as precludes the chancellor from giving any such relief. The imitation in this case began

first in the month of November, 1878, but was not made complete until some time in 1879. Then the precise similitude appeared, and in some five or six months thereafter this action was instituted. So there was no laches on the part of the appellants, and would have been none if the similitude had been completed in the month of November, 1878, for then only 14 months would have elapsed between the commission of the wrong in the first place and the bringing of the action. Whether a lapse of time of less than five years would constitute a bar to the recovery of profits in equity is not necessary to be decided. There might be such an acquiescence on the part of the plaintiff as would amount to consent, or work an equitable estoppel, but we find no such case presented in this record.

This case should therefore go to the commissioner, with directions to ascertain the number of simulated plows, from the time the simulation became complete, which was in the beginning of the fall of 1879, sold by the appellees, and the amount realized for them; the actual cost of the material used in the manufacture; the cost, which includes the hire of the employees, in making the plows, allowing the use of the value of the tools, machinery, power, and other facilities necessary for the manufacture; expenses of selling and advertising; the value of the labor and superintendence of the work by the appellees themselves. These items deducted from the amount realized from the sales will leave the net profits, if any. If no profits, the damages are nominal only, as an election to take the profits has been made. In some instances, interest has been allowed on the profits to the plaintiffs, but there are facts and circumstances existing in this case that authorize the chancellor to withhold interest, if such is to be regarded as the general rule.

For the reasons indicated, the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

TONEY v. HARRIS.

(Court of Appeals of Kentucky. March 29, 1887.)

1. ELECTIONS—CERTIFICATE—JUDGE.

Gen. St. Ky. c. 33, art. 5, § 2, providing that the county board for examining poll-books shall give a certificate of election to the person who has received at an election the highest number of votes for an office exclusively within the gift of the voters of the county, does not apply to the office of judge of the Louisville law and equity court, or to any other district office that requires the voters of two or more counties to fill, especially as section 8, art. 5, c. 33, and chapter 21, § 28, make it the duty of the state board to give certificates of election to the judges of the circuit and other courts of similar jurisdiction.

2. OFFICE—QUALIFYING—ACTION.

It is not absolutely essential that one who has been duly elected to office should be commissioned by the governor in order to enable him to sue for and recover the office from a usurper.

3. CONSTITUTIONAL LAW—GOVERNOR—JUDGE.

Section 9 of the Kentucky act of March 26, 1872, creating the vice-chancellor's court, (afterwards called the Louisville law and equity court,) providing that "until the next general election the vacancy existing, as well as all vacancies hereafter occurring, shall be filled by appointment by the governor," and the act of May 15, 1886, providing "that vacancies in the office of judge of the Louisville law and equity court shall be filled at the same time, and for the same period, and in like manner, and on like occasions, as vacancies in the office of the Jefferson circuit court," authorize the governor to fill a vacancy in the office not merely until an election can be held to fill it, but for the balance of the unexpired term, and the acts are so far unconstitutional. The constitution having made a radical change in the mode of filling judicial offices by making them elective, instead of appointive, it must be presumed that it was intended that the governor should have the power to appoint temporarily only until an election can be had, and not for the balance of the unexpired term.

4. ELECTION—VALIDITY—TIME OF.

An election for an officer of government, to be valid, must be held on the day fixed by law, or by proclamation or writ of election issued by the governor, for

holding the election; and, where a special election is to be held to fill a vacancy in an office, and neither the constitution nor statutes fix a day for it, and the governor refuses to issue a writ or proclamation fixing a day, no valid election can be held.

5. JUDGE—APPOINTMENT—TERM OF OFFICE.

Where the governor, having constitutional authority to appoint one to fill a vacant judgeship *only* until a special election can be held, undertakes to make the appointment for the whole of the unexpired term, the appointee will be judge *de jure*, and his acts valid, until his successor is elected and qualified.

Appeal from common pleas court, Jefferson county.

Woolley & Buckner, Hargis & Eastin, H. L. Stone, and O'Neal, Jackson & Phelps, for appellant. *Brown, Humphery & Davie, Helm & Bruce, and A. Barnett*, for appellee.

LEWIS, J. Appellant instituted this action to prevent an alleged usurpation by appellee of the office of judge of the Louisville law and equity court, and to recover of him the possession thereof; the petition and amended petition, to which a general demurrer was sustained, containing substantially the following statement of facts: That J. G. Simrall was, on the first Monday in August, 1884, elected to that office for the full term of six years, but, having resigned, appellee was by the governor appointed January 1, 1886, to fill the vacancy thus created until the general election on the first Monday in August of that year, and thereupon entered upon the duties of the office, and still claims the right to hold it; that, at the general election held at the last-named date, appellant was a candidate for election by the voters of Jefferson county, including the city of Louisville, to said office for the residue of the term, and his candidacy, as well as the fact that there would be an election for that office then held, was fully advertised in the newspapers of the county, and by cards and posters; that the qualified voters of said county took notice of the law requiring such election to be held, and had actual notice it would be held, and voted for appellant as a candidate for said office, their votes being regularly recorded in the several poll-books used at said election; that in due time thereafter the county board, appointed by law to examine the poll-books, and ascertain the correctness of the summing up of votes, made out certificates of the number of votes given in that county for appellant for that office, he being the only candidate, which show that he received 18,580, and that none were given to any other person; that one of said certificates was transmitted to the secretary of state at the seat of government; but the board for examining returns of elections for state and district officers, composed of the governor, attorney general, and auditor, refused to make out and deliver to appellant a certificate of his election to said office upon the ground stated in a written communication filed with the petition, that the office in question is exclusively within the gift of the voters of Jefferson county, and consequently the county board of examiners is alone authorized to give a certificate of election in such case. It is further stated that subsequently he received a certificate of election from the county board, and thereupon qualified, and demanded of appellee the possession of the office, which he refused to surrender, and yet wrongfully and illegally withholds from appellant.

In an amended petition it is stated that the governor, although actually informed more than six weeks prior to the first Monday in August, 1886, that a vacancy existed in said office, refused to issue a proclamation for an election on that day to fill such vacancy, and the sheriff of the county, by reason thereof, did not give official notice that an election for that purpose would be then held. It is further stated that appellant requested the governor to issue to him a commission as judge of said court for the remainder of the regular term, but he refused to do so. The special relief prayed for is judgment against appellee for the surrender to appellant of the office, together with the books, records, franchise, and emoluments appertaining thereto; and the final

judgment of the lower court was that the action be dismissed, and for the recovery by appellee of his costs.

The two sections of the Civil Code applicable to this case are as follows:

"Sec. 483. If a person usurp an office or franchise, the person entitled thereto, or the commonwealth, may prevent the usurpation by an ordinary action."

"Sec. 487. A person adjudged to have usurped an office or franchise shall be deprived thereof by the judgment of the court, and the person adjudged entitled thereto shall be placed in possession thereof; but no one shall be entitled thereto unless the action be instituted by him," etc.

The attitude of appellant in this case being that of plaintiff, to recover "he must, as the plaintiff in every other case must do, show a legal title to that which he demands." *Justices v. Clark*, 1 T. B. Mon. 82. And the question directly presented to us by this appeal is whether, assuming the facts stated by him to be true, he is entitled to the office. But to decide that question it becomes necessary to ascertain the true meaning of certain provisions of the statutes relating to the office, about which the parties differ, and if construed as it is contended on behalf of appellee they should be, to also decide as to their validity. Hence, whether the case be determined one way or the other, we will have to indicate our views in regard to appellee's title to the office; and it is proper to state his counsel have requested that we do so.

The commission filed with the petition shows that appellee was appointed by the governor for the residue of the term of six years, and not, as alleged by appellant, until the August election in 1886. Appellant admits that he has neither a certificate of election from the state board, which we think is alone empowered to give it, nor a commission from the governor; and whether the possession of either is indispensable to enable him to maintain this action we will now consider.

The first was refused under a misconception, as it seems to us, of the statute. It is true, section 2, art. 5, c. 33, Gen. St., provides that the county board for examining poll-books shall give a certificate of election to the person who has received at an election the highest number of votes for an office exclusively within the gift of the voters of the county. But, manifestly, that provision was intended to apply only to what are treated in the constitution and statutes as county officers, and not to what is called a district office, that it generally requires the voters of two or more counties to fill. This is made clear by section 6 of the same article, which makes it the duty of the state board to give certificates of the election of judges of the circuit court, considered in connection with section 28, c. 21, which requires a circuit court to be construed to mean any court of similar jurisdiction, either criminal, ordinary, or equitable. But we do not think the refusal of the state board to give the certificate should defeat appellant's recovery; for the essential fact that he received the highest number of votes given for the office has been duly ascertained by the board whose duty it is to examine the poll-books and sum up the votes.

The commission was refused by the governor upon the ground, stated by him in a communication filed with the petition, that there was not a legal election for judge of the Louisville law and equity court on the first Monday in August, 1886, because no vacancy existed in that office to be then filled by election; and it is now contended that, as appellant had no commission as judge of the court when he demanded possession of the office, he is not entitled to sue for and recover it. The power and duty of the judiciary to decide upon the validity of an act of the governor, as well as upon a law of the general assembly, when involved in the determination of a controversy properly before a court for adjudication, necessarily results from the division of the powers of the government into three distinct departments, and has frequently been exercised by this court in cases similar to this. In the cases of *Justices v. Clark*,

1 T. B. Mon. 82; *Bruce v. Fox*, 1 Dana, 447; and *Page v. Hardin*, 8 B. Mon. 648,—the decision of the governor that a vacancy in office existed, and his act in attempting to fill it, were directly before this court for revision, and in each one it was decided no vacancy existed, his act was invalid, and the person appointed by him was not entitled to the office.

In the last-named case the relative powers and duties of the departments are defined in the following language: "When, by the constitution or the law, the governor has a discretionary power, or when, on any ground, his act is made conclusive as to all rights involved, it is of course not within the province of a court to inquire into the propriety or impropriety of his act. Such a power controls all rights which it may affect, and a properly authenticated act done in pursuance of it cannot be questioned, for the reason there can be no legal right coming in conflict with it. Rights dependent upon a discretionary power cannot exist in opposition to it, but terminate at its will. The question, however, whether there is such a power in a given case, or whether any particular act or power is of the character referred to, is a judicial question whenever the right in litigation before a judicial tribunal depends upon it, and requires its decision. If any office be held at the will of the governor, the appointee could not complain of the violation of any legal right by the revocation of his appointment, however sudden or groundless. But, if the governor were to attempt to displace any officer at his mere will, he might undoubtedly make the question, in a legal contest with a proper party, whether the governor had such power, and whether his right to the office was terminated. The question of right on his part, and of power on the part of the governor, would be the same; and, as he might unquestionably assert his right by appropriate legal remedy, the question of power would necessarily be brought within the cognizance of the court. And so any power claimed or exercised by the governor may be brought in question before a judicial tribunal if it be relied on, and material either in opposition to any right asserted by legal remedy, or in support of it. Such we understand to be the operation of the judicial power and the law in the protection of individual rights under a constitutional government. The judiciary pretends to no direct control over the action of the legislature or the supreme executive; but it may decide upon the validity of the acts of either affecting private rights. And, by a writ of *mandamus*, it may coerce a ministerial officer, though of the executive department, to the performance of legal duty for the effectuation of legal right. It must decide all questions essential to a determination of the rights of the parties in a judicial proceeding coming properly before it." The plaintiff in that case was the secretary of state, whom the governor had attempted to remove from office, and the defendant was the auditor; but the decisive question was one of right on the part of the plaintiff, and of power on the part of the governor. There his act, which this court decided invalid, was, as it is here, in opposition to a right "asserted by legal remedy."

But, if the position of counsel be correct, it results that, although the decision of the governor upon the legality of an election is not, nor can be under our form of government, conclusive against the right of a person claiming an office in virtue of such election, still he may, by withholding the commission, not only deprive the claimant of it, but prevent any inquiry or determination by a judicial tribunal as to his title. Section 15, c. 81, Gen. St., provides that the officers named therein, including judges of the circuit, criminal, and common pleas courts, chancellors and vice-chancellors, shall have commissions issued to them by the governor. But it was not intended thereby that the possession of a commission should be a condition of the right to maintain an action for any such office. Section 2, art. 11, c. 33, provides that each officer elected by the voters of a judicial district "shall enter upon the discharge of the duties of his office after the commencement of his term, as soon as he receives his commission." If the decision by this court should be

in favor of appellant, it would be regularly followed by a judgment placing him in possession of the office, and depriving appellee of it, which judgment the court would unquestionably have the power to enforce. But whether appellant could then, according to a fair construction of the last-named section, enter upon the discharge of the duties of the office without having received the commission, is a question it is improper to discuss, because we are not permitted to presume that the governor, whose duty it is to take care that its laws be faithfully executed, would in such a case leave the law creating the office in question suspended.

We will now proceed to the discussion of the validity of and construction to be given to the act of March 26, 1872, creating the vice-chancellor's court, the name of which was subsequently changed to that of the Louisville law and equity court, and the amendatory act of May 15, 1886. The first and ninth section of the act of 1872, the only two necessary to quote, are as follows:

"Section 1. There shall be elected at the next general election of the qualified voters of Jefferson county, and every six years thereafter, a vice-chancellor of the Louisville chancery court, who shall hold his office for the term of six years, and shall receive the same compensation and have the same qualifications as the chancellor of said court," etc.

"Sec. 9. This act shall take effect and be in force from and after its passage; *and until the next general election the vacancy existing, as well as all vacancies hereafter occurring, shall be filled by appointment by the governor.*"

The act of May 15, 1886, is as follows:

"An act providing for filling vacancies that have or may hereafter occur in the office of judge of the Louisville law and equity court.

"Section 1. That vacancies in the office of judge of the Louisville law and equity court shall be filled at the same time, and for the same period, and in like manner, and on like occasions, as vacancies in the office of the Jefferson circuit court.

"Sec. 2. *But this act shall not apply to or in any manner affect the term of the present incumbent of said office of judge of the Louisville law and equity court.*

"Sec. 3. This act shall take effect from and after its passage."

It is argued for appellant it was intended by section 9 of the act of 1872 that in case of a vacancy in the office occurring at any time after the first Monday in August of that year, when the first election under the act was held, it should be filled for the residue of the regular term unexpired, by an election, at the general election in August next thereafter, and that the governor has no power to fill a vacancy for a period extending beyond a general election; and that the object and effect of section 2 of the act of May 15, 1886, was to leave the act of 1872, thus construed, in force until the first Monday in August, 1886, at which time an election to fill the vacancy for the residue of the term was duly held, and appellant was legally elected. On the other hand, it is contended for appellee that, by section 9 of the act of 1872, the governor was empowered to appoint and commission appellee to fill the vacancy caused by the resignation of Judge Simrall for the whole of the unexpired term of six years, which he did do January 1, 1886; and that the meaning and object of the proviso contained in section 2 of the act of May 15, 1886, was to leave the right of appellee to the office, thus defined, unaffected.

The latter clause of section 9 is somewhat awkwardly drawn, but we think the construction of appellee is the correct one. The words "until the next general election," connected by the conjunction "and" with the preceding clause, declaring when the act should take effect, we think relate to a particular period of time, beginning at the passage of the act, and ending at the next or nearest general election thereto, during which it was the intention "the vacancy existing" by operation of the act itself should be filled by appointment. To make them apply to vacancies occurring after the termination of

that period requires, not only a transposition of the words of the sentence, but the substitution of "each" or "any vacancy" for "all vacancies." It therefore follows that the length of time for which the governor is empowered by that section to fill the vacancies occurring after the first election under the act is the whole of the term unexpired when an appointment is made. Such is the natural import of the language in reference to such vacancies, unaccompanied, as we think it is, by any qualifying words; and as the section manifestly was not intended to be construed in connection with nor made subservient to the provisions of the constitution and existing statutes relating to the circuit and Louisville chancery courts, such must be regarded as its meaning. The act was thus construed by the predecessor of the present governor, who made an appointment to fill a vacancy in the office for two years, the legality of which the legislature, by an act passed in 1884, continuing the appointee in office to the end of the regular term, seems to have recognized. And section 1 of the act of May 15, 1886, properly construed, shows the same legislative construction.

It is, however, argued for appellant that such a construction renders so much of the act as relates to filling vacancies unconstitutional, and the court should therefore, if possible, so construe section 9 as to make it harmonize with the constitution. If a statute be fairly susceptible of two constructions, that one in harmony, rather than the one in conflict, with the constitution, should be adopted; and, if there be a reasonable doubt on the subject of the validity of a statute, it is the duty of the court to hold it to be constitutional. But a court is never justified in perverting the true meaning of a statute, to avoid deciding upon its constitutionality, nor for any other purpose. It seems to us, however, that the application of the rule would not benefit appellant more than appellee, because, if section 9 be construed either way contended for, it is liable to the same objection.

Section 1, art. 4, of the constitution is as follows: "The judicial power of this commonwealth, both as to matters of law and equity, shall be vested in one supreme court, to be styled the court of appeals, the courts established by this constitution, and such courts inferior to the supreme court as the general assembly may from time to time erect and establish."

There being no express provision of the constitution in regard to the manner of selecting or the qualifications of judges of the courts authorized to be erected and established, nor as to the mode of filling vacancies in the offices thus created, the question arises whether as to any or either of these matters there are implied limitations and restrictions on the power of the general assembly; for, if so, they are as obligatory as if they had been expressed. For the sure and true interpretation of the organic as well as the statute law it is useful to look to the occasion and necessity of the law, the mischief felt, and remedy had in view, "and then the office of all the judges is always to make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers, *pro bono publico*."

It seems to us that it is only necessary to look at the radical and complete change made by the present constitution in the tenure and mode of filling offices from the former system, to be convinced that it was the design of its framers, who but obeyed the sovereign will, that all judicial offices, from the highest to the lowest grade, whether expressly named or to be established by the legislature, should be filled by election by the people, and in no other way. In *Speed v. Crawford*, 3 Metc. (Ky.) 207, decided in 1860, this court used the following language: "To curtail the power of appointment to office by the executive, and to extend the election principle, was one of the leading objects of the authors of the constitution. This purpose was not more distinctly manifested in the expression of public sentiment which led to the

call of the convention than it has been in the provision of the instrument itself. * * * The great object in the change of the system was to refer to the people the choice of their officers, of all grades and classes, whether state, district, county, city, or town offices. That choice was to be made through the instrumentality of an election." To except from the application of the election principle offices which the general assembly was authorized to erect and establish, particularly those of a judicial character, destroys the consistency and harmony of the constitution, and defeats what was manifestly a controlling idea, and therefore we are bound to conclude, if it had been so intended, it would have been in express terms provided.

The only exception or even modification to be found, is in section 10, art. 6, and that proves no other was intended. That section is as follows: "The general assembly may provide for the election or appointment, for a term not exceeding four years, of *such other county or district ministerial and executive officers* as shall from time to time be necessary and proper."

But it is useless to argue further to prove what is so plain, and has been so universally accepted as true since the formation of the constitution. If these offices, erected and established under section 1, art. 4, are to be filled in the mode prescribed by the constitution, it follows that by it, and not by statute law, are the qualifications of the officers to be determined; for it is not to be presumed that the framers of the constitution intended to fix the qualifications of judges of the circuit court and Louisville chancery court, and leave to the legislature the discretion as to the qualifications of judges of other courts having the same general jurisdiction. By what rule, then, are the qualifications of judges of the statutory courts to be determined?

In *Rudd v. Woolfolk*, 4 Bush, 355, the principal question involved was as to the construction of section 28, art. 4, of the constitution, which is as follows: "The general assembly shall provide by law for holding circuit courts when from any cause the judge shall fail to attend, or, if in attendance, cannot preside." And the court said: "The circuit court being of general common-law, equity, and criminal jurisdictions, all the statutory courts having general jurisdictions of either of these branches may be said to be carved out of it, and therefore, substantially, and for every legal and constitutional purpose, circuit courts, whatever may be their designation by name or cognomen. * * * Looking at the evil to be remedied, and the objects in view, we can hardly suppose the convention attached more importance to the name than the jurisdiction of the court. Therefore we construe the meaning of this clause of the constitution as conferring power to provide by law for the election of special judges for any court carved out of the jurisdiction of the circuit court, because *pro tanto* it is a circuit court, although called by another name."

A person, to be eligible under the constitution as judge of the circuit or Louisville or chancery court, must be a resident of the district for which he may be a candidate two years next preceding his election, at least 30 years of age, and have been a practicing lawyer eight years. But a person is eligible to the office of judge of the county, city, or police court, or as a justice of the peace, who is over 21 years of age, and shall have resided one year in the county or district in which he is chosen, one year next preceding his election. It will be perceived that, while eight years' experience and practice as a lawyer is a necessary qualification under the constitution for a judge of the circuit court and Louisville chancery court, there is no such qualification required for any of the other judicial officers named. It is therefore manifest that it was not intended to give to the legislature the power to prescribe the qualifications of a judge of a statutory court having the same general jurisdiction as the circuit court, but that they should be regulated by the provisions of the constitution applicable to circuit judges; and such has been the uniform legislative construction since the establishment of the first statutory

court, in 1865. If there is harmony with the obvious design and general construction of the constitution, judges of such courts must be elected, and, belonging to the same class, erected for the same purpose, invested with the same dignity and powers, must have the same qualifications as judges of the circuit court; the logical conclusion is that vacancies, being within the reason of the constitution, must be regarded as within the constitution itself, and therefore intended to be filled in the same manner as vacancies in the office of circuit judges are directed to be filled.

Section 26, art. 4, is as follows: "If a vacancy shall occur in the office of judge of the circuit court, the governor shall issue a writ of election to fill such vacancy for the residue of the term, provided that, if the unexpired term be less than one year, the governor shall appoint a judge to fill such vacancy." The same provision is made as to a vacancy in the office of judge of the court of appeals; and at the first session of the legislature after the adoption of the constitution, it was provided that, in case of a vacancy in the court of appeals or circuit court, the day appointed for filling it shall be within six weeks after the governor receives notice of a vacancy, and such has been the law ever since. But in the case of every other judicial office named in the constitution, except the Louisville chancery court, the power to provide by statute for filling vacancies is given to the general assembly. The courts which the general assembly is authorized by section 1, art. 4, of the constitution, to erect and establish, are not required to be necessarily of less or even of the same jurisdiction as circuit courts, but inferior only to the court of appeals; and under that section the legislature has established the superior court, and invested it with jurisdiction of appeals from the circuit court. And consequently, under the construction of the constitution contended for, we have the singular anomaly of qualifications of age and experience and knowledge of the law required of a judge of the inferior court, which the legislature, in its discretion, may not at all require of the judge of the appellate court.

It is impossible to examine the constitution without coming to the conclusion that the framers intended that vacancies in the higher class of judicial offices should not, except in case of practical necessity, be filled by the governor, but as speedily as possible by the people themselves, who manifested through their delegates jealous disposition to control the selection of such offices by elections. It seems to us that no one can for a moment believe that the framers of the constitution ever intended the legislature to have, or contemplated that it would attempt to exercise, any more discretion as to the selection and qualifications of judges of such courts, or as to vacancies, than is given in respect to the circuit court. To suppose they did, is to assume that, while explicitly providing the circuit judges should be elected, it was intended to give the legislature discretion as to the mode of selecting judges of statutory courts of equal importance and dignity; while it was deemed necessary to prescribe as qualifications a certain age, knowledge, and experience in law for the circuit judge, power was properly given the legislature to dispense with such qualifications as to judges of statutory courts upon whom might be imposed precisely the same duties; and, while it was deemed necessary to provide for promptly filling vacancies in the office of circuit judge, such vacancy in the office of a judge of a court created by statutes might be filled by appointment for the residue of the term unexpired, without regard to the length of time.

It seems to us that the power attempted to be conferred on the governor by section 9 of the act of 1872, is a palpable evasion of the plain intent and meaning of the constitution, and, if now sanctioned as a precedent, will result in annulling the design, defeating the purpose, and violating the fundamental principles, of the constitution; for, if it may be in this instance violated upon the ground of the inconvenience and unreliability of popular elections, other and repeated encroachments upon the constitution might be expected to follow.

If we are correct in these views, it results that section 2 of the act of 1886 is likewise invalid; and, as the first section of that act is but a mere re-enactment of the provision of the General Statutes on the subject of filling vacancies in the office of circuit judge, alike applicable to the office of judge of the Louisville law and equity court, it follows that neither before nor after the passage of that act could the vacancy existing be filled at any other time than that fixed in the proclamation or writ of election issued by the governor, and that an election to fill the vacancy could not be legally held at all without such proclamation. To make the election of an officer of government legal, there must be a time fixed for holding such election either by law or by the officer authorized by law to prescribe the time. If it was not so, there could be neither a fair, orderly, or free expression of the popular choice. If one candidate for office and his friends may, without authority of law, fix a time for holding an election to fill a vacancy, his opponent may as well fix another and a different time. Neither the constitution nor statutes fixes the first Monday in August as the day in course for holding an election to fill vacancies in the office of circuit or other judges of the same class, and such election, therefore, can be held legally on that day only when appointed by writ of election. To sanction elections for offices held without lawful authority would be to countenance confusion, tumult, and unfairness. A proposition so plain needs no citation of authority to support it. We are therefore of the opinion that the facts stated by him do not show in appellant a legal title to the office.

Having incidentally, but necessarily, expressed our views as to the title of appellee to the office, it is proper to add that, in our opinion, his appointment by the governor was, under section 9, art. 3, of the constitution, legal; and, though the governor had no power to make the appointment for the whole of the unexpired term, nor, under that section, longer than the time required by law, to be fixed by proclamation, for filling the vacancy by election, appellee should be judge *de jure*, and his official acts valid, until his successor is elected and qualified. Judgment affirmed.

HEAD v. MARTIN.

(Court of Appeals of Kentucky. March 31, 1887.)

HOMICIDE—JUSTIFICATION—ARREST.

A peace officer, having arrested one upon a warrant for bastardy or other misdemeanor may not, in order to prevent the offender's escape, kill him when *fleeing*.

Appeal from circuit court, Oldham county.

Ben S. Robbins and *Carroll & Barbour*, for appellant. *Ira Julian*, for appellee.

HOLT, J. The single question presented is whether a peace officer may, in order to arrest one upon a warrant for bastardy, or to prevent his escape after arrest, kill him *when fleeing*. If he has the right, under such circumstances, to shoot and wound him, as was done in this instance, then it necessarily follows that he cannot be held responsible if it results in death.

It is attempted to draw a distinction between a case where one is attempting to avoid arrest, and where one is endeavoring to escape after arrest. If, however, the offender is *in flight*, and is not at the time resisting the officer, then the law is the same whether he be fleeing to avoid arrest, or to escape from custody. 2 Bish. Crim. Law, § 664; Whart. Hom. §§ 212-214.

The averments of the answer, admitted by the demurrer, show that the appellee, Martin, had in fact been arrested by the appellant, Head, as deputy-sheriff, and was shot by the latter *when fleeing* from his custody; but the fact that an arrest had been made, does not alter the law of the case. A bastardy proceeding is, under our law, a civil one; yet it proceeds in the name of the commonwealth, and, under the statute, the offender is subject to arrest. As

to the question now before us, it is therefore to be regarded in the same light as a misdemeanor.

Our statute is silent, unless it may be regarded as speaking by implication, as to the force an officer may use in effecting an arrest or in recapturing a prisoner. It merely provides that "no unnecessary force or violence shall be used in making the arrest." We therefore turn to the common law for guidance. By it an officer, in a case of *felony*, may use such force as is necessary to capture the felon, even to killing him when in flight. In the case of a *misdemeanor*, however, the rule is different. It is his duty to make the arrest; he may summon a *posse*; and may defend himself, if resisted, even to the taking of life; but when the offender is not resisting, but fleeing, he has no right to kill. Human life is too sacred to admit of a more severe rule. Officers of the law are properly clothed with its sanctity; they represent its majesty, and must be properly protected; but to permit the life of one charged with a mere misdemeanor to be taken when fleeing from the officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his *posse*, and take the offender. The reason for this distinction is obvious. The security of person and property is not endangered by a petty offender being at large, as in the case of a felon. The very being of society and government requires the speedy arrest and punishment of the latter.

Bishop says: "The justification of homicide happening in the arrest of persons charged with misdemeanors or breaches of the peace is subject to a different rule from that which we have been laying down in respect to cases of felony; for, generally speaking, in misdemeanors it will be murder to kill the party accused for flying from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; but, under circumstances, it may amount only to manslaughter if it appear that death was not intended. * * * But in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance, and the offender is killed in the struggle, the killing will be justified." 2 Bish. Crim. Law, §§ 662, 663.

The same rule may be found in the works of the other common-law writers. Hale says: "And here is the difference between civil actions and felonies: If a man be in danger of arrest by a *capias* in debt or trespass, and he flies, and the bailiff kills him, it is murder; but if a felon flies, and he cannot be otherwise taken, if he be killed, it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods." 1 Hale, P. C. 481.

So great, however, is the law's regard for human life, that if even a felon can be taken without the taking of life, and he be slain, it is at least manslaughter. Even as to him, it can be done only of necessity. An officer, in arresting or preventing an escape for a misdemeanor, may oppose force to force, and sufficient to overcome it, even to the taking of life. If the offender puts the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must not use any greater force than is reasonably and apparently necessary for his protection. It is often said that an officer may use such force as is necessary to make an arrest. Generally speaking, this is true. It was so said in the cases of *Fleetwood v. Com.*, 80 Ky. 1, and *Mockabee v. Same*, 78 Ky. 380. But in these a deadly affray between parties was in progress, or about to occur, endangering the lives, not only of the participants, but innocent persons; and it was the duty of the officer, when resisted, to quell it, even at the sacrifice of human life. In those cases he was justified in killing, not only *se defendendo*, but to prevent the impending commission of a felony.

In cases, however, of a mere riot upon one day, and an attempted arrest upon the next, surely the officer would not be justified in killing the offender when fleeing from custody or to escape arrest. A person commits a misde-

meanor by the use of profane language. He flees from the officer attempting to arrest him, or from custody. The dictates of humanity, as well as the legal rule, forbid the taking of his life under such circumstances. The officer must, in such a case, summon his *posse*, and take him. He has no more right to kill him than he would have if the offender were to lie down and refuse to go with him.

It is said, however, that the appellee was in the wrong; that there was a sort of contributory neglect upon his part, which produced the injury. It was not, however, such neglect or conduct as, under ordinary circumstances, would produce the injury. It could not be expected that in consequence of it the officer would go beyond the limit of the law, and employ force when and of a character forbidden by it. It is not a question whether unnecessary force was used, but the answer of appellant shows that he used it when and in a degree forbidden by the law.

The demurrer was therefore properly sustained, and the judgment must be affirmed.

WARD v. BLACKWOOD, Adm'r.

(*Supreme Court of Arkansas.* February 26, 1887.)

1. SET-OFF AND COUNTER-CLAIM—UNLIQUIDATED DAMAGES—ASSAULT AND BATTERY.

In an action brought by one of the prison guards against the keeper of the penitentiary for damages caused by an assault and battery committed upon him, the damages caused the keeper, by the escape of convicts through the negligence of the plaintiff, is not the proper subject of a counter-claim.

2. NEW TRIAL—EXCESSIVE DAMAGES.

In an action for an assault and battery, if the plaintiff is entitled to recover, and the amount of the verdict is a fair compensation for the injuries complained of, the verdict of the jury will not be disturbed.

3. ASSAULT AND BATTERY—ACTION FOR—DAMAGES.

In an action for an assault and battery, the elements of damages are the personal indignity involved in the assault, the plaintiff's bodily pain and suffering, loss of time and labor, and diminished capacity to work from the date of the assault, and the expenses of medical and surgical attendance consequent upon the injuries received; following *Ward v. Blackwood*, 41 Ark. 300.

4. NEW TRIAL—ARRIVING AT VERDICT BY LOT—AFFIDAVITS OF JURORS.

The affidavits of jurors showing that the jury arrived at their verdict by lot are not admissible to impeach the verdict.

Appeal from circuit court, Faulkner county.

R. C. Newton and *Geo. W. Caruth*, for appellant. *W. L. Terry* and *Blackwood & Williams*, for appellee.

BATTLE, J. This action was brought by Massey, in his life-time, against Ward, for damages caused by an assault and battery committed upon him by Ward on the twenty-fifth of August, 1880. Massey having died since its commencement, it was revived in the name of Blackwood, as his administrator. Ward answered, and alleged that, at the time the assault and battery was committed, he was the lessee and keeper of the Arkansas penitentiary; that on the day of the trespass complained of Massey was one of the prison guards in charge of a large number of convicts, engaged at work at Argenta; that some time in the morning Massey negligently went to sleep, and suffered several of the most desperate convicts to escape; that, in the confusion produced by this escape, he went into the yard where Massey was, and struck him two or three times with a piece of thin scantling; that he was damaged to the extent of \$1,500 by reason of the loss of valuable dogs, and of the labor of the escaped convicts, caused by Massey's negligence. He asked for judgment against plaintiff for the amount of his damages.

There was evidence introduced in the trial of the action tending to prove.

among other things, the following state of facts: On the twenty-fifth of August, 1880, Ward was the lessee and keeper of the Arkansas penitentiary, and Massey was in his employment as a guard over a large number of convicts at work in Ward's brick-yard, opposite the city of Little Rock. Three of these convicts forcibly disarmed Massey while on guard, and made their escape. Ward was not in the brick-yard at the time, but came up soon after, and, seeing Massey standing guard with a piece of plank in his hand, accused him of letting the convicts escape, and Massey replied: "I could not help it. They slipped up behind me, back of the lumber pile." Ward, thereupon abused him, and ordered him out of the yard, and, as he turned to go, struck him violently on the back, and Massey fell; and as he got up Ward threw a piece of brick at him, and as he was going out ordered the convicts present to put him out, and they seized him, and threw him down. The injuries inflicted by Ward were serious and painful. On the other hand, there was evidence introduced tending to prove that there was no lumber, at the time of the escape of the convicts, nearer to the place where Massey at a prior time had been placed as a guard, and where Ward found him soon after the escape, than 75 yards; that Massey, several days after the escape, admitted he was asleep when the convicts disarmed him; that the period of the confinement of the three convicts who escaped extended beyond the year 1883; that Ward's lease expired in 1883; and that the labor of the three convicts was worth \$675 a year.

The trial court directed the jury to respond to the following interrogatory: "Do you find from the evidence that the convicts escaped through the negligence of Massey?" The jury returned a verdict in favor of plaintiff for \$1,800, and to the interrogatory answered, "No." The defendant filed a motion for a new trial, and, the plaintiff remitting \$75, it was overruled, and defendant saved exceptions and appealed.

It is first insisted by appellant that he was entitled to judgment on his counter-claim to the extent of the damages proven; that the jury, in disregard of the law and evidence, refused to so find, and that, as to this issue, the verdict was totally unsupported; and that, therefore, the judgment of the court below should be reversed. If it be true the special finding of the jury was contrary to the evidence, it would be no ground for reversal, unless it was prejudicial to appellant; and it was not prejudicial if he had not the right to plead the damages claimed by him as a counter-claim. Had he this right? Appellee insists he had not.

The Code of Civil Practice of this state provides that a defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he shall have. The counter-claim meant by the Code is defined to be "a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." Mansf. Dig. §§ 5083, 5084. The alleged tort of the defendant which constitutes the foundation of plaintiff's action is the assault and battery committed by appellant, and the foundation of the appellant's counter-claim is the escape of the three convicts through the alleged negligence of Massey. It cannot be said that the escape of the three convicts arose out of the assault and battery committed by Ward. Is it connected with the subject of the action? What is the subject of an action?

Mr. Pomeroy, in his work on Remedies and Remedial Rights, says: "It would, as it seems to me, be correct to say in all cases, legal or equitable, that the subject of the action is the plaintiff's main primary right which has been broken, and by means of whose breach a remedial right arises. Thus the right of property and possession in ejectment and replevin, the right of possession in trover or trespass, the right to the money in all cases of debt,

and the like, would be the subject of the respective actions. Although in a certain sense, and in some classes of suits, the things themselves, the land or chattels, may be regarded as the subject, and are sometimes spoken of as such, yet this cannot be true in all cases; for in many actions there is no such specific thing in controversy over which a right of property exists. The primary right, however, always exists, and is always the very central element of the controversy, around which all the other elements are grouped, and to which they are subordinate." Pom. Rem. § 775; Bliss, Code Pl. § 126.

This view of what is the subject of an action appears to have been adopted by this court in *White v. Reagan*, 32 Ark. 281.

A few cases will serve to illustrate what the subject of an action is.

Glen & Hall Manuf'g Co. v. Hall, 61 N. Y. 226, was an action to restrain the defendant from using an alleged trade-mark, "Number 10," on the ground that it was a part of the plaintiff's trade-mark. The defendant admitted that he used the words "Number 10" in his business, but alleged that it was a part of his own trade-mark, and set up that the plaintiff had fraudulently used the same for the purpose of unfairly securing the defendant's customers, and asked, by way of counter-claim, that the plaintiff might be enjoined from using the words in the course of its business to the defendant's damage. The court said: "There will, then, be two distinct cases provided under subdivision 1: (a) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim; (b) a cause of action connected with the subject of the action. The present case falls under the last of these instances. A subject is that on which any operation, either mental or material, is performed; as, a subject for contemplation or controversy. The subject of an action is either property, as illustrated by a real action, or a violated right. In the present instance the subject of the plaintiff's action was the expression 'Number 10,' of which he claimed ownership as a designation of his business. The defendant's counter-claim is a cause of action against the plaintiff growing out of his infringement of the defendant's right to the same expression which he asserts belongs to himself. In the language of the Code, it is 'connected' with it. * * * The policy of the Code requires a liberal construction of this section, to the end that controversies between the same parties, on the same subject-matter, may be adjusted in a single action." See, also, *Cornelius v. Kessel*, 58 Wis. 237, 16 N. W. Rep. 550.

Simkins v. Columbia & G. R. Co., 20 S. C. 258, was an action against a railroad company for the killing of two horses by the defendant's train. The defendant denied liability, and asserted, as a counter-claim, injuries done to the engine and cars of the company by the presence of these horses on the track at the time they were killed. The court said: "The alleged tort of the defendant which constituted the foundation of plaintiff's action is the negligent running of defendant's cars, by which his horses were killed. The alleged tort of plaintiff, which is the foundation of defendant's counter-claim, was the alleged illegal presence of his horses upon the railroad track, by which the train was thrown from the track, and the engine injured. The injury to the engine, in point of time, it is true, followed in quick succession that of the injury to the horses; but it cannot be said that the illegal presence of the horses on the track, which is the foundation of defendant's counter-claim, arose out of the negligence of defendant in running the cars, which is the foundation of plaintiff's action. Nor was it connected with the subject of plaintiff's action." And the court held that the damages to the defendant's engine resulting from the trespass of plaintiff's horses on its track were not a proper subject of a counter-claim, because they did not arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, and were not connected with the subject of the action.

In California they have a statute which defines a "counter-claim" as follows: "The counter-claim mentioned in the last section shall be one existing

in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: *First*, a cause of action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim or defendant's defense, or *connected with the subject of the action*; *second*, in an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action." In *Maddougall v. Maguire*, 35 Cal. 274, the court held that, in an action to recover damages for an assault and battery, a libel published by the plaintiff of and concerning the defendant, which was the provocation to the offense, did not constitute a counter-claim under this statute.

Barhyte v. Hughes, 33 Barb. 320, was an action for an assault and battery. The defendant set up, by way of counter-claim, an assault and battery committed upon him by the plaintiff *prior* to the one described in the complaint. The court held that the two occurrences were so independent of each other that they could not be disposed of in one action.

The subject of this action was the right of Massey to immunity from personal violence. The breach or infringement of that right constituted appellee's cause of action. The cause of action of appellant against appellee, which was the escape of three convicts through the alleged negligence of Massey, had no connection whatever, direct or remote, with the subject of this action, and was not a proper subject of a counter-claim. But it is insisted by appellant that the special finding of the jury contrary to evidence proves that the verdict of the jury was the result of prejudice against him. The right of plaintiff to recover damages is not denied. Defendant admitted the assault and battery, and thereby necessarily conceded the plaintiff's right to recover. If the damages allowed by the jury were not excessive, he had no right to complain. Verdicts of juries are not set aside on account of the amount of recovery, unless the amount is excessive. If the plaintiff was entitled to recover, and the amount of the verdict was a fair compensation for the injuries complained of, the verdict of the jury should be permitted to stand. Upon a careful consideration of all the evidence in the case, we do not think the damages recovered were excessive.

It is next urged by appellant that the court below erred in instructing the jury, at the instance of plaintiff, as follows: "The court instructs the jury that the defendant, Ward, is liable in this action, not only for any wrongful assault which he himself may have made upon the plaintiff's intestate, Massey, but also for any wrongful assault which he may have caused to be made upon him by convicts acting under his orders on the occasion named in the complaint. If the jury find this to be true, and if the jury find for the plaintiff, it will be their duty to find for the plaintiff in such amount as would be a fair compensation to the plaintiff's intestate, Massey, for the injuries he suffered from any such wrongful assault; and in estimating such amount the jury may take into consideration the pecuniary outlay for medical and surgical attendance, loss of time and labor, and diminished capacity to work thereby occasioned from the date of such assault to said Massey's death, and also the personal indignity involved in such assault, and the bodily pain and suffering said Massey may have endured therefrom; and, in estimating the damages for such personal indignity and bodily pain and suffering, it will be the duty of the jury to say, within the bounds of reason and justice, what amount they believe to be a fair compensation for the injury sustained." It is insisted that this instruction was erroneous, because it furnished an improper measure of damages. But this question was settled by this court in this action when it was here before. Upon this point it said: "The elements of damages are the personal indignity involved in the assault, the plaintiff's bodily pain and suffering, loss of time and labor, and diminished capacity to work from the date of the assault to Massey's death, and the expenses of medical and surgi-

cal attendance during his injuries consequent upon the injuries received." *Ward v. Blackwood*, 41 Ark. 300.

It is next contended that this instruction was erroneous because it permitted the jury to allow such damages as they, within the bounds of reason and justice, believed to be a fair compensation for the injury sustained, without regard to the evidence. But this and all other instructions given to the jury are to be considered together, and as a whole. In this connection the court instructed the jury among other things, that the burden of proof was upon the plaintiff to show, by evidence fairly preponderating, that Massey was unlawfully assaulted by Ward, and also to what extent Massey was *actually damaged*; and that, if they found Ward unlawfully assaulted and beat Massey, then Ward was liable for actual damages; and that, in arriving at the amount they should assess, they should take into consideration all the circumstances surrounding both parties. In construing these instructions together we see no conclusion to which the jury could fairly and reasonably have come, except that in considering their verdict, and the amount thereof, they should be governed by the evidence. Moreover, one of the elements of damages in the case was the pain and suffering caused by the wrong complained of, for which there is no legal measure of damage. The amount allowed therefor, if any, must to some extent have been left to the fair discretion and judgment of the jury.

One of the grounds of appellant's motion for a new trial was misconduct of the jury in arriving at their verdict by lot. In support of this ground the following affidavit was filed: "On this day comes J. D. Murphy, I. B. Durrall, and J. M. Simpson, who state, on oath, that they were members of the jury who tried and returned the verdict in the above-entitled cause; that the jury differed as to the amount of the said verdict, and finally concluded to write the amount of \$2,000 on one slip of paper, and the sum of \$1,800 on another slip of paper, and the two were then placed in a hat, and one of the jurors was requested to draw one of said pieces of paper out of the hat, which was done, and the slip of paper with the \$1,800 written upon it was drawn, and the verdict was made and rendered at such amount, and so returned it." And the plaintiff objected to the admission of it as evidence for any purpose whatever. Was it admissible? In *Pleasants v. Heard*, 15 Ark. 407, the affidavit of Strawn, one of the jurors, was filed to show that the jury agreed that each member thereof should write down the amount that he was in favor of, and that these several amounts should be added up, and their sum divided by 12, the number of the jurors, and that the quotient should be taken and written as the amount of their verdict, which was accordingly done, and the verdict so arrived at was returned into court as the verdict of the jury. Chief Justice ENGLISH, in delivering the opinion of the court, said: "Though there are some conflicting cases, we think it may be safely decided, upon authority, and for many good reasons, that the affidavit of the juror Strawn was not admissible in this case to impeach the verdict rendered by him, for the cause stated in the affidavit." *Thomp. & M. Jur.* § 414. The rule laid down in *Pleasants v. Heard* has not been changed or repealed in civil cases, but, on the contrary, in such cases, remains in full force.

We find no error in the judgment of the court below prejudicial to appellant, and it is affirmed.

ADAMS v. EDGERTON.

(*Supreme Court of Arkansas.* March 5, 1887.)

1. ACTION—MISJOINDER—PRACTICE—APPEAL.

Where there is a misjoinder of causes of action and of parties, but the defect does not go to the jurisdiction of the court, the remedy is by motion to strike out the names of the parties, and the cause of action improperly joined, but the objection to such defect, unless made in the trial court, will be considered as waived.

2. FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—VOLUNTARY SETTLEMENT—SUBSEQUENT PURCHASER.

A voluntary settlement by a husband upon his wife of the whole of his property is void against a subsequent *bona fide* purchaser without notice.

3. DEED—VALIDITY—DESCRIPTION—VENDOR AND PURCHASER.

Where a husband made a settlement of land upon his wife, describing it as "three-fourths of the south part of the north-west quarter of section 30, township 1 south, range 10 west, containing forty-four and 31-100 acres," "held that the deed was void for uncertainty in the description, and a purchaser for value was not affected with notice of the wife's title, or of those claiming under her.

4. EQUITY—REFORMING DEED—HUSBAND AND WIFE.

A deed of settlement of land on a wife by her husband, in which no boundaries are given, and no landmarks, natural or artificial, are mentioned, will not be reformed in equity against a subsequent purchaser for value.

Appeal from chancery court, Pulaski county.

P. C. Dooley, for appellant. *John Fletcher*, for appellee.

SMITH, J. In the year 1872, Edgerton sold to William H. Rector and Henry Powers a block of ground in Capital Hill extension to the city of Little Rock for \$1,750, of which sum \$550 were paid down, and for the residue the notes of the purchasers were taken. In 1874, shortly before the maturity of the last of these purchase notes, Rector conveyed his other lands to Powers, and Powers on the same day reconveyed to Rector's wife, Celine. The consideration expressed in the two deeds is respectively \$1,000 and \$1,200, but no money was in fact paid, nor any other thing of value delivered or agreed to be paid or delivered; so that the transaction is transparently a voluntary settlement by Rector upon his wife. In 1876, Edgerton obtained a decree in the proper court against Rector and Powers for \$1,528, and for the enforcement of his lien as vendor on the block sold them. Under this decree the property was sold for \$100. In 1878, Celine Rector died childless; her heirs being her mother and her brothers and sisters. In 1881, Edgerton caused execution to be issued for the balance due on his decree, and it was levied upon one of the tracts which had been conveyed to Celine Rector. Edgerton and Rector then agreed to compromise the indebtedness at \$500, for which sum Rector executed his notes, and secured the same by a mortgage upon the tract so levied upon. Edgerton seems to have been ignorant of the previous conveyances to Powers and to Celine Rector, although this is immaterial, if he was chargeable with constructive notice by their registry. The conveyances had been in fact duly acknowledged and admitted to record in the proper office shortly after their execution. In those deeds the land is described as "three-fourths of the south part of the north-west quarter of section 30, township 1 south, range 10 west," containing 44.31 acres. The correct technical description is: "Undivided three-fourths interest in and to the south half of the north-west quarter of section 30, township 1 south, range 10 west," and the land is so described in the mortgage.

Edgerton now exhibited his bill against Rector and the heirs at law of his deceased wife, Powers being out of the jurisdiction, to set aside these conveyances as fraudulent against him, a pre-existing creditor and a subsequent purchaser, and also to foreclose his mortgage. Rector made no defense; but the other defendants alleged that the conveyances were made in good faith and upon a valuable consideration. They deny Rector's insolvency at the date of the transfer, or that he owed the plaintiff any debt, having, as they say, been imposed on and deceived by the plaintiff as to the present and prospective value of the block, whereby it was sold at a grossly exorbitant figure. They further deny that Rector had any estate in the land, or power to incur it, at the time the mortgage was executed; and they assert that the land described in the mortgage is the same tract that was intended to be conveyed to Celine Rector; that the description of it in the deeds under which they claim follows the description contained in Rector's title-papers; and that, if there is any

inaccuracy, it was the mistake of the draughtsman, there being no uncertainty about the tract that was meant, and Rector owning no other lands in that section. But they aver that the description is sufficiently certain to ascertain and identify the land. Their answer was made a cross-bill, in which it was prayed that the deeds might be reformed if the description was found to be inadequate. The court sustained a demurrer to so much of the answer and cross-bill as sought to reopen the question of Rector's indebtedness to Edgerton, holding that matter concluded by the judgment that Edgerton had recovered in the former suit; and the plaintiff answered the other allegations of the cross-bill. Depositions were taken, and at the hearing a decree was entered declaring the mortgage a lien superior to the rights of the defendants, and ordering its foreclosure.

It is irregular, and, according to some authorities, fruitless, to litigate in a foreclosure suit an adverse claim which is paramount to the title of the mortgagor. There is no privity between such an adverse claimant and the mortgagee. 2 Jones, Mortg. § 1440, and cases cited; Wiltsie, Mortgage Foreclosures, §§ 118, 119; *Dial v. Reynolds*, 96 U. S. 340; *Peters v. Bowman*, 98 U. S. 56.

Section 4940 of Mansfield's Digest authorizes any person to be made a defendant "who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the questions involved in the action." But the holder of an adverse title, prior to the mortgage, is a stranger. His interest is not opposed to a recovery of judgment by the plaintiff, as he is not affected by it. Nor is his presence necessary to a complete determination of the question of foreclosure; for his rights were not acquired subsequent to the giving of the mortgage. He is therefore neither a necessary nor a proper party; and disputes involving his title should be settled in an ejectment or other appropriate action, apart from the foreclosure. Pom. Rem. § 333 *et seq.* But the defect is only a misjoinder of causes of action and of parties, and does not go to the jurisdiction of the court. The remedy is by motion to strike out of the bill the names of the parties and the cause of action improperly joined, and the objection is waived unless made. Mansf. Dig. §§ 5016, 5017; *Crawford v. Fuller*, 28 Ark. 370; *Terry v. Rosell*, 32 Ark. 478; *Clements v. Lampkin*, 34 Ark. 598; *Oliphint v. Mansfield*, 36 Ark. 191; *Riley v. Norman*, 39 Ark. 158. In this case the defendants have interposed no objection, here or below, to the litigation of their title.

We entertain no doubt of the fraudulent character of the conveyances under which the appellants hold. They were without any consideration deemed valuable in law, and were in legal effect a voluntary post-nuptial settlement upon the wife. This is enough to stamp them as presumptively fraudulent against existing creditors, and to cast upon those who claimed title under them the *onus* of proving the entire good faith of the transaction, and that the gift was a reasonable provision for the wife, comprehending but a small portion of the debtor's estate, and having ample funds unincumbered for the satisfaction of his creditors. But the proofs show that Rector thereby stripped himself of all, or very nearly all, of his property that was subject to execution. Wait, Fraud. Conv. §§ 98, 94, 307, 308; *Leach v. Fowler's Devisees*, 22 Ark. 143; *Bertrand v. Elder*, 23 Ark. 494; *Kehr v. Smith*, 20 Wall. 35; *Salmon v. Bennett*, 1 Conn. 525, 1 Amer. Lead. Cas. 32.

There is another view that may be taken. Section 3374 of Mansfield's Digest, which is a re-enactment of the statute of 27 Eliz. c. 4, as well as that of 13 Eliz. c. 5, avoids covinous transfers against subsequent purchasers as well as creditors. Now, a mortgagee is a purchaser within the meaning of this statute; and, according to the English authorities, which were followed in *Cathcart v. Robinson*, 5 Pet. 263, (per MARSHALL, C. J.,) a voluntary settlement by a husband upon his wife of the whole of his property is absolutely

void against a subsequent purchaser, even though he had notice. The weight of American authority seems to be against this proposition. But the conveyance is certainly void against a subsequent *bona fide* purchaser without notice. 1 Amer. Lead. Cas. (5th Ed.) [*47,] note to the case of *Sexton v. Wheaton*. Then the inquiry arises: Was Edgerton affected with notice by the recording of the deeds? According to the previous decisions of this court, the description of the land is so vague and indefinite as to be void for uncertainty. No boundaries are given, and no landmarks, natural or artificial, are mentioned. A surveyor could find the N. W. $\frac{1}{4}$ of section 30, township 1 S., range 10 W., without difficulty. But he would not know where to begin to lay off 44 acres in the south part of that quarter. *Mooney v. Cooledge*, 30 Ark. 640; *Jacks v. Chaffin*, 34 Ark. 534; *Freed v. Brown*, 41 Ark. 495. The deeds, being voluntary, could not be reformed so as to affect Edgerton. *Dyer v. Bean*, 15 Ark. 519.

Decree affirmed.

STATE *ex rel.* ARKANSAS INDUSTRIAL CO. v. NEEL.

(Supreme Court of Arkansas. March 5, 1887.)

1. HABEAS CORPUS—CERTIORARI—COURTS.

Under the constitution of Arkansas the supreme court has appellate jurisdiction by the writ of *habeas corpus*, in connection with the writ of *certiorari*, to review the proceedings of the chancery court of that state refusing to grant the writ of *habeas corpus* to obtain the custody of certain convicts who were unlawfully restrained from their legal custodian, the lessee of the penitentiary, and to order them turned over to such custodian.

2. CONTRACT—VALIDITY—JAILS.

The statute of Arkansas does not authorize the lessees of the penitentiary to hire out for labor or make a contract for the use and custody of the convicts committed to said prison. A contract of such character is void, and convicts held in restraint thereunder by a contractor will be delivered up on *habeas corpus* to the custody of the lessee.

Certiorari to chancery court, Pulaski county.

Caruth & Erbane and *U. M. & G. B. Rose*, for petitioner. *Thos. B. Martin*, *Met. L. Jones*, and *M. L. Bell*, for respondents.

BATTLE, J. On the sixteenth of January, 1887, the Arkansas Industrial Company presented a petition to this court, alleging therein, among other things, that on the tenth of January, 1887, it presented to the Pulaski chancery court its petition in which it set forth and showed the following facts: That in 1883 the state of Arkansas, for a valuable consideration, made and executed to Townsend & Fitzpatrick a lease of the state penitentiary, together with the custody, use, and control of all the convicts therein confined, for a period of 10 years; that, for a valuable consideration, Townsend & Fitzpatrick subsequently transferred and assigned this lease to relator, and that thereby it became the lessee of the state penitentiary; that prior to this assignment, on the twenty-second of January, 1883, Townsend & Fitzpatrick hired to the defendant, C. M. Neel, for 10 years, 100 of the convicts confined in the state penitentiary, at \$12.50 *per capita*, per month; that this contract with Neel was assigned to it at the time the lease was transferred; that, under this contract, the defendants unlawfully hold in their possession and control and detain 95 convicts, named in the petition, who are duly and lawfully sentenced to confinement in the state penitentiary by courts of competent jurisdiction of the state of Arkansas; that relator is entitled to the custody of these convicts by virtue of its being the lessee of the penitentiary; that relator had demanded the custody and possession of these convicts, and defendants had refused to surrender them; and that it asked the chancery court in that petition for a writ of *habeas corpus*, directing defendants to produce the bodies of these convicts, and that they be delivered to relator. And relator further

states in its petition to this court that defendant filed a response to its petition in the Pulaski chancery court, and that the chancery court, upon a hearing, refused to issue a writ of *habeas corpus*, and dismissed its petition. The prayer of the petition filed here is that the proceedings of the chancery court be reviewed by this court, and that a writ of *habeas corpus* be issued as prayed for in its first petition, and that the convicts named in its petition be delivered to it, and for general relief. In response to a writ of *certiorari* the record and proceedings of the chancery court have been certified to this court, from which it appears that the allegations of relator in both petitions, so far as they are stated in this opinion, are true. They are not denied by the defendants. Both parties appear in this court.

Section 4 of article 7 of the constitution of this state reads as follows: "The supreme court, except in cases otherwise provided by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error, and *supersedeas*, *certiorari*, *habeas corpus*, prohibition, *mandamus*, and *quo warranto*, and other remedial writs; and to hear and determine the same."

The jurisdiction of the supreme court of the United States is similar to that of this court. After saying to what cases and controversies the judicial power of the United States shall be limited, the constitution of the United States defines the jurisdiction of the supreme court as follows: "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." In defining the jurisdiction of the district, circuit, and supreme courts of the United States, congress, by an act of September 24, 1789, enacted "that all the before-mentioned courts shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the justices of the supreme court, as well as judges of the district courts, shall have power to frame writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Under the constitution of the United States and this act of congress, the supreme court of the United States has in numerous cases held that it can, in the exercise of its appellate jurisdiction, issue the writ of *habeas corpus*, and hear and determine the same.

In *Ex parte Yerger*, 8 Wall. 85, Chief Justice CHASE, after an exhaustive review of the decisions upon that subject, announced the conclusions of the court as follows: "We are obliged to hold, therefore, that in all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of the detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the circuit court, and, if it be found unwarranted by law, release the prisoner from the unlawful restraint to which he has been remanded."

In commenting upon this jurisdiction, in *Ex parte Stebold*, 100 U. S. 374, the supreme court of the United States said: "The question is whether a party

imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of congress, may be discharged from imprisonment by this court on *habeas corpus*, although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original and not appellate jurisdiction, and therefore not within the jurisdiction of this court. But we are clearly of opinion that it is appellate in its character. It requires us to revise the act of the circuit court in making the warrants of commitment upon the conviction referred to. This, according to all the decisions, is an exercise of appellate power. *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 100, 101; *Ex parte Yerger*, 8 Wall 98. That this court is authorized to exercise appellate jurisdiction by *habeas corpus* directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers, and consuls, and cases in which a state is a party; but has appellate jurisdiction in all other cases of federal cognizance, with such exceptions and under such regulations as congress shall make. Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction, and may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law, except those in which it has original jurisdiction only. *Ex parte Bollman*, *supra*; *Ex parte Watkins*, 3 Pet. 202, and 7 Pet. 568; *Ex parte Wells*, 18 How. 307, 328; *Ableman v. Booth*, 21 How. 506; *Ex parte Yerger*, 8 Wall. 85."

The appellate jurisdiction exercised by the supreme court of the United States in the issue of writs of *habeas corpus* has been expressly conferred upon this court by the constitution of this state. It is not, however, confined to a review of the action of a court, as in the case of the supreme court of the United States, but it extends to a review of the proceedings of chancellors and judges at chambers upon applications for *habeas corpus* and *certiorari*, and upon proper transcripts of the proceedings. *Ex parte Jackson*, 45 Ark. 158. In both courts this jurisdiction is brought into exercise by the aid of the writ of *certiorari*, it being issued in connection with the writ of *habeas corpus* in order to bring up the proceedings of the lower court or judge, and thereby enable the court to review, revise, and correct the action of the inferior court or judge. It is, however, to be borne in mind that the right to issue a writ of *habeas corpus* in the exercise of its appellate and supervisory jurisdiction does not authorize the court to convert it into a writ of error. The great object of the writ is the liberation of those who may be imprisoned without sufficient cause, and to deliver from unlawful custody. It is not the function of this writ to inquire into or correct errors, but its object is to require the person who answers it to show upon what authority he detains the prisoner. If the person restrained of his liberty is in custody under process, nothing will be inquired into; by virtue of the writ, beyond the validity of the process upon its face, and the jurisdiction of the court by which it was issued. If he be detained under a conviction and sentence by a court having jurisdiction of the cause, no relief can be given by *habeas corpus*; the general rule being that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment. *Ex parte Siebold*, 100 U. S. 375; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152.

The object of the writ of *habeas corpus*, as a general rule, is not to recover the possession of the persons unlawfully detained in custody, but simply to free them from all illegal restraints upon their liberty. But this rule is not without its exceptions. It has been frequently held that the detention of a child of tender years from the one entitled to his custody amounts to illegal restraint; and that in a proceeding by *habeas corpus*, if he is not of sufficient

age to determine for himself, the court or judge hearing the application must decide for him, and make an order for his being placed in the proper custody. Not being competent to govern and direct his own actions, he is not permitted to decide for himself what they shall be. *The King v. Johnson*, 2 *Ld. Raym.* 1333; *Rez v. Delaval*, 3 *Burrows*, 1436; *Verser v. Ford*, 37 *Ark.* 27; *People v. Kling*, 6 *Barb.* 366; *State v. Banks*, 25 *Ind.* 495; *Church, Hab. Corp.* § 439.

Milligan v. State, 97 *Ind.* 355, was an application by a foreign corporation, the Children's Home of Cincinnati, Ohio, to a court of the state of Indiana for a writ of *habeas corpus*. The object of the application was to obtain possession and control of a minor. The facts in that case were as follows: The Children's Home of Cincinnati was a corporation organized under the laws of the state of Ohio, and as such had the lawful charge and custody of an infant, and had authority to procure for her a permanent home in a Christian family. By a written agreement executed at the city of Cincinnati, in the state of Ohio, the Home transferred the care, custody, and education of the infant to the defendant. It was provided in the statutes of Ohio, under which the Home was incorporated, that its trustees and managers might remove a child from a home when in their judgment the same had become an unsuitable one, and that they should, in such case, resume the same power and authority they originally possessed. In the judgment of the trustees and managers of the Children's Home, the defendant's home had become and was an unsuitable one for the child, and he was not a proper person to have the custody and management of such child, and the Home demanded of the defendant the surrender to it of the custody and control of the child, which was refused. The court held, upon this state of facts, that the Children's Home had the right to remove the child from the home of the defendant, and to resume its original power and authority over such child, and ordered, adjudged, and decreed accordingly.

From the cases referred to it is clear that while the writ of *habeas corpus* is eminently the writ of liberty, and its office is to inquire into the ground upon which any person is restrained of his liberty, and, when it is found that the restraint is illegal, to deliver him from such illegal restraint, courts may, in some cases of *habeas corpus*, award the custody of such person to whom it may belong. While the great object of the writ is to restore the person unlawfully restrained to liberty, and that end is ordinarily attained by allowing the party improperly detained the free exercise of his volition, it will not restore him, in all cases, to a liberty to which he is not entitled, and is incompetent to exercise. It would be contrary to reason to say that, when a person shall be relieved by this writ of illegal restraints, he should be allowed the free exercise of his own volition when the law positively demands and commands he shall be held in custody.

The next question is, are the convicts named in the petition filed in this case in unlawful custody? It appears they are held under a contract made by Townsend & Fitzpatrick, former lessees and keepers of the state penitentiary, and the defendant, C. M. Neel, by which Townsend & Fitzpatrick hired them as so many chattels, and surrendered their care and custody to Neel. Had they authority to do so? The statutes of this state, under which Townsend & Fitzpatrick leased the state penitentiary, make it the duty of the lessee to provide the convicts with clothing, and with good and wholesome food; to treat them humanely; to preserve discipline among them, by the enforcement of such rules as shall be prescribed by the penitentiary board of commissioners; and make it the duty of the board to appoint a physician of the penitentiary, whose duty it is to visit the convicts daily, and see that they are not inhumanely punished; that they are properly clothed; that they are sufficiently supplied with bed-clothing; that they are not overworked; that they are sufficiently fed on good, healthy, and sound food; that they are not worked when their state of health forbids; that their cells are properly warmed and venti-

lated; that they are, in all things, whether within or without the walls, humanely treated; and to make a quarterly report to the board of commissioners; and make it the duty of the board, on receiving notice from the physician or otherwise that the lessee is inhumanely treating the convicts, or not faithfully performing his duty as lessee, to notify the lessee; and, on his failure or refusal to comply with the terms of his lease, or to treat the convicts humanely, to take such steps as may be warranted by law. These statutes impose all the duties to the convicts upon the lessee. If he fails to perform them, he suffers the penalty. No provision is made for the hiring of convicts by lessee to other persons, and what their duties shall be, and the penalty of their failure to perform them. All the duties to the convicts are to be performed by the lessee, and are such as necessarily preclude any idea that he can surrender the control and custody of the convicts to any other person. The requirements of the statutes are such as he can only perform by keeping the convicts in his custody; and, to prevent any question in this respect, the statutes expressly say, he "shall receive and receipt in duplicate for any person who shall be convicted by any federal or state court in this state, and sentenced to confinement in said penitentiary, and *shall keep* any such person according to sentence until the expiration of the term thereof, unless sooner discharged by due course of law. Mansf. Dig. §§ 4881, 4884, 4890.

The relator is conceded to be the lessee and keeper of the state penitentiary. As such, it is entitled to the exclusive custody of the state convicts. The convicts in question are unlawfully detained and held in custody by the defendants. This being true, it becomes the duty of this court to relieve them of this unlawful restraint, and award their custody to the relator; and it is so ordered.

EDWARDS v. RUMPH.

(*Supreme Court of Arkansas.* March 12, 1887.)

USURY—APPLICATION OF PAYMENT TO USURIOUS INTEREST—EQUITY.

Where a debtor makes a payment without designating to what particular item of indebtedness it shall be applied, neither the creditor nor a court of equity has the right to apply it to usurious interest without the consent of the debtor. The payment should be first applied to the debt, with legal interest. And in an action by the creditor to enforce the contract, it appearing that the partial payment is sufficient to satisfy the debt and legal interest, the creditor is entitled to no relief, but should be adjudged to deliver up the collateral securities given by the debtor to secure the debt, and pay the costs of the action.

Appeal from circuit court, Nevada county. In chancery.

Smoot, McRae & Hutton, for appellants. *B. W. Johnson*, for appellee.

BATTLE, J. G. B. Rumph was a merchant doing business in the city of Camden, in this state, during the years 1879, 1880, 1881, 1882, and 1883. Joe Edwards was a farmer, and during these years bought goods, wares, and merchandise, and borrowed money, of Rumph on a credit. On the moneys loaned, Rumph charged, and Edwards agreed to pay, 15 per cent. interest. They settled annually, Edwards giving new notes to cover balances due and future advances, and deeds of trust to secure the same. On the second of March, 1882, on a settlement, Edwards was found to owe Rumph \$822.25. Fifteen per cent. interest was charged and added to this balance, pursuant to an agreement between Rumph and Edwards for indulgence and extension of time for payment. On the fourth of April, 1882, Edwards executed his note to Rumph for the sum of \$1,100 to cover this balance and interest, and in settlement and payment thereof and of future advances, payable on the first day of November following, and bearing 10 per cent. per annum interest from the maturity thereof until paid, and executed a deed of trust to secure the same and other indebtedness of Edwards to Rumph, which should be

existing at the time of the maturity of the deed of trust. In this deed certain lands were conveyed in trust as security. Edwards sold a part of this land to William Bolden for the sum of \$400, and Bolden gave two notes for the purchase money. Edwards deposited these notes with Rumph as collateral security for the payment of his indebtedness to Rumph. In the mean time Edwards continued to trade with and borrow money of Rumph. On the first of March, 1883, Edwards' debts to Rumph, including the balance of \$822.25, and the 15 per cent. added thereto, were \$1,681.80, and his credits amounted to \$1,271.32, leaving a balance of \$410.48 due Rumph. Bolden failing to pay the first of his notes falling due, Rumph brought this action against Edwards and Bolden in the Nevada circuit court, on the equity side thereof, to recover of Edwards the \$410.48, and asked in his complaint to be subrogated to all the rights and privileges of Edwards as vendor of the land sold to Bolden, and that the land so sold be sold under a decree of the court, and that the proceeds of the sale be applied to the payment of the amount due on the note of Bolden then due, and that the amount so applied to the payment of Bolden's note be paid to Rumph in part payment of the balance due him by Edwards, and that the residue of the proceeds, if there should be any, be held subject to the order of the court for the payment of the other note of Bolden when it should fall due, and for general relief; and Edwards pleaded usury by way of defense. On the hearing, evidence was introduced which established the foregoing facts. The court found that the debt secured by the deed of trust executed on the fourth of April, 1882, was usurious and void; that the open account of Rumph against Edwards for the year 1882 was not usurious, but had been paid in full; that plaintiff was not entitled to foreclose the deed of trust; that plaintiff was an innocent purchaser of the notes of Bolden before maturity; that these notes were due and unpaid; and that there was due upon them the sum of \$430.21; and decreed that plaintiff take nothing by this action, that Edwards have and recover of Rumph all his costs, and that Edwards further have and recover of Bolden the \$430.21 for the use and benefit of Rumph. Both parties have appealed to this court.

There is a distinction made in equity between suits brought to enforce usurious contracts and actions for relief against such contracts. In the first case a court of equity will refuse any assistance, and repudiate the contract, and in the other case will interfere on the condition that plaintiff will pay the defendant what is really and *bona fide* due him, and lawful interest. "The ground of this distinction is that a court of equity is not positively bound to interfere in such cases by an active exertion of its power, but it has discretion on the subject, and may prescribe the terms of its interference; and he who seeks equity at its hands may well be required to do equity. And it is against conscience that the party should have full relief, and, at the same time, have the benefit of the contract complained of, which may have been made at his own solicitation; for then a statute made to prevent fraud and oppression would be made the instrument of fraud." But in the other case, if equity should enforce the contract, "it would be aiding a wrongdoer, who is seeking to make the court the means of carrying into effect a transaction manifestly wrong and illegal of itself." 1 Story, Eq. Jur. § 301.

The note for \$1,100 is manifestly void on account of usury. The remainder of the indebtedness of Edwards to Rumph has been paid. As already stated, the amount of the entire indebtedness was \$1,681.80. There was paid on account \$1,271.32. This was not appropriated to the payment of any particular item of indebtedness. Rumph himself had no right to ascribe this payment upon the usurious part of Edward's indebtedness without the permission of Edwards, and the courts will not. *Gill v. Rice*, 13 Wis. 549; *McAlister v. Jernan*, 32 Miss. 142. The payment should be first applied to so much of the indebtedness of Edwards as was legal. *Wright v. Laing*, 3 Barn. & C. 165; *Treadwell v. Moore*, 34 Me. 112; *Backman v. Wright*, 27

Vt. 187; *Seymour v. Marvin*, 11 Barb. 85; *Caldwell v. Wentworth*, 14 N. H. 431.

Appropriating the payments made in the manner indicated, all the indebtedness of Edwards, except a small part of that tainted with usury, will be paid. This being true, Rumph can recover nothing in this action. The court below committed an error which probably was the result of the hurry of business, and was manifestly an oversight. While it found that Edwards was not liable, in law or equity, for any part of the claim sued on, yet it rendered a decree in favor of Edwards for the use and benefit of Rumph for the amount due on the notes of Bolden. These notes were only placed in the hands of Rumph as collateral security for the payment of Edwards' indebtedness to him. When Edwards was absolved from this indebtedness, Rumph's right to hold the notes as collateral security ceased to exist. Rumph had no right to appropriate the property of Edwards to the payment of a claim he did not owe. The court below should have required Rumph to bring into court the deeds of trust and notes executed by Edwards to be canceled, should have canceled the same, should have required Rumph to surrender and deliver Bolden's notes to Edwards, and rendered judgment in favor of defendants against plaintiff for costs.

The decree of the court below is therefore reversed, and this cause is remanded, with instructions to the court to enter a decree herein in accordance with this opinion, and for other proceedings.

HENRY and others v. WELLS.

(*Supreme Court of Arkansas. March 19, 1887.*)

FRAUDS—STATUTE OF—CONTRACT NOT TO BE PERFORMED IN A YEAR—PART PERFORMANCE.

In an action to recover upon a verbal contract of service, not to be completed within a year, but which had been partly performed at the time the action was brought, *held*, although part performance may take a case out of the statute of frauds, so that equity will enforce its completion, it can have no such effect at law.¹

Appeal from circuit court, Drew county.

Wells & Williamson, for appellants.

SMITH, J. The complaint stated that the defendants had employed the plaintiff as a bar-tender for the whole of the year 1884, but had on the first of May in that year discharged him without cause, paying his wages only to that date. The prayer was for a recovery of wages for the remaining months. The answer, among other defenses, set up the statute of frauds. The proof was that the contract was made in November, 1883, and, according to the plaintiff's version, was to include the remainder of that year and the year following, and that it was not manifested by any writing. The court charged, in substance, that the plaintiff's entry upon the service and readiness to perform took the case out of the statute, and the plaintiff had a verdict and judgment. Verbal contracts are sometimes enforced in equity, especially for the purchase of land, where possession has been taken and improvements made on the faith of them; but partial execution has no effect at law to take any case out of the provisions of the statute. *Browne, St. Frauds*, (4th Ed.) § 451.

This case is governed by *Meyer v. Roberts*, 46 Ark. 80.

Reversed for a new trial.

¹ As to the application of the statute of frauds to contracts not to be performed within the year, see *Treat v. Hiles*, (Wis.) 32 N. W. Rep. —, and note.

FELTON and Wife v. LEIGH.

(Supreme Court of Arkansas. March 19, 1887.)

VENDOR AND PURCHASER—VENDOR'S LIEN—REFORMING DEEDS.

In order to facilitate a division of land between heirs, one heir, A., sold her share to another heir, B., but, in making the necessary conveyances, instead of the land designed for B. under this arrangement being all conveyed to him directly, half of it was conveyed to A., and through A. to B. The half thus conveyed through A. was comparatively worthless. The parties were illiterate. *Held*, that a reformation of the deeds would be ordered so as to allow A. to enforce a vendor's lien upon an undivided half of the whole tract allotted to B., instead of upon the worthless half.

Cross-appeal from circuit court, Lonoke county. In chancery.

U. M. & G. B. Ross and Geo. Stibly, for appellants. *J. C. & C. W. England and R. J. Lea*, for appellee.

SMITH, J. Thomas G. Harrison and his three married sisters had inherited from their father 80 acres of land. Their mother was also the owner in her own right of 120 acres. With a view to provide her children with homes, the mother was willing to put her lands into hotchpot, and receive for her share a life-estate in the part that should be allotted to her son. The two tracts contained five lots, of 40 acres each, lying contiguous, and were of the aggregate value of \$5,000, but were not susceptible of convenient division into four parts. Mrs. Felton, one of the children, therefore sold her interest to Leigh, the husband of one of her sisters. A partition was then agreed upon, by which two whole lots and the half of a third lot, all of which were specified, were to be allotted to the Leighs, and the remaining lands to be divided, in certain definite proportions, between the others. Being illiterate persons and unable to transact such business intelligently, they called in a justice of the peace, upon whom they relied to draw the papers to carry into effect their intentions. Leigh having in the mean time sold the half lot, which fell to him, to Thomas G. Harrison, the same was, with the knowledge and consent of Mrs. Felton, conveyed directly to Thomas G., along with his own allotment proper, by the other parties in interest. Leigh directed the share he had purchased to be conveyed to his wife; and the justice, instead of including the two lots in one deed, drew a conveyance of one lot to Mrs. Leigh, and of the other to Mrs. Felton, and then a reconveyance of the latter by Mrs. Felton to Mrs. Leigh. He then drew two notes for \$125 each, which Leigh signed and delivered to Mrs. Felton, purporting to be for the purchase money of the lot which the justice had assigned to her in his division. The two lots varied greatly in value. One lay in the prairie, and was worth not exceeding \$50; the other was in the timber, and worth about \$375. When the notes fell due, Leigh was unable to meet them; and, when the papers were examined, it was discovered that Mrs. Felton had been placed in the attitude of selling the comparatively worthless tract in the prairie, and that an attempt had been made to confine her lien to that tract. She therefore filed her bill, charging that the above-mentioned result had been brought about by the fraud of Leigh and the connivance of the justice, and praying for a reformation of the instruments so as to make them conform to the intention of the parties, and for the enforcement of her lien as vendor against the entire tract held by Mrs. Leigh. Leigh and his wife denied the charge of fraud and collusion. The circuit court found that the prairie lot and the half lot subsequently sold to Thomas G. Harrison had been set apart to Mrs. Felton as her share, and that, no fraud having been practiced, her lien must be restricted to those tracts.

The clear preponderance of the testimony is that Mrs. Felton was no party to the partition further than to join in the necessary conveyance to carry it out. No lands were allotted to her; but a double share was allotted to the Leighs on account of her previous sale to them. Such was the understanding of

all the parties to the arrangement, except Mrs. Leigh. What was sold to Leigh was her undivided one-fourth share of the 200 acres. This interest was afterwards defined by the voluntary partition to be one-half of the 100 acres that were assigned to the Leighs. It is therefore to this that her vendor's lien attaches. And her right to relief does not depend altogether upon her ability to prove the active fraud of Leigh in the matter. It may be based on the blunder of the justice of the peace. The instruments do not express the agreement of the parties. There is, indeed, reason to believe that he never intended to pay for the land. He did not venture to testify in his own behalf; and this is a suspicious circumstance in cases of this kind. *Bowden v. Johnson*, 107 U. S. 262, 2 Sup. Ct. Rep. 246; *McDonough v. O'Neil*, 113 Mass. 96. Mrs. Felton has no recourse upon the 20 acres which Leigh sold to Thomas G. Harrison, nor does she claim any right to resort to it. That parcel was sold by her consent, and the price of it has been paid to Leigh.

The decree is reversed, and cause remanded, with directions to reform the instruments in accordance with this opinion, and to declare and enforce a lien in favor of the plaintiffs upon an undivided one-half interest in the two tracts of 40 acres each that were conveyed to Mrs. Leigh.

HOT SPRINGS R. CO. v. MAHER.

(*Supreme Court of Arkansas.* March 9, 1887.)

1. CONTRACT—CONSTRUCTION—CONDITION.

A contract under which plaintiff built a railroad for the defendant company provided "that all questions relating to quantity, quality, or manner of construction of" the work stipulated to be done "shall be decided by the engineer in charge of said work, and his decisions shall be final and conclusive on all matters pertaining to" the contract. The engineer made an estimate of the quantity and quality of the work done by plaintiff, and the amount due him therefor. Plaintiff refused to abide by this estimate on the ground that it was wrong and erroneous. Held that, in the absence of fraud, or such gross mistakes as would necessarily imply bad faith or a failure to exercise an honest judgment, the estimates of the engineer were conclusive.

2. NEW TRIAL—ERRONEOUS INSTRUCTIONS.

On the trial of an action for railroad work done under a contract in which the parties had agreed to abide by the estimates of the engineer, the court failed to instruct the jury that the errors or mistakes which would avoid the decisions or estimates of the engineer must have been so gross or of such a nature as necessarily implied bad faith upon the part of the engineer. Held error, for which a new trial should be granted.

Appeal from circuit court, Saline county.

G. W. Shinn, for appellant. *U. M. & G. B. Rose*, for appellee.

BATTLE, J. This action is founded on a contract made and entered into by the defendant, the Hot Springs Railroad Company, as the party of the first part, and the plaintiff, P. J. Maher, as the party of the second part, in which they agree as follows: "That for and in consideration of the payments hereinafter stipulated, to be well and truly made by the party of the first part, the party of the second part hereby agrees that he will build, or cause to be built, construct, and grade, a certain portion of the proposed change or alteration of the line of the Hot Springs R. R. on the west slope of Sulphur hill, on said line of railroad; commencing at or near to station one, on said new line, and running to and terminating at or near station number ten on said new line. In consideration of the faithful performance of the above stipulated work, completed to the satisfaction of the engineer in charge of said work, for and in behalf of said railroad company, said party of the first part agrees to pay to the party of the second part the sum of twenty cents per cubic yard for all earth excavation, and fifty cents per cubic yard for all loose rock excavation,

and \$1 per cubic yard for all solid rock excavation, and to pay for said work on semi-monthly estimates, in full for all work done at time of making estimate, less 10 per cent., which shall be reserved from each estimate until said contract shall have been fully completed and complied with by the party of the second part. It is mutually agreed by and between the parties hereunto that all questions relating to quantity, quality, or manner of construction of said above stipulated work shall be decided by the engineer in charge of said work, and his decision shall be final and conclusive on all matters pertaining to this contract. The party of the second part agrees to commence said work on or about the fourth day of August, 1884, and to complete the same within sixty working days thereafter."

G. M. French, the engineer in charge of the work mentioned in the contract, made an estimate of the quantity and quality of the work done by plaintiff, and the amount due him therefor, under the contract, and ascertained that there was due \$1,847.15, of which defendant had paid \$1,836.41, leaving due \$10.74. Plaintiff refused to abide by this estimate, but, insisting that it was wrong and erroneous, sued for the amount he contends is due him according to the contract. The evidence introduced in the trial as to the quantity and quality of the work done under the contract is conflicting. Plaintiff was allowed to prove, over the objection of defendant, how many hands were employed in doing the work sued for, the number of days they were employed in the work, and the amount of each kind of the work done they could do in a day.

The court instructed the jury, at the request of plaintiff, over the objections of defendant, as follows:

"(2) If the jury believe that the decision of French was arrived at or obtained by any fraudulent practice, suppression of evidence, or gross error or mistake, they will find for the plaintiff what they believe from the evidence he is entitled to recover.

"(3) Fraud is the wrongful and intentional deprivation of a person of his legal rights."

"(5) No act of French which was done fraudulently or in gross mistake of fact in his estimate will bind Maher."

The defendant asked for the following instructions:

"(1) The plaintiff and defendant having by their contract selected the engineer in charge of the work to be done under it to estimate the work, and decide all questions pertaining to it, and agreed that his decision should be final, his classification of the work done under said contract is conclusive upon them.

"(2) To warrant you in finding for the plaintiff on account of any work done by him under the contract read in evidence in this case, it is necessary that the evidence clearly establish, in your opinion, that the engineer in charge of the work intentionally made a false classification of the work.

"(3) If you believe from the evidence in this case that there is no uniform and fixed rule among engineers in classifying rock removed in excavating, and that some engineers would have classified the rock excavated by plaintiff as the engineer in charge of said work did, while others would have classified it differently, the classification and estimate of said engineer in charge must be taken as conclusive and binding upon the plaintiff.

"(4) If you believe from the evidence that it is impracticable and impossible to make a correct survey and cross-section of the work performed by the plaintiff under the contract, after the excavation has been completed, so as to estimate correctly the amount of work done, you are instructed that you cannot take into consideration, in arriving at your verdict, any estimate of work done, which has been made from cross-sections taken after the excavation; and the estimate and classification as made by the defendant's engineer under the contract sued on is binding and conclusive upon the plaintiff, unless you

find from the evidence that said estimate is false, fraudulent, and intentionally incorrect."

The court refused to give these instructions as asked, but modified the first by adding to it, at its conclusion, the following words: "Unless it clearly appears that he was mistaken in such classification, or that the same was fraudulently made by him;" and modified the second by adding, "or that he was mistaken in such classification;" and the third by adding, "if made honestly and in good faith;" and gave the first, second, and third as modified, and refused the fourth. The jury returned a verdict in favor of plaintiff for \$425.40. Defendant filed a motion for a new trial, which was overruled, and it saved exceptions and appealed.

The contract sued on provides "that all questions relating to quantity, quality, or manner of construction of" the work stipulated to be done "shall be decided by the engineer in charge of said work, and his decisions shall be final and conclusive on all matters pertaining to" the contract. By these terms of the contract both parties agree to abide the decisions of the engineer in charge of the work as to the quantity and quality of the work done under the contract. They are clear and precise, leaving no room for doubt as to the intention of the contracting parties, and seem to be susceptible of no other interpretation than that the estimates of the engineer as to the quantity and quality of the work done were intended to be final and conclusive. They show that both parties considered the possibility of disputes arising between them in reference to the execution of the contract, and that, to prevent the interests of either party being put in peril by disputes as to any of the matters covered by their contract, or in reference to the quantity or quality of the work done under it, or the compensation which the plaintiff might be entitled to demand, expressly stipulated that the engineer's decision should be final and conclusive. While both parties well knew the engineer might err, yet neither reserved the right to revise his decisions and estimates for mere errors or mistakes upon his part; but, while they saw fit to risk his estimates and decisions, it is presumed that the estimates and decisions on which they relied and agreed to abide were estimates and decisions to be made in good faith, and in the exercise of an honest judgment. It would follow, then, that in the absence of fraud, or such gross mistakes as would necessarily imply bad faith or a failure to exercise an honest judgment, the estimates of the engineer are conclusive, and otherwise not. *Kihlberg v. U. S.*, 97 U. S. 398; *Martinsburg & P. R. R. v. March*, 114 U. S. 549, 5 Sup. Ct. Rep. 1035; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. Rep. 344; *Baltimore & O. R. Co. v. Polly*, 14 Grat. 459.

The instructions of the court were well calculated to mislead the jury, by leading them to believe that the estimates of the engineer, as to the amount and character of the work done, were not binding on either party if there were any mistakes in them. They were not informed by the court that the errors or mistakes which would avoid the decisions or estimates of the engineer must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer.

There was no error in allowing the evidence objected to by appellant to go to the jury. It tended to show the amount and character of the work done by appellee, and was admissible for that purpose, and no other.

The judgment of the court below is therefore reversed, and this cause is remanded, with instructions to the court to grant appellant a new trial.

GOSLING v. GRIFFIN.¹

(Supreme Court of Tennessee. 1875.)

PROMISSORY NOTE—PAYMENT AFTER TRANSFER AS COLLATERAL—NOTICE.

The payment, by the maker of a negotiable promissory note, to the original payee, before its maturity, but after its indorsement and transfer as collateral security, constitutes no valid defense to a suit by the indorsee on the note, although the maker had no notice of such transfer at the time of making payment; overruling *Vatterlien v. Howell*, 5 Sneed, 441.

Appeal from circuit court, Shelby county.

Action on negotiable promissory note.

Randolph, Hammond & Jordan, for plaintiff. *T. A. Ryan*, for defendant in error.

JACKSON, Special Judge. The material facts of this case necessary to be noticed in determining the legal question presented by the record are the following: On the ninth day of January, 1872, the defendant, T. S. Griffin, executed and delivered to Pollard & Co. his negotiable promissory note for the sum of \$598, payable 30 days after date; the consideration for said note being the proceeds of a buggy which Pollard & Co. had placed in said Griffin's hands for sale, and which he had sold, and used and appropriated the money. The payees in said note being indebted to plaintiff, Gosling, in the sum of \$554.25, evidenced by his acceptance, which matured third January, 1871, and which had been placed in the hands of attorneys at Memphis for collection, on the tenth day of January, 1871, indorsed in blank the defendant's said note for \$598, and delivered it to the plaintiff's attorneys as collateral security for the indorser's acceptance, which said attorneys held for collection. Said attorneys, at the time of receiving defendant's note from said Pollard & Co., gave to the latter a receipt specifying that said note was received by them as collateral security for the payment of said Pollard & Co.'s acceptance for \$554.25, due third January, 1871. It appears that the defendant, after the date of this transfer, and before the maturity of his said note, delivered to Pollard & Co. several lots of flour and meal in payment and satisfaction of his note. This flour and meal, to the amount of \$613, was delivered on the twenty-fifth, twenty-sixth, twenty-ninth, and thirtieth of January, 1871, without notice or knowledge on the part of defendant that his note had been previously indorsed and transferred by Pollard & Co. to the plaintiff. He accordingly refused to pay the note at its maturity, and was sued thereon by the plaintiff in first circuit court of Shelby county.

Among other pleas not necessary to be noticed, the defendant plead that said note was not transferred to the plaintiff in due course of trade, but was given to the plaintiff by the firm of Pollard & Co., as collateral security for a debt which the said Pollard & Co. owed the plaintiff; and, further, that the defendant paid said note to the firm of Pollard & Co. without notice from the plaintiff that he had the note assigned to him, and of this he put himself upon the country.

By consent of parties, a jury was waived and the case was tried by the court, and resulted in a finding "that, though the note was assigned before maturity, it being received as collateral to secure a pre-existing debt, the defendant should have been notified of the assignment, and the plaintiff cannot recover on the note because defendant was not so notified before paying the note to Pollard & Co. Court thereupon gave judgment for the defendant, from which the plaintiff has appealed in error to this court.

In rendering judgment for the defendant upon the foregoing facts, the court

¹ The above case is not regularly reported in the official reports, and is now published here, at the request of a prominent jurist in the state of Tennessee.

below followed the case of *Vatterlien v. Howell*, 5 Sneed, 441, which presented the direct question here presented, and is conclusive of the present case, if it is to be adhered to as authority. In *Vatterlien v. Howell* the material facts were that Howell & Co., on the tenth March, 1856, executed to F. S. Brown & Co. their promissory note for \$208.50, due at six months. On the fifteenth day of May, 1856, Brown & Co., the payees, indorsed and delivered said note to Vatterlien as collateral security for the payment of a pre-existing debt due from them to him. Vatterlien gave the makers no notice of this assignment of the note to him, and on the thirtieth July, 1856, before the note matured, the maker paid the amount thereof to Brown & Co., the payees. When the note was due, Vatterlien sued the makers, and it was held that this payment to the payees before maturity, and after the assignment of the note, having been made without notice of the transfer, was a good defense against the suit of said Vatterlien. This decision seems to proceed upon the idea that an indorsee of negotiable paper, who receives it before maturity as collateral security for or in payment of an antecedent debt, is bound to *notify* the maker of his being the holder, in order to protect himself against payments by the maker to the original holder or payee; that, in the *absence* of such *notice*, an indorsee must show himself to be a holder for value, and in due course of trade, in order not to be bound by the maker's payment to the original payee, although made before maturity, and after transfer of the note. We cannot assent to the correctness of this principle, as applied to *negotiable paper*. It, in effect, places *such* paper upon *precisely* the same footing as open accounts, and, in our opinion, attaches a condition to the legal and complete transfer of negotiable instruments, which is supported neither upon principle nor authority.

It was decided in *Clodfelter v. Cox*, 1 Sneed, 330, that the assignee of equitable rights and open accounts must give notice to the debtor or holder of the fund of the assignment, in order to protect himself against subsequent payments by the debtor to the assignor. But in the subsequent cases of *Mutual Protection Co. v. Hamilton*, 5 Sneed, 277, and *Sugg v. Powell*, 1 Head, 221, it was held that this doctrine as to notice had no application to the assignment of *negotiable paper*, or of instruments which, though not negotiable by the law-merchant, are made assignable by law, so as to pass the legal interest or title, and permit the assignee to sue in his own name.

The rule announced in these cases is irreconcilable with the position assumed in *Vatterlien v. Howell*. No authority is cited to sustain the proposition or conclusion of law laid down in *Vatterlien v. Howell*, except the case of *Van Wych v. Norvell*, 2 Humph. 192, which fails to support the decision. The contest in *Van Wych v. Norvell* was between the true owner of the notes and a party holding them as *collateral security*. The former prevailed upon principles well settled in our decisions; but Judge GREEN, who delivered that opinion, recognized the fact that a pre-existing debt was a good consideration, as between the holder and the individual from whom he received the paper, though it would not be sufficient to entitle him to hold against the true owner. The consideration on which Vatterlien received the transfer of the note from Brown & Co. being a good one, as between *themselves*, and that transfer having vested him with the legal title to the note so as to dispense with the necessity of his giving notice of the assignment, the conclusion seems to be inevitable that a payment by the makers to the original payee, after such transfer, and before maturity, should not be held good against the holder.

Again, the decision in *Vatterlien v. Howell* ignores the distinction that should manifestly be taken between the payment of a *negotiable note* made after its transfer and such a payment *before* assignment. The latter is the proposition discussed by the judge delivering that opinion. He says: "The argument is that, if a party pay a negotiable paper (as this is) before maturity, and fails to take it up, he does it at his peril, and if it is *afterwards* assigned

before maturity, the assignee has the right to enforce its repayment." After correctly saying that this doctrine was too broadly stated, the opinion proceeds: "It is true that if a party pay a negotiable paper before due, and fail to take it up, and it is *afterwards*, and before maturity, negotiated in *due course of trade*, the assignee, being an innocent holder for a valuable consideration, would be entitled to enforce its payment. But it is equally true that, if it is taken in payment of, or as collateral security for, a *pre-existing* debt, it is not negotiated in due course of trade, and the holder would stand in no better situation than the payee, and would be subject to all defenses which might be made against it in the hands of the payee." This was undoubtedly a correct statement of the law as applicable to the case of payment of negotiable paper made *before* its transfer or assignment. But it did not follow from this principle, as the court concluded therefrom, that a *payment* made after such transfer or assignment would stand upon the same footing and be equally available as a defense to an action by the holder. The indorsement and delivering of negotiable paper as collateral security for pre-existing indebtedness is a transaction of daily occurrence in all commercial communities. It is a legitimate use of such paper, and, if the person so receiving it does not become thereby a holder for value and in due course of trade, according to the law-merchant, so as to cut off all defenses, he is certainly entitled to protection, as against payments made or equities arising between the maker and indorser *after* the date of such transfer.

The business of mercantile communities is to a great extent transacted through the medium of bills of exchange and promissory notes; and this free circulation of such paper is a matter of too much importance to be restricted by adhering to an adjudication not founded upon principle, nor supported by authority. Our decisions have gone sufficiently far in holding that negotiable paper, transferred in payment of a pre-existing debt, or as collateral security, is subject to all equities or defenses existing against the paper at the time of its transfer, and we are unwilling to extend the principles of these decisions so as to let in *defenses* arising *after* such transfer. Every maker of negotiable paper knows, as a matter of law, that it is transferable, by indorsement, so as to pass the legal and complete title to the paper, and the debt evidenced thereby, and it is his duty to pay to the holder upon production of the note. Payments of negotiable paper before it is due, and in the absence of such paper, are not made in the due course of business, and the party so paying should be held to do so at his own risk; for, when the title has passed by indorsement and delivery of such paper, the actual holder alone has the right to receive the money due thereon, and the maker, in paying to the original payee after such transfer, in the absence of the paper, either before or after its maturity, must abide the consequences of making payment to a party not entitled to receive it.

Our legislature, in providing indemnity for makers of lost negotiable paper when sued thereon, proceeds upon the principle that the actual legal holder thereof could lawfully compel a repayment to himself. We therefore hold that, in the case of negotiable paper, the maker is not discharged if, before the maturity of the paper, and after its transfer, even as collateral security, he makes payment to any person other than the *real holder*. This conclusion is fortified by the rule applicable to overdue negotiable paper. When such paper is indorsed and transferred *after* maturity, the maker can avail himself only of such matters of defense as existed between himself and the promisee or indorser at the time of the actual indorsement and transfer of the note to the holder. This is so both upon the principles of the law-merchant, and under the provisions of our statutes of set-off. It is founded upon the well-settled rule that a note does not cease to be negotiable because it is overdue. The payee, by his indorsement, may still communicate a good title to the indorsee, nor can the maker, when sued thereon, rely on matters of defense

against the indorser which arose after such transfer, although he had no notice of the transfer at the time of acquiring his defense. The maker has no right to presume that such overdue paper, which he has made negotiable, and on which he agrees to be liable to the actual holder or indorsee, remains in the hands of the original payee; and if he pays to the original promisee, without requiring the production of the paper, he does it at his own risk. This is the true distinction between the assignment of open accounts or equitable interest in a fund and the indorsement of a negotiable note.

In the former case notice of the assignment must be given the debtor to protect the assignee against future payments to the assignor. Such assignee acquires only an equitable title, and, in the absence of such notice, the debtor may reasonably presume that the original creditor still holds or controls the claim, and may accordingly make payments to him in the ordinary course of business. But the indorsee of an overdue negotiable note acquires a full legal title, with the sole and exclusive right to demand and receive payment thereof. His rights being *only* subject to the equities and defenses existing against the paper *at the time* of its transfer to him, no defenses against the original payee acquired after the transfer are available against him.

Now, it is manifest that negotiable paper, taken as collateral security for pre-existing indebtedness *before maturity*, and before any equities or defenses exist against it, must stand upon the same footing as the transfer of such overdue paper. The holder in neither case is considered a holder for value in due course of trade, under the law-merchant. Both are subject to all equities existing *at the time* of the transfer, but neither are subject to *defenses* arising after such transfer.

The foregoing doctrines are, we think, supported both by principle and authority. See *Carr v. Lewis*, 20 N. Y. 138; *Wheeler v. Guild*, 20 Pick. 545; *Baxter v. Little*, 6 Metc. 7; Edw. Bills & N. marg. 537, 538.

Our conclusion is that the case of *Vatterlien v. Howell*, 5 Sneed, 441, was not correctly decided, and should not be adhered to as authority.

It follows from the principles already announced that the defendant's payment to Pollard & Co., the original payee of the note sued on, made *before* its maturity, but *after* the date of its indorsement and transfer to the plaintiff as collateral security, constitutes no valid defense to the plaintiff's suit upon said note, although the defendant may have had no notice of such transfer at the time of making such payment. It results, therefore, that the judgment of the circuit court must be reversed, and that the plaintiff have judgment here upon the note, with cost of suit.

RAYBURN, by Next Friend, v. NORTON and others.

(*Supreme Court of Tennessee. January 21, 1887.*)

HOMESTEAD—HOW LOST—WAIVER.

If a creditor of a husband levies upon and sells a part of the husband's land, leaving enough land, however, for a homestead, and the wife subsequently joins her husband in a conveyance of the homestead, she cannot afterwards claim homestead in the part previously levied upon.

Appeal from chancery court, Coffee county.

P. C. Isbell, for Rayburn, respondent. *A. S. Marks* and *I. T. Stone*, for Norton, appellant.

SNODGRASS, J. William G. Rayburn was the owner of 130 acres of land in Coffee county, 100 acres of which lies on one side, and 30 acres on the other side, of the Murfreesborough & Manchester Turnpike. His dwelling-house was on the hundred acres, and this is proven to have been worth \$2,000. Before the levy on the 30 acres now in controversy was made, a levy had been made on the hundred acres. Sale under this levy was had, and the creditor bought it. The time of redemption having expired, Mrs. Rayburn

filed a bill to set up a resulting trust in the land, claiming that her money was invested in it. In the mean time the 30 acres had been levied upon, October 11, 1878, by another judgment creditor, who bought it at the sale. Still another redeemed from him, and then recovered the 30 acres in ejectment. The last creditor was the present defendant Norton. Mrs. Rayburn, by next friend, thereupon files the bill in this case against Norton, alleging that her husband was the owner of the 130 acres; that the 100 acres had been levied upon and sold and bought by the creditor Hancock; that the 30 acres left was not worth \$1,000, and that she was entitled to homestead, in connection with her husband, upon said 30 acres, not having conveyed the same or done anything to forfeit the homestead right, and she sought to enjoin the writ of possession in the ejectment suit. Injunction issued accordingly, and was executed. Defendant answered, and insisted that the complainant and her husband occupied the 100 acres as a homestead; that, since the levy on the 30 acres, complainant and her husband had conveyed valuable lands, either absolutely or in trust, more than sufficient for a homestead, and in fact the real homestead. In the evidence it appeared that they had made some conveyances; that since the levy on the 30 acres they, in the name of Mrs. Rayburn, borrowed \$1,000 from G. N. Tillman, and she and her husband executed a deed of trust, to secure its payment, on the 100 acres on the fifteenth October, 1881. This instrument recites that Mrs. Rayburn has compromised the suit against Hancock; the defendants agreeing that, upon her paying \$1,000 in satisfaction of Hancock's debt, title to the land sold by Hancock should be vested in Mrs. Rayburn, and this money received of Tillman was to "assist" in such payment. In this conveyance Rayburn and wife convey all their "right, title, claim, and interest, including any homestead right of both Wm. G. and wife, E. J. Rayburn," and also "the right of dower of said E. J. Rayburn (if any or either exists according to law) in and to all the land" involved in the Hancock suit, (describing it,) "upon which the said Rayburn now lives, except five acres this day deeded by us to W. K. Peay." For this five acres they received \$130.45. In pursuance to the compromise referred to, a decree was subsequently entered, vesting title in Mrs. Rayburn. Upon these facts the chancellor held that complainant was entitled to the relief sought, and so decreed. The defendant appealed, and the commission of referees report in favor of reversal.

The decree is erroneous. It has been held by this court that a husband may mortgage a part of the tract of land on which he resides with his family, without his wife joining with him, provided he retain enough of it for a homestead, and that, if the wife subsequently join him in a conveyance of the homestead, she cannot afterwards claim homestead in that part previously conveyed by the husband alone. *Hildebrand v. Taylor*, 6 Lea, 659; *Enochs v. Wilson*, 11 Lea, 228. We hold the same rule applies where a creditor has levied upon and sold a part of such tract as where the husband had himself sold it.

The facts in this cause can make no change in the application of the rule. The compromise and decree vesting title in Mrs. Rayburn do not affect the right of Norton, who was no party to that proceeding, nor was the 30 acres in controversy there, and he is of course not bound by the decree. In this case no question of resulting trust is made. The sole question is whether she is entitled to the homestead because her husband was the owner of the entire tract, 130 acres. So far as the result in the *Hancock Case* is concerned, it must be treated in this case precisely as if Rayburn had been vested with the title. The record relied on from that case shows that, before the decree was entered, Mrs. Rayburn joined in conveying the land, upon which they realized over \$1,000, while it was still the property of the husband, though to effectuate the compromise.

The decree should be reversed, and the bill dismissed, with cost.

LUCAS v. LARKIN and Wife.

(Supreme Court of Tennessee. January 22, 1887.)

1. DEED—MARRIED WOMAN—ACKNOWLEDGMENT—JUSTICE OF THE PEACE—SEAL.
In Tennessee a certificate of a justice of the peace to the acknowledgment of a married woman to a deed is valid, without adding any seal to his official signature.
2. SUNDAY—DEED—ACKNOWLEDGMENT OF—VALIDITY.
A deed acknowledged in Tennessee on Sunday is not, for that reason, void.

Appeal from chancery court, Franklin county.

Marks & Gregory, for appellants. *Estill & Whittaker*, for respondent.

SNODGRASS, J. There was a decree in this case in favor of complainant for \$1,465, and for sale of land held by the court to be mortgaged to secure the debt. The wife of defendant Larkin had resisted the sale upon the ground that she was not bound by the deed, and was entitled to homestead. The two objections urged against the deed were—*First*, that the justice of the peace commissioned to take her acknowledgment had not put his seal to the certificate; *second*, that the acknowledgment was taken on Sunday, and was therefore void.

The act of 1833 did provide that the commission should direct that the certificate be under "hand and seal," and the form prescribed had the seal appended. Caruthers & Nicholson, 594, 595. The same direction to the commissioner for certificate under "hand and seal," and the same attestation of the commissioner, "Witness my hand and seal," in the certificate, is continued in the Code, but the appended seal in the original form is omitted; and, in view of the fact that the justice has no seal of office, and private seals (except of corporations) are abolished, (Old Code, 1804,) it is no longer essential to add to the official signature any seal, and the certificate is valid without it. Such omission from the statutory form referred to was probably intended so to indicate.

Nor is the acknowledgment void because taken on Sunday. We are referred to a Wisconsin case assumed by counsel to decide the contrary. *De-forth v. Wisconsin & M. R. Co.*, 52 Wis.320, 9 N. W. Rep. 17. Whatever may have been the holding in Wisconsin upon a statute making it unlawful "to do any manner of labor, business, or work, except only works of necessity or charity," on Sunday, or in any other state upon statutes unlike our own, as was this one, or upon statutes similar to ours, our court has held that a contract executed on Sunday was not void for that reason alone, and we have likewise held that a writ issued on Sunday was not void; and we hold in this case that the acknowledgment of Mrs. Larkin was not void because taken on Sunday.

The decree is affirmed, with cost.

MARTIN, Ex'r, v. OSBORNE and others.

(Supreme Court of Tennessee. February 10, 1887.)

1. WILL—HOUSE LOT, AND PERSONAL EFFECTS THEREON—CATTLE—RESIDUARY LEGATEE.
A. devised to B. the house and lot used by him as his homestead, "together with all the personal property and effects in the house and on the lot as it might exist at his death." In other clauses of his will he gave B. a legacy, directed his debts to be paid, a monument to be erected over his brother's grave, and the balance remaining to be equally divided between C. and D. At A.'s death, in addition to household effects, there were upon the lot given to B., which contained 10 acres, some farming utensils, a carriage, wagon, feed in an outhouse, hogs, mules, horses, and cattle. The stock on the house lot were worked from time to time on a large lot adjoining it, as necessary, and the cattle were occasionally pastured there, but were driven up, fed, and housed at night on the house lot. C. claimed that he and D. were entitled to the stock. *Held*, that B. was entitled to the stock as personal property on the lot at A.'s death.

2. SAME—LEGACY—SPECIFIC OR GENERAL.

A. in his will, *inter alia*, gave B. a legacy of \$10,000, in cash, stocks, notes, or bonds that he might leave at his death. At A.'s death there was on hand a few hundred dollars in cash, \$2,200 in good notes, \$7,040 worth of railroad stocks, and \$3,000 in worthless notes. *Held*, that the legacy to B. was not a specific legacy, either as to the money or stock, notes, etc., but a general legacy, and the deficiency was payable out of the assets of the estate.

Appeal from chancery court, Wilson county.

A. B. Martin, for Martin. W. H. Williamson & Beard, J. Stokes & Son, and R. P. McLain, for Osborne.

FALKES, J. This is a bill filed by Andrew B. Martin seeking a construction of the will of the Hon. Robert L. Caruthers, deceased. So much of this will as is necessary to the consideration of the questions presented in this record is as follows: "In compliance with the dying request of my wife, who was greatly instrumental in any success I may have met with in the world, to make ample provision for our niece, who had from infancy filled the vacant place of a daughter to us, and who has since my sad bereavement, more than eleven years ago, managed my household affairs without trouble to me, and whose tenderness and affection for me in sickness and in health has ever been that of a daughter, I give to Mary Cahal the house and lot on which I now live, and which has been my homestead since 1828, [here describing the same by proper boundary,] together with *all the personal property and effects in the house, and on the lot as it may exist at my death*. I also give her \$10,000 *in such cash, stocks, notes, or bonds as I may leave*. This, however, is to extinguish a claim she has upon me for the price of her land, received by me from Harry Smith, which, with interest, now amounts to between four and five thousand dollars, and any other claims she may have against me, if any. (2) I give to W. H. Caruthers my law library." (3) He then directs his executor to sell his other real estate at such time, and "on such terms, as he may think best to insure a fair price. To these proceeds is to be added any and all other debts, claims, or effects I may leave not heretofore disposed of; the aggregate fund to be raised under this section to be disposed of as follows:" *First*, to pay all debts and expenses of administration; *second*, to the erection of a monument over the grave of a deceased brother; *third*, the balance remaining is then to be equally divided between his nephew W. H. Caruthers and his niece Sally Robinson. The will is dated December 21, 1881.

Judge Caruthers died on October 2, 1882. The inventory filed by the executor, and the other proof in the cause, shows that at the time of his death, in addition to the usual household effects reasonably expected to be found in the home of a man of testator's culture, high social position, and pecuniary condition, there were upon the lot given to his niece, Mary Cahal, some few farming utensils, a carriage, a wagon, a quantity of hay, and other feed in the out-buildings, a lot of fattening and stock hogs, two mules, one mule colt, two horses, and six head of cattle, four of the latter being registered Jerseys. The defendant W. H. Caruthers in his answer insists that the live-stock above enumerated does not pass to Mary Cahal under the will, but that the same goes to him and Sally Robinson, under the third clause.

The proof shows that the lot upon which testator resided was a large one, containing near 10 acres; that contiguous thereto was a much larger body of lands, upon which at the time of his death there was a small lot of corn ungathered in the field, a quantity of clover hay cut and stacked, some wheat straw, and 25 head of grazing cattle. Upon the adjoining lands the work stock, enumerated as being on the home lot, were worked from time to time, as the necessities of his small farming operations might require; and they, together with the two cows and four Jerseys, were occasionally pastured on said adjacent lands; but they were driven up at night, and fed and housed on

the home lot, where were situated the stable, barn, and cribs. The cows, including the Jerseys, were used for the purposes of milk and butter, were generally grazed on the home lot, and only turned upon the adjoining lands when the condition of the grass on the home place rendered it expedient so to do. It is too manifest to justify argument that the stock, including the Jerseys, thus housed and domiciled on the home place, became the property of Mary Cahal, under the language, "together with all the personal property and effects in the house and on the lot, as the same may exist at the time of my death," to be found in the first clause.

Defendant W. H. Caruther's next contention is that, under that portion of the will which gives to Mary Cahal "\$10,000 in such cash, stocks, notes, or bonds as I may leave," she may have all the cash on hand in payment of this legacy; but that, if the cash on hand is not enough to pay it, she must take such stocks, notes, or bonds as were on hand, at their face value; that is, dollar for dollar. It appears that there was on hand, at the time of testator's death, only a hundred or two dollars in cash, about \$2,200 in good notes, and 572 shares of stock in the Memphis & Charleston Railroad Company, together with two or three thousand dollars in notes that were reported by the executor as worthless. There were no bonds. The stock was greatly below par, and, when sold by the executor, realized \$7,040. Of course, the intention of the testator upon this subject, as in every question on the construction of wills, is the principal object to be ascertained; and it is therefore necessary that the intention be either expressed in reference to the thing bequeathed, or otherwise clearly appear from the will, to constitute the legacy a specific one, as contended for. This is not a *specific* legacy, either as to the money or the stocks, notes, etc., but is a *general* or pecuniary legacy, where, if there be a deficiency of assets, the legatee is entitled to recompense or satisfaction out of the estate of the testator. It is what is called in the books "a legacy of quantity in the nature of a specific legacy." It is for many dollars, with reference to a particular fund for their payment. 1 Roper, Leg. 192. As is said by the same author: "This is a species of legacy between a general and specific bequest. The testator's intention is its basis. It assumes that the testator meant to give a general legacy, with a charge upon a particular fund for its payment, not intending its existence should depend upon the validity or continuance of such fund; for the terms of the bequest are literally complied with by sale of so much of the stock as is required to answer the legacy." 1 Roper, Leg. 218. No one understood these principles better than the author of this will, who, as a distinguished member of this court, has contributed so much to enrich and adorn the jurisprudence of the state of Tennessee. So that, looking both to the circumstances and surroundings of the testator, and this object of his bounty, as also to the language of the will itself, we are clearly of opinion that \$10,000 in money must be paid by the executor, with interest after one year from death of testator, to Miss Cahal.

The question made by the defendant in his answer as to the law library is very properly abandoned at the bar.

The decree of the chancellor will be affirmed. The cost of the cause in the court below will be paid by the executor out of the funds in hand; the cost of this court will be paid by the appellant W. H. Caruthers.

STEELE, Adm'r, and others v. FRIARSON and others.

(Supreme Court of Tennessee. February 16, 1887.)

1. DESCENT AND DISTRIBUTION—SALE OF EXPECTANCY—ADVANCEMENTS—DEBTS—LIEN.

An assignment by a son of his expectancy in his father's estate, freely and voluntarily made to one who, as surety, has paid large sums of money for him, and in part payment thereof, is valid, and may be enforced in equity after the death of the father; but the interest so assigned will be subject to the repayment to the estate of

advancements made by the father to the son, though not subject to mere debts of the son due the father which have not been made liens on the son's interest by the administrator.

2. **WILL—ADVANCEMENT—PAYMENT OF SON'S DEBT.**

Where a father pays a debt for his son without taking a note or obligation from the son, and there is no other circumstance indicating an intent that the amount should become a debt, it will be considered as an advancement.

3. **SAME—INTEREST.**

Such an advancement will bear interest from the death of the father.

4. **SAME—EVIDENCE—DEBT DUE FATHER.**

Where a father pays money to a person, to be used in paying the official liabilities of his son, and refuses to accept a receipt therefor stating that it is an "advancement," but returns such receipt, with a receipt from which the word "advancement" has been omitted, for such person to sign, and retains it among his private papers until his death, such payment will not be held an advancement, but as creating a debt due from the son to his father.

5. **APPEAL—EXCEPTIONS—EXCLUSION OF EVIDENCE BY CHANCELLOR.**

Where evidence is excluded by a chancellor in Tennessee, his action can only be reviewed in the supreme court by a bill of exceptions.

Appeal from chancery court, Bedford county.

Warder & Moody, for J. W. Steele. *Cooper & Friarson*, for Friarson.

LURTON, J. Thomas S. Steele, being largely indebted to A. Friarson, executed and delivered to him the following assignment: "For value received, I, T. S. Steele, of the county of Bedford and state of Tennessee, do hereby bargain, sell, transfer, and convey unto Albert Friarson, of the same county and state, all my interest in the estate of my father, P. C. Steele, Sr., also of Bedford county, Tennessee, of every kind and character whatever, in real, personal, and mixed property; the true consideration being the following: I am indebted to said Friarson in a large amount, and the foregoing sale and conveyance is made by me in part payment of said indebtedness. The precise amount of my said interest is not known, as my father is still alive. But, when ascertained, the said Friarson is to credit my indebtedness to him with the amount received by him from the said estate. Witness my hand and seal this December 1, 1876." This paper was acknowledged before the clerk of the county court on the second December, 1876, and delivered, without being registered, to Mr. Friarson.

P. C. Steele, Sr., the father of the grantor, Thomas S. Steele, was then living, and was the owner of a large estate, real and personal. On the ——— July, 1880, P. C. Steele, Sr., died intestate; his heirs and distributees being ten sons and daughters, one of whom was Thomas S. Steele. Immediately upon his death, Mr. Friarson caused the assignment above set out to be registered. This bill was filed by the administrators of P. C. Steele against said Albert Friarson and the heirs of P. C. Steele to have an account between the estate and said Thomas S. Steele of advancements claimed to have been made to him by his father; but, if the claims in favor of the estate are held to be debts, and not advancements, then it seeks to have the interest of said Thomas S. Steele in the estate of his father subjected to the payment of such indebtedness. The assignment of the expectancy of Thomas S. Steele in the estate of his father is charged to be void, and a fraud upon the estate of his father, in that it is inoperative as against either advancements or debts due to his father.

No fraud in fact is either proven or charged. The proof abundantly establishes that Mr. Friarson, as security for Thomas S. Steele, had paid debts amounting to between twelve and fourteen thousand dollars. This assignment of his expectancy was voluntarily made, as the only means by which any part of this large and meritorious debt could be paid. Is such an assignment of the expectancy of an heir void as matter of law? Whatever may be the rule at law concerning the validity of the assignment of an interest or

right not in existence, there can be no doubt that courts of equity will give effect to such assignments, fairly made, in behalf of innocent purchasers.

"Contingent interests and expectancies may not only be assigned in equity, but may also be the subject of a contract, such as a contract of sale, when made for a valuable consideration, which courts of equity, after the event has happened, will enforce." "So, even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and in such case, if made *bona fide*, for a valuable consideration, it will be enforced in equity after the death of the ancestor,—not, indeed, as a trust attaching to the estate, but as a right of contract." Story, Eq. Jur. § 1040b.

The ground upon which such assignments are enforced in equity is stated most satisfactorily by Prof. Pomeroy: "The doctrine of equitable assignment of property to be acquired in future is much broader than the jurisdiction to compel the specific performance of contracts. In truth, although a sale or mortgage of property to be acquired in future does not operate as an immediate alienation at law, it operates as an equitable assignment of the *present possibility*, which changes into an assignment of the equitable ownership as soon as the property is acquired by the vendor or mortgagor; and because this ownership, thus transferred to the assignee, is equitable, and not legal, the jurisdiction by which the right of the assignee is enforced, and is turned into a legal property accompanied by the possession, must be exclusively equitable. A court of law has no jurisdiction to enforce a right which is purely equitable." Pom. Eq. § 1288. Again, he says that legislation recognizing as legal such assignments out of the way, that, "according to the general course of decision, [such rights] are assignable in equity for a valuable consideration; and equity will enforce the assignment when the possibility has changed into a vested interest or possession." Id. § 1287.

Even at law the sale of an interest in the lands of an ancestor living has been enforced, but generally by aid of the operation of the doctrine of estoppel springing from the covenants in the deed. The argument that the assignment now under discussion contains no covenants might be effective in a court of law; but, regardless of the doctrine of estoppel, such an assignment or sale is operative in equity as an equitable assignment of a future interest, and, upon the expectancy being converted into a vested interest, will be enforced by courts of equity. Such an assignment was enforced by this court against an attaching creditor; the court saying that "the question was too well settled to require or even allow debate at this day." *Fitzgerald v. Vestal*, 4 Sneed, 257. The fact that such sales or assignments will be closely scrutinized by courts to prevent frauds upon expectant heirs or persons in necessitous circumstances does not at all affect the power of the courts to give effect to such sales when fairly made and for full consideration.

Thomas S. Steele, at the time he made this assignment, was probably 40 years of age, a lawyer by profession, and the clerk of the chancery court. No advantage is pretended to have been taken of him, and neither he nor his representatives have sought to set it aside. Upon the death of P. C. Steele, Sr., and the registration of this conveyance, it operated to at once vest in the grantee the interest of the grantor as an heir and distributee of the estate of his father. So far as P. C. Steele had made advancements to his son, they must be accounted for in diminution of the interest assigned; that is, the interest assigned is clearly subject to be charged with legal advancements. No assignment by an heir, either before or after the interest has vested in him, and no attachment or levy by a creditor of such heir, will defeat an account of advancements. *Johnson v. Hoyle*, 3 Head, 56; *Mayor, etc., v. Potomac Ins. Co.*, 2 Baxt. 303. But, on the other hand, the indebtedness of an heir to the intestate is not a lien upon the interest of the heir in the estate, and such share is therefore subject to the creditors of the heir, or to sale or

assignment by the heir; and if the creditor obtain the first lien, either by levy or attachment, or obtain an assignment before the administrator has taken steps to fix a lien upon such interest, the creditor's right in either case will be superior. *Towles v. Towles*, 1 Head, 601; *Mann v. Mann*, 12 Heisk. 246.

There is no doubt of the correctness of the decree of the chancellor in holding that the item of \$1,000 paid by the intestate for his son Thomas was an advancement. It was a debt of the son paid by the father. No note or other obligation was taken by the father, and there is no circumstance indicating an intent that it should become a debt. In such case it is well settled that it will be charged as an advancement. *Johnson v. Hoyle*, 3 Head, 56. The chancellor should have allowed interest on this advancement from the date of the testator's death. The report of the master is not excepted to upon the ground that interest is not reported on this advancement; but we do not think it was necessary, because, as matter of law, such advancements bear interest. The question is properly raised by exception to the report of the referees, and the decree of the chancellor and report of referees will be corrected upon this point.

The item of \$3,000 paid by the intestate upon the liabilities of T. S. Steele as clerk and master, we think, under the facts of this case, was not an advancement, but is a debt. This fund was paid into the hands of Col. Edmond Cooper to be by him applied in the payment of the official liabilities of Thomas Steele. Col. Cooper gave a receipt for this fund to the intestate, in which he stated that this was paid as an advancement. This receipt was not accepted by the intestate, for he prepared another, an exact copy of the original, omitting the words "as an advancement," and sent it to Col. Cooper for his signature, and returned at the same time the original receipt. The second was signed by Col. Cooper, and sent to the intestate, and this was found among his valuable papers. This is a most significant circumstance, indicating very clearly that he desired to retain this as a claim or liability, and did not intend it as an advancement. The evidence of the agent who carried the second receipt to Col. Cooper, even if sufficient to explain the objection to the first receipt, is not before us. The evidence was objected to upon the ground that the witness was a party in interest, and a party to this suit, and not competent to testify as to any conversation with the intestate. The record shows that the chancellor excluded the evidence, and no bill of exceptions makes the excluded evidence a part of the record. Where evidence is excluded by the chancellor, his action can only be received by us by a bill of exceptions showing the excluded evidence, and his ruling upon it. There is no other competent evidence sufficient to affect the result reached in holding this matter a debt, and not an advancement. There can be no question but that the other two items are likewise debts.

The decree of the chancellor will be affirmed, except in the matter of interest upon the advancement. The report of referees is likewise confirmed, except as modified in the same matter. The costs will be paid by appellants.

ROBINSON and others v. FRANKEL and another. HERMAN v. SAME. LOEB and others v. SAME.

(Supreme Court of Tennessee. February 25, 1887.)

FRAUDULENT CONVEYANCE—BROTHERS—UNCERTAIN INDEBTEDNESSES—PROCEEDS TO GO TO CREDITORS.

A sale by a failing debtor of all his available assets to a near relation, upon consideration of the payment of a large and suspicious debt to himself, and the execution of his unsecured notes payable in 6, 12, 18, and 24 months, for a sum over and above his own debt, equal to all the other debts of the vendor in amount, the purchaser being a man of no financial responsibility, and having no reasonable means of paying such notes, except from the assets so purchased, is fraudulent and void;

and the fact that it was a part of the agreement of sale that the notes of such purchaser should be turned over to a trustee for the benefit of the creditors of the vendor, and that such assignment was made, will not save the transaction.

Appeal from chancery court, Bedford county.

Tillman & Davidson, for Robinson. *Ivie & Ivie*, for Herman Loeb & Co., and J. Herman. *Bearden & Warder*, *W. B. Bates*, and *John Ruhm*, for H. & M. Frankel.

LURTON, J. These three causes have been heard together, as the evidence relied upon to establish the fraudulent character of the conveyance attacked is the same in each case. The complainants are creditors of the defendant M. Frankel, and the several bills have been filed for the purpose of attacking as fraudulent and void a sale made by their debtor of a large stock of merchandise to his brother, the defendant H. Frankel. The defendant M. Frankel was a merchant doing business in Shelbyville, Tennessee, under his own name, and conducting a similar business under the name of Isaac Frankel at Pulaski, Tennessee. On the second December, 1884, his indebtedness to persons other than the disputed debt of H. Frankel, was about \$35,000. On the second December, 1884, the Shelbyville stock of goods was sold and transferred to H. Frankel upon an agreement, as stated in the answers of the defendants, that H. Frankel should take the stock "at the amount of the debts as they then existed; he to execute his notes in 6, 12, 18, and 24 months for the residue of the indebtedness over and above his own indebtedness, and these notes, thus executed, to be assigned in trust by Marcus Frankel for the benefit of his creditors, share and share alike." Under this arrangement, the defendant H. Frankel executed his four notes payable to M. Frankel, each for \$8,719.42, and payable, respectively, in 6, 12, 18, and 24 months after date. Simultaneously with this transaction, M. Frankel assigned these four notes to ——— Brown as trustee for the benefit of all his creditors equally. Complainants refused to accept the benefit of this assignment, and attack the transaction as fraudulent. Within a day or two the stock of goods at Pulaski was sold to the same brother upon an arrangement not definitely appearing, but stated to have been of a similar character.

Was this sale of the Shelbyville stock fraudulent as to the creditors of M. Frankel? This stock is clearly shown to have been worth at the time of this sale \$50,000. In the sale the alleged debt of M. Frankel to the purchaser, H. Frankel, is paid; that is, the agreement of sale was that H. Frankel should take this stock at a sum equal to the whole indebtedness, including the debt claimed to be due to himself, and should execute his notes for a sum equal to the whole indebtedness, less only his own debt. What was the debt due really to H. Frankel? The fact that this was a transaction between two brothers, while not a badge of fraud, is one which naturally awakens suspicion; and while not in itself and by itself sufficient to justify a court in setting aside the transaction, yet it is a fact which undoubtedly gives greater weight to other circumstances, if any such shall appear, than otherwise attach to them. *Bump*, Fraud. Conv. 96; *Bumpas v. Dotson*, 7 Humph. 317. It is a fact in itself sufficient to require fuller and more distinct proof of the fact of indebtedness and of the fairness of the transaction than would otherwise be sufficient.

The several answers of the defendants are very vague on the matter of this alleged debt. Vagueness and indefiniteness in an answer to a bill of this description is in itself another circumstance arousing suspicion. These brothers must have certain *data* by which this debt, if it ever in fact existed, could have been stated with detail and precision in their answers. In each of the three answers, H. Frankel is declared to have been the largest creditor. In the answer to the bill of J. M. Robinson & Co. the only statement as to the amount or character of this debt is as follows: "Respondent's debt of eighteen thousand dollars was due; he could have proceeded energetically to collect."

In the answer to the bill of J. Herman the answer says that "respondent's debt of sixteen thousand dollars was due." etc.; while in the answer to the bill of Herman Loeb & Co. there is no amount stated,—the allusion to the debt being "that respondent's debt was due, he could have proceeded energetically to collect." While this disagreement in these several answers as to the amount of this debt, and the entire failure to show in what this debt consisted, and when and upon what consideration it was contracted, is not of itself enough to satisfy us of its fictitious character, yet it is an added circumstance to the already awakened suspicion.

The deposition of M. Frankel, throws no light upon this question. He was not examined by his counsel upon the matter of this debt. H. Frankel, in his deposition taken upon interrogatories, states that his object in buying this stock "was to secure a large claim owing to me from my brother Marcus Frankel, which I thought I could do by assuming his liabilities. This debt of my brother Marcus was principally for money loaned, and *indorsements*, amounting in all from twenty-five thousand to thirty thousand dollars, all of which was then owing to me from my brother, and no part of which had then been paid." Upon cross-examination concerning this debt, he states that "M. Frankel was indebted to Frankel & Butler, of which firm I was a member, on account of indorsements to Levy Bros. & Co., to Stick Bros. & Co., and to the City National Bank of Denver, all of which has been paid by me. In addition to this, he owed for money loaned by Frankel & Butler, and guaranteed by myself and Louis Butler, and to myself and Louis Butler, in a large amount, aggregating in all about the sum of \$30,000. As to the amount to be allowed out of the purchase price of each of said stores to said Frankel & Butler upon said debts due, I do not now remember, but I refer to the bill of sale wherein the amounts so to be paid are correctly and distinctly set forth. As I now remember the said bill of sale, I gave, to the best of my recollection, for the Pulaski goods, my notes for \$16,800." This is as much light as Mr. H. Frankel proposes to give concerning the existence of this large claim. The bill of sale to which he refers us as showing how much he credited this expanding debt by reason of his purchase of the Pulaski stock, and how much by reason of his purchase of the Shelbyville stock, he does not file. As we understand his deposition, he took the Pulaski stock for \$16,800; but whether the whole of this, or what part of it, was paid on this debt to himself, we cannot determine. The whole Pulaski transaction is shrouded in darkness. The debt stated in one answer to be \$16,000, and in another at \$18,000, has expanded, according to this deposition, to \$25,000 or \$30,000. No evidence as to a dollar of this debt is filed. No statement of the items is given.

His counsel, however, seem to mainly rely upon the deposition of Mr. Wallace, the cashier of a bank at Shelbyville and a creditor, for proof to sustain the fact of this indebtedness. Mr. Wallace does prove that while M. Frankel was in business at Shelbyville, that he drew on H. Frankel for sums aggregating about \$17,000, and that these drafts were passed to the credit of M. Frankel, and were paid by the drawer. Admitting that this is true, yet it by no means shows that M. Frankel was drawing against his own funds, or that the claims had not been paid. This witness proves that H. Frankel had more than once said to him, about the time of this sale, that all that he had was the debt due to him by M. Frankel. An advance or loan of his whole estate by a brother living in Colorado to one living in Tennessee indicate something more than brotherly affection. The proof, by itself, is wholly insufficient to overcome the suspicions surrounding this claim.

Now, in view of the relationship between the parties to this transaction, and the grave suspicions which point strongly to the fictitious character of the debt, let us look at the other facts. This brother, H. Frankel, to whom this sale was made, was a resident of the state of Colorado. He reached Shelby-

ville but a day or two before this transaction, and evidently came in company with one Leo Frank, an agent for H. B. Claflin & Co., large creditors of Marcus Frankel. A secret consultation was had, at which there were present the two brothers and their counsel, and Frank, the representative of Claflin & Co., and the representative of one of the local banks which was a large creditor. The situation is pictured by the joint answer of the two brothers: "Your respondent [M. Frankel] found himself confronted with the question, what is the best to do for my creditors? What is the best mode to adopt to secure the most for them? Animated with this purpose alone, his older brother and co-defendant was, with representation of creditors and prominent business men, invited to a consultation. Respondent had no means with which to pay except as he could realize from the goods, and it was evident to all that with the pressure of the times the money could not be realized to meet the debts as they fell due. It was likewise apparent, and all believed, if a general assignment of the goods in trust was made under the continued stringency of the times, the innumerable expenses, and the modes and methods that inevitably attend the closing out of such a stock of goods, but a comparatively small amount would be saved and realized for the creditors, under these circumstances. The representative of another creditor and the consulting attorneys proposed and advised that the only reasonable solution of the difficulty was a purchase of the stock of goods by Henry Frankel at the amount of the debts as they then existed." Notes were to be given, as before stated, and these notes assigned by M. Frankel for the benefit of creditors. Though there were other creditors in the town at the time, they were not invited to this conference. The sale was made, and the notes were turned over to a trustee. These notes were wholly unsecured. H. Frankel, the maker, had not a dollar of property in this state or any other, save his claim of a debt against this brother. It is difficult to believe that any creditor would advise or sanction such a transaction, who had not some secret trust declared in his favor. That such a secret arrangement was made in behalf of the two creditors present and advising this course is rendered very probable; for the proof shows that the debt to the bank was in a very short time paid off in full by H. Frankel, and that he at once gave his individual notes to the other creditor present, H. B. Claflin & Co. That this was understood at the time we have no manner of doubt, and it is just such a secret preference as might be expected. The great body of the creditors found themselves secured only by the notes of a non-resident of no financial responsibility, the collection of their debts postponed for 6, 12, 18, and 24 months, and all the amounts of their debt turned over to an irresponsible brother, claiming a large and very suspicious debt.

A sale of this character cannot be permitted to stand. A sale by a failing debtor of all his property to an irresponsible purchaser, and upon so long and unusual a credit, with no security, is an unquestioned badge of fraud. It was not a sale safe for the debtor or the creditors, or calculated to be useful to either. *Bump, Fraud. Conv.* 89, 92, 93; *Hendricks v. Robinson*, 2 Johns. Ch. 300. Even if H. Frankel be treated, as he well may be, as in effect a trustee of this stock of goods in behalf of the creditors whose debts he in effect assumed, yet in this case he would be a trustee without bond, clothed with the legal title, and permitted apparently to buy and sell and continue the business at his pleasure.

In view of the facts of this case, we hold that a sale by a failing debtor of all his available assets to a near relation, upon consideration of the payment of a large and suspicious debt to himself, and the execution of his unsecured notes payable in 6, 12, 18, and 24 months for a sum over and above his own debt, equal to all the other debts of the vendor in amount, the purchaser being a man of no financial responsibility, and having no reasonable means of paying such notes except from the assets so purchased, is fraudulent and

void. The fact that it was a part of the agreement of sale that the notes of such purchaser should be turned over to a trustee for the benefit of the creditors of the vendor, and that such assignment was made, will not save the transaction. Creditors cannot be compelled to accept such a hazardous and unsafe security, or have the collection of their debts postponed for so unreasonable a time; especially where the purchaser is a relative, and claims a debt not satisfactorily proven.

The decree of the chancellor will be affirmed.

ROBINSON and another v. LINCOLN SAV. BANK.

(*Supreme Court of Tennessee. January 31, 1887.*)

1. MORTGAGE—DEED ABSOLUTE IN FORM—EQUITY.

A deed made by a purchaser at an execution sale to a third party, at the request of the judgment debtor, to secure money borrowed by the judgment debtor from the third party in order to redeem from the execution sale, although absolute in form, will be treated in equity as a mortgage.¹

2. PRINCIPAL AND AGENT—RATIFICATION BY PRINCIPAL—MORTGAGE.

Where an agent acting for another borrows money in order to redeem the principal's property from an execution sale, and procures conveyances of the principal's property to the lender as security, in an action by the principal to have the deeds declared a mortgage and to redeem, the lender cannot complain that there was no privity between the agent and plaintiff, when the deeds show upon their face the plaintiff's ownership.

Appeal from chancery court, Lincoln county.

Carmack & Woodard, for Robinson and another. *Holman & Wright*, for Lincoln Sav. Bank.

SNODGRASS, J. William Jones, a judgment creditor of W. B. Robinson and complainants, had an execution levied on the lands of complainants, and sold it (after condemnation) on the nineteenth May, 1877; Jones becoming the purchaser at the price of \$252.65. W. B. Robinson procured Jones to extend the time of redemption, and in 1879 borrowed of the defendant bank an amount sufficient to redeem it, and had the bank satisfy Jones' debt; the bank taking Jones' deed, and also the deed of the sheriff to the land. The arrangement was made about the money on August 18, 1879, but Robinson did not, it seems, receive the Jones money, it being agreed that it was to be placed to the credit of Jones, subject to his order. When the deed was made Jones made a deed to the bank on the second December, 1879, for the recited consideration of \$291.45, the amount of his debt and interest, and directed the sheriff also to make a deed, which was done on the twelfth day of January, 1880. Both these deeds showed that it was the lands of Melissa and Cassena Robinson bought by Jones at execution sale. When Robinson made the arrangement with the bank to borrow the money, he transferred to the bank certain notes and personal property, and took its receipt, showing that if he paid off this \$291.45 and certain other debts, which he secured, in all amounting to \$482.30, with interest, by the first day of December, 1879, (except a \$160 judgment, upon which Robinson might take further time until the first of March, 1880,) then the bank was to reconvey the land. But "the bank," the receipt recites, "is in no manner bound to convey said land to said Robinson till he shall have paid the amounts, and by the times as herein agreed," and he was to have no recourse on the bank for the notes, obligations, watch, and horse conveyed, provided he falls to pay as stipulated; "they being," as recited, "the property of the bank; but, on the payment of said sums, promptly as stated, said bank will deliver the same to him, or otherwise satisfactorily account for them." On this receipt, several credits appear,—one for \$25,

¹ See *Hanlon v. Doherty*, (Ind.) 9 N. E. Rep. 782, and note.

August 20, 1879; three aggregating \$141.50; and one for \$11, December 22, 1879; and two others \$50 and \$54.50, of subsequent date. The bill in this case was filed to have the transaction declared a mortgage, and to have the payments credited, together with the rents received, etc. The matter, before the court, was the subject of compromise negotiations, which were suddenly broken off by the bank selling the land to defendants McLemores. They, however, bought on time, and the payment of their notes was enjoined, and they make no defense, so that their purchase is not in the way of the relief sought. Complainants show the land was worth about \$1,200. Robinson's object in negotiating this arrangement was to save and redeem the land. The absolute conveyances made were put in this form only to secure the debt, and it is very clear that in equity the transaction must be treated as a mortgage.

But the bank insists that it dealt alone with W. B. Robinson, and that there is no privity between him and complainants, and that they have no right to relief under the contract made with him. There is nothing in this. Robinson, who was the brother-in-law of complainants, was acting as their representative in the matter; and whether he so represented to the bank or not is immaterial. Both deeds to the bank show that the land was sold as the land of complainants. Robinson would have had no right to redeem for himself, and a contract whereby he secures money to redeem, effectuated by the execution of such deeds, shows itself in this way the parties for whose use the money was obtained. Of course, when an agent, acting for another, borrows money to relieve and does relieve the principal's property, by procuring a conveyance of it with other property, the principal, when he discovers it, can take the same advantage secured to the agent. He but steps in and takes his place as the real principal, and of this the lender cannot complain, having received a conveyance of the principal's property, which upon its face discloses the real ownership.

The decree of the chancellor should be reversed, the deed to the McLemores canceled; and the deeds of Jones and the sheriff to the bank declared mortgages; payments on the receipt, and proceeds of other property therein mentioned, and rents received, or which should have been received, credited on the debt; and, if any balance remain due, the land should be sold for its payment. But, in the event the payments and property shown in the receipt and rents exceed the amount used in redemption, secured to the bank as shown in the receipt, the excess will be first applied to payment of the other debts secured. Should these payments, etc., exceed the amount therein shown to be due the bank, the mortgage will be declared satisfied, and a writ of possession will issue to put complainants into possession of the land. The costs accrued in the chancery court and in this court will be paid by the bank; those subsequently accruing in the chancery court, as the chancellor may decree. The cause will be remanded.

FOUST v. STATE.

(*Supreme Court of Tennessee. January 15, 1887.*)

CRIMINAL PRACTICE—FORMER JEOPARDY—VOID CONVICTION—CARRYING WEAPONS—JUSTICE OF THE PEACE.

Justices of the peace have no jurisdiction to try and punish for the offense of unlawfully carrying a pistol, and a conviction and fine by a justice is therefore no bar to an indictment for the same offense.

Appeal from circuit court, Macon county.

Indictment for unlawfully carrying a pistol. On rehearing. For the original opinion, see 12 Lea, 404.

Defendant pleaded a former conviction and fine by a justice of the peace, under what is called the "Small Offense Law." The court below held that
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that was not a bar, and defendant was convicted. The only question is whether the justice had jurisdiction to try and punish in this class of cases.

Roark & Wooton, for appellant. *Atty. Gen. Pickle*, for the State.

CALDWELL, J. This case was heard at a former term of this court; and the majority and dissenting opinions then delivered were published in 12 Lea, 404-420. Their publication was inadvertent or improper, however, a rehearing having been previously granted. Upon reargument and reconsideration at the present term, the court is of the opinion that the magistrate had no jurisdiction to hear the case finally, and release the prisoner under the "Small Offense Law," and that his action in that behalf constituted no bar to the prosecution in the circuit court. Affirmed.

POE v. STATE.

(*Supreme Court of Tennessee. January 19, 1887.*)

CARRYING WEAPONS—JOURNEY—REPEAL OF THOMP. & S. CODE TENN. § 4759d.

The Tennessee act of 1870, (2d Sess. c. 13, § 3,) carried into Thomp. & S. Code, § 4759d, exempting from the provisions of the statute prohibiting the carrying of concealed weapons a person on a journey out of his county or state, was repealed by Acts 1879, c. 186, and it is not a defense to a prosecution for carrying a pistol that the defendant was on a journey out of his county or state.

Appeal from circuit court, Warren county.

W. V. Whitson, for Poe. *The Attorney General*, for the State.

FOLKES, J. At the May term, 1886, of the circuit court of Warren county, the plaintiff in error was indicted, tried, and convicted for carrying a pistol. After a motion for new trial and in arrest of judgment, he has appealed in error to this court. In his charge to the jury the judge said: "It is insisted by the defendant that, if he did have a pistol at the time and manner charged, he would not be guilty, because, at the time, he was on a journey out of his county, or state. The court instructs you that the act of 1879 [just read to the jury] does not exempt persons on a journey from its provisions, and consequently that defense cannot avail the defendant, if the facts have been so proven." This is now complained of as error.

There was proof tending to show that the prisoner was on a journey. It is therefore insisted that he is exempt from punishment under the act of 1870, (2d Sess. c. 13, § 3,) carried into Thomp. & S. Code, § 4759d. This section is as follows: "The provisions of the first section of this act shall not apply to an officer or policeman while *bona fide* engaged in his official duties, in the execution of process, or while searching for or engaged in the arrest of criminals; nor to any person who is *bona fide* aiding the officers of the law or others in the legal arrest of criminals, or in turning them over to the proper authorities after arrest; nor to any person who is [not] on a journey out of their county or state." The word "not" which occurs in the original act is manifestly a clerical error or a misprint. It is urged that there has been no repeal of this statute. It may not be uninteresting to review briefly the history of modern legislation on this subject in this state.

In December, 1869, an act was passed prohibiting the carrying about the person, "concealed or otherwise," any pistol, dirk, etc., at any election, fair, race-course, or other public assembly of the people. See Acts 1869-70. There were no exception in this act. At the same session, on the sixth January, 1870, it was declared a misdemeanor for "any person, whether publicly or privately, to carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol," etc., "except a knife conspicuously on the strap of a shot-pouch, or on a journey out of his county or state." On the eleventh June, 1870, the pistol law was re-enacted in a severer form, under the title of "An act to preserve the

peace, and prevent homicide." This act prohibits "any person to publicly or privately carry a dirk, * * * belt or pocket pistol, or revolver." The punishment is fixed by a fine of from ten to fifty dollars, and imprisonment from thirty days to six months. It will be noticed that the prohibition of the first section is *absolute*. Section 2 of this act prescribes the duty of the courts and officers in relation to the enforcement thereof. Section 3 is as quoted at length in the early part of this opinion. On the fourteenth December, 1871, under the same title, the entire pistol law was again re-enacted, applying to same weapons as before, except that an army pistol, or such as are commonly carried and used in the United States army, to be carried openly in the hand, is excluded from the operation of the statute. Section 2 relates to the duty of peace officers and grand jurors. Section 3 enacts that "the provisions of the first section shall not apply to any officer or policeman in the actual discharge of his official duties, nor to any person who is on a journey out of his county or state." None of these acts contain a repealing clause.

Thus the law stood as to carrying weapons until 1879, when chapter 96 was enacted "to prevent the sale of pistols in the state." At the same session we find chapter 186, p. 231, Acts 1879, passed, entitled "An act to amend the criminal laws of the state upon the subject of carrying concealed weapons, and to amend section 4759 of the Code." Section 1 expressly amends Acts 1871, c. 90. It adds several weapons to the list, such as razor, slung-shot, brass-knucks, etc. It fixes the fine imperatively at \$50 and imprisonment in the county jail, the imprisonment only at the discretion of the court. Section 2 provides that offenses theretofore committed shall be punished under laws then in force; nothing in this act to be so construed as to operate as a pardon for such offenses. Section 3 excepts from the operation of this act persons employed in the army, navy, or marine service of the United States, officers and policemen while *bona fide* engaged in their official duties, and to persons summoned by such officers to assist them. Section 4 provides "that all laws and parts of laws that come in conflict with the provisions of this act be, and the same are hereby, repealed."

It will thus be noticed that the journey feature is omitted from the act of 1879, while the other exceptions, which had been side by side with this, are expressly provided for. Nothing can be clearer than the legislative intention to repeal the clause in question. Experience had demonstrated that the journey feature was invoked as a convenient subterfuge for evading the enforcement of the law. The exception as to persons on journeys in the former acts operated expressly and exclusively upon the provisions of those acts, and cannot remain to modify the first section of the act of 1879. The latter act is much broader than the former acts, and repeals the same, not only by necessary implication, but in express terms, so far as it is inconsistent with them. Such would be the effect of the act of 1879 independent of the repealing clause; it falling clearly within the familiar rule that where two statutes embrace the same subject-matter, and the latter is inconsistent with the former, the former is thereby repealed.

It is agreed that the act by its title shows a purpose to "amend," and not to "repeal;" and that, if it undertakes to repeal, it is still obnoxious to section 17 of article 2 of the constitution, where it provides: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title; all acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended." The position is untenable. The title of the act shows an intent to legislate on the *entire subject of concealed weapons*, not a purpose to amend or repeal a particular provision *only*.

Speaking of the provision of the constitution, this court has said: "A construction might be adopted of such a latitudinous character as virtually to neutralize the beneficial effects intended to be secured; while, on the other

hand, a too rigid and strict construction would in many instances unnecessarily embarrass useful legislation. While adhering to the constitution always, legislative acts should not be subjected to a hypercritical test. Judge Cooley in his work says: 'There has been a general disposition to construe these provisions liberally, rather than embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it is adopted.' But to conclude this opinion, already too long, it is sufficient to say that the clause of the constitution referred to, and the evil intended to be guarded against, have no reference to acts merely inconsistent with former laws, and operating as an implied repeal thereof for the time being, but alone to acts which purport, without more, to repeal former acts." *Home Ins. Co. v. Taxing Dist.*, 4 Lea, 644, and cases there cited. Judge Cooley says: "It has been uniformly held that statutes which amend others by implication are not within these constitutional provisions, and that it is not necessary that they even refer to the acts or sections which by implication they amend;" citing cases from several states to sustain the text.

We have practically held at the present term, in the case of *Foust v. State*, ante, 657, that the act of 1879, now under consideration, has repealed by implication the acts giving justices of the peace jurisdiction over concealed weapon cases, under the "small offense" laws. It results, therefore, that there is no error in the charge.

Let the judgment be affirmed, with costs.

T. & P. R. Co. v. ROGERS.

(*Supreme Court of Tennessee. February 12, 1887.*)

CARRIER—OF GOODS—LIMITING LIABILITY—CONNECTING LINES.

A condition in a bill of lading providing that its liability shall cease upon delivery to the consignee or carrier over whose connecting line the freight is to be shipped, is valid.¹

Appeal from circuit court, Wilson county.

East & Fogg and *C. D. Porter*, for T. & P. R. Co. *John C. Farr*, for Rogers.

SNODGRASS, J. In this case the contract in controversy expressed in the bill of lading contained a clause limiting the liability of the defendant company, and providing that its liability shall cease upon delivery to the consignee or carrier over whose connecting line the freight was to be shipped. This provision was valid. The circuit judge failed to instruct the jury as to the effect of such limitation of the liability of defendant, and for this error the judgment must be reversed, and the case remanded for a new trial. The costs of this appeal will be paid by defendant in error.

LEVINE v. STATE.²

(*Court of Appeals of Texas. January 22, 1887.*)

BURGLARY—INSTRUCTION.

Charge of the court should respond to the case as made by the indictment and the evidence. See the opinion for instructions in a burglary case held to be unwarranted by any evidence in the case. The same having been opportunely accepted to, the Code expressly necessitates a reversal of the conviction.

Appeal from district court, Jefferson county.

¹See *Savannah, F. & W. Ry. Co. v. Pritchard*, (Ga.) 1 S. E. Rep. 261, and note.

²Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

This conviction was for the burglary of the house of B. F. McDonough. The penalty assessed was a term of two years in the penitentiary.

The testimony established the fact that the house was entered by defendant through a window, about 8 o'clock A. M., and that he so entered it by raising the window. The non-consent of the owner was admitted.

Greer & Huck, Jr., for appellant, assigned the error discussed in the opinion.

Asst. Atty. Gen. Burts, for the State.

HURT, J. This is an appeal from a judgment of conviction for the offense of burglary. The indictment alleges that the appellant "by force, threats, and fraud did break and enter" the house. The entry, according to the record, was made in the day-time, through a window. The court instructed the jury that "the offense of burglary is constituted by entering a house by force, threats, or fraud, by night." In this case there was no evidence of the employment of threats or fraud, or that the entry was effected in the night-time. The court also charged that the offense might be completed "by entering the house during the day-time, and remaining concealed therein until night." There was no evidence of an entry by day, and remaining until night. In treating of the character of force necessary to constitute a breaking, the court charged: "It may be by lifting a latch of a door that is shut, or by raising a window, the entry at a chimney or other unusual place, the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose." There was no latch, door, or chimney, no introducing of a hand or other instrument, testified to in the record. If the appellant was guilty of a burglarious entry, it was by reason of the fact that, with intent to steal, he entered through a window in the day-time. This was the case made by the evidence, and to it the charge should have been restricted. Code Crim. Proc. art. 594; *Shultz v. State*, 5 Tex. App. 390.

The appellant having duly excepted to the charge upon the grounds noticed, the error is such as must work a reversal of the judgment. Code Crim. Proc. art. 602; *Mace v. State*, 9 Tex. App. 110; *McGrew v. State*, 10 Tex. App. 539; *Maddox v. State*, 12 Tex. App. 429; *La Norris v. State*, 13 Tex. App. 33, 41; *Cartwright v. State*, 14 Tex. App. 486; *Boddy v. State*, Id. 534; *Goode v. State*, 16 Tex. App. 411; *White v. State*, 17 Tex. App. 188; *Niland v. State*, 19 Tex. App. 166; 21 Tex. App. 436.

The judgment is reversed, and the cause remanded.

WILLIAMS v. STATE.¹

(Court of Appeals of Texas. February 5, 1887.)

INTOXICATING LIQUORS—SALE TO MINOR—EVIDENCE.

To support a conviction for the violation of article 376 of the Penal Code, the state must show that, when he sold the liquor, the defendant knew that the purchaser was a minor.

Appeal from criminal district court, Galveston county.

The conviction was for knowingly selling liquor to a minor, and the penalty imposed was a fine of \$25. The record discloses a total absence of evidence showing that the defendant knew that the person to whom he sold the liquor was a minor.

J. B. Stubbs, for appellant, assailed the evidence as insufficient to support the verdict. *Asst. Atty. Gen. Burts*, for the State.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WHITE, P. J. This appeal is from a judgment of conviction for selling intoxicating liquor to a minor. There is not a particle of proof going to show that, at the time the appellant sold the liquor, he knew that the party to whom he sold it was a minor. The offense consists in "knowingly" selling liquor to a minor, (Pen. Code. art. 376,) and it must be alleged and proved that the act was "knowingly" done; that is, that the seller *knew* he was selling to a minor. *Hunter v. State*, 18 Tex. App. 445.

Judgment reversed, and cause remanded.

DAVIDSON v. STATE.¹

(Court of Appeals of Texas. November 20, 1886.)

1. PERJURY—FALSE SWEARING.

The making of a false affidavit in order to secure the issuance of a marriage license will support an assignment for false swearing against the affiant, but not for perjury. But the false statement, under oath, by a witness on the trial of the affiant for false swearing, will support an assignment of perjury against the witness.²

2. SAME—EVIDENCE.

The general rule is that, if the statement assigned as perjury tends even circumstantially to prove the issue, it is material. It is not necessary that the particular facts sworn to shall be immediately material to the issue, but it must have such a direct and immediate connection with a material fact as to give weight to the testimony on that point. *Held* that, under the rule, as the perjury assigned tended to strengthen the affidavit of B., it was material to the issue on trial in B.'s case.

3. SAME.

The state was permitted, over the objection of the defendant, to prove by the attorney who defended B. on the trial in which the perjury was charged to have been committed, his reason and purpose in placing the defendant upon the stand as a witness on that trial. *Held*, that the evidence was properly admitted. Article 189 of the Penal Code provides that "a false statement made through inadvertence, or under agitation or by mistake is not perjury," and it was proper to permit the state to negative those conditions by the attorney who introduced the witness.

4. SAME—JUDGMENT—CHARGE OF THE COURT.

The judgment rendered in the judicial proceeding wherein the perjury was alleged to have been committed was properly admitted in evidence as inducement, though not as proof, of the perjury. It was, however, the duty of the trial court, in its charge to the jury, to properly limit the purpose of such evidence; the rule being that, whenever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a wrong, undue, or improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of a party, then it becomes the imperative duty of the court, in its charge to the jury, to so limit and restrict it that such unwarranted results cannot ensue; and a failure to do so will be radical and reversible error, even though the charge be not excepted to.

5. SAME—QUESTION FOR COURT.

The materiality of matter assigned as perjury is for the determination of the court, and it is error if it be left to be ascertained by the jury.

Appeal from district court, Williamson county.

This conviction was for perjury, and the penalty assessed was a term of seven years in the penitentiary. The opinion discloses the case.

Sheeks & Sheeks and *Fisher & Townes*, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. In order to obtain a marriage license, one Thomas Bratton made an affidavit, which was required of him by the county clerk, that his fiancée was 18 years of age, and that her parents had given their consent to

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

²An indictment for perjury cannot be sustained unless the court or officer had authority to administer the oath. *State v. McCone*, (Vt.) 7 Atl. Rep. 406, and note; *People v. Greenwell*, (Utah,) 13 Pac. Rep. 89; *State v. Jenkins*, (S. C.) 1 S. E. Rep. 437.

the marriage. It turned out that neither of these sworn statements was true, and that the maiden was in fact only 17 years of age. A prosecution was instituted in a very short time against Bratton by indictment based upon this affidavit, charging him with "false swearing." Bratton defended, and procured this appellant to appear as a witness in his behalf. Appellant's testimony, in substance, was that Catherine Ross (the female in question) "was a great big girl thirteen years ago; that she had not grown but very little since he became acquainted with her, thirteen years ago; that he picked cotton with Catherine Ross thirteen years ago, and that she was then a good sized girl,—big enough to pick cotton." Notwithstanding this testimony, Bratton was convicted of "false swearing," and his punishment was assessed at two years' confinement in the penitentiary. Appellant was then indicted for "perjury" in testifying as aforesaid on Bratton's trial, and, having been convicted and sentenced to seven years in the penitentiary, he appeals to this court.

It is contended that the county clerk had no authority to take Bratton's affidavit in the premises, and that Bratton committed no offense in making it, and that if no offense was committed by Bratton then appellant's testimony on the trial of Bratton could not support an assignment of perjury. Had Bratton been indicted for perjury, there might have been some plausibility, if not reason, in this position, inasmuch as perjury can only be assigned upon an "oath or affirmation legally administered under circumstances in which an oath or affidavit is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice." Pen. Code, art. 188.

A county clerk is the only officer authorized by law to issue marriage licenses, and the same article which confers that authority upon him also empowers him "to administer all oaths and affirmations, and to take affidavits and depositions, to be used as provided by law in any of the courts." Rev. St. art. 1149. He is also generally empowered to take affidavits. Rev. St. art. 7. He is expressly prohibited from issuing a license to marry without the consent of the parents or guardians of the parties applying, unless the parties so applying shall be, in the case of the male 21 years of age, and in the female 18 years of age. Rev. St. art. 2841. But the law nowhere requires or authorizes the taking of an oath or affidavit of the age of the applicant in cases where the clerk is in doubt upon the subject. His authority to require such oath and affidavit for his own protection is, if at all, derived solely from his general power "to administer all oaths, and take affidavits." Such being the case, it may well be questioned whether, under our law, an affidavit so made would be a legitimate basis for an assignment of perjury. Mr. Desty, in his *American Criminal Law*, says perjury may be assigned on a false oath taken before a surrogate to obtain a marriage license. *Amer. Crim. Law*, § 75g. Mr. Bishop, on the other hand, says: "In England a false oath taken before a surrogate to deceive him into granting improperly a marriage certificate, though not perjury, is a criminal misdemeanor." 2 *Bish. Crim. Law*, (7th Ed.) § 1029. In Ohio perjury can be assigned upon such an oath. *Call v. State*, 20 Ohio St. 330; *Warwick v. State*, 25 Ohio St. 21.

Our opinion is that it would not be a legitimate basis for an assignment of perjury under our statute, it being only a voluntary affidavit. Not being for use in any of the courts, such an affidavit would be extrajudicial, and an extrajudicial oath lays no foundation for a prosecution of perjury. *U. S. v. Babcock*, 4 McLean, 113; 2 *Bish. Crim. Law*, (7th Ed.) § 1027. And it seems clear that no oath whatsoever, taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colorable, but in truth

unwarrantable and merely void, can ever amount to perjury in the eye of the law, because they are of no manner of force, but are altogether idle. 1 Hawk. P. C. c. 69, § 4. In 4 Bl. Comm. 137, it is said: "It is much to be questioned how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is now too frequent upon every petty occasion, since it is more than possible that by such idle oaths a man may frequently in *foro conscientiae* incur the guilt, and at the same time evade the temporal penalties of perjury."

But the indictment against Bratton was not for perjury, but for *false swearing*,—a distinct specific offense under our Code, which provides that "if any person shall deliberately and willfully, under oath or affirmation legally administered, make a false statement by a voluntary declaration or affidavit which is not required by law, or made in the course of a judicial proceeding, he is guilty of false swearing, and shall be punished by imprisonment in the penitentiary not less than two nor more than five years." Pen. Code, art. 196. The distinction between perjury and false swearing is this, viz.: If the false statement be made in an oath or affidavit "required by law," or made in "the course of a judicial proceeding," the offense is perjury; if the false voluntary oath or affidavit is "not required by law, or made in the course of a judicial proceeding," then it is false swearing *Langford v. State*, 9 Tex. App. 283. Most clearly the clerk had authority to administer the oath, and a written declaration, or "affidavit," as it is called, of Bratton, was a legitimate subject upon which to assign a charge of "false swearing," though not of perjury.

The next question raised by appellant is that the matter assigned against him, as set out above, is not material; in other words, that the statements of defendant on Bratton's trial, as to the size of the girl Catherine Ross, and the fact that she picked cotton 13 years ago, was immaterial to the issue being tried, that issue being whether the girl was 18 years old at the time Bratton made the affidavit to that effect.

The rule is that "a party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by swearing falsely and corruptly as to material circumstances tending to prove or disprove such fact; and this without reference to the question whether such fact does or does not exist. It is as much perjury to establish the truth by false testimony as to maintain a falsehood by such testimony." *Bradberry v. State*, 7 Tex. App. 375. "If the statement tend, even circumstantially, to the proof of the issue, it will be deemed material." 2 Archb. Crim. Plead. (8th Ed.) 1727. "Testimony tending to affect the verdict of the jury, or extenuating or increasing the damage, and thus influencing the judgment of the court, is material. It is not necessary that the testimony should of itself be sufficient to sustain the issue in the case in which the witness is called, or that it should change the mode of punishment, if in a criminal case. If it is pertinent to the issue, it is sufficient." *King v. Rhodes*, 2 Ld. Raym. 887. "In the case of *State v. Hattaway*, 2 Nott & McC. 118, it was said that to constitute perjury it was not necessary that the particular fact sworn to should be immediately material to the issue, but it must have such a direct and immediate connection with a material fact as to give weight to the testimony on that point." Mr. Bishop says: "The true test would seem in reason to be whether the evidence could have properly influenced the tribunal. * * * Where the incidental matter is calculated to incline the jury to give a more ready credit to the substantial part, it will sustain a conviction for perjury, if willfully false." 2 Bish. Crim. Law, (3d Ed.) §§ 1036, 1037. It is evident that the testimony tended to strengthen Bratton's affidavit that the girl was 18 years old.

A bill of exceptions was saved because the state was allowed to prove by the witness John, who had as attorney defended Bratton on his trial, what

was witness' object and purpose in calling this defendant to testify as a witness in that case. The reason and purpose, as well as the admissibility of the evidence, is, we think, apparent. Our Code declares that "a false statement, made through inadvertence or under agitation or by mistake, is not perjury." Pen. Code, art. 189. Now, if, from information derived previously from the witness, the attorney was induced to call him upon the stand to swear to the facts to which he did testify, it stands to reason that such statements, when thus sworn to, could not have been made through inadvertence, nor been the result of agitation or mistake.

Another bill of exceptions was taken to the reading in evidence by the state, over objection, of the record including the judgment in the *Bratton Case*. It is contended that this evidence was both inadmissible and prejudicial to defendant's rights. There was no error in admitting the evidence. Mr. Wharton says: "A prior judgment may be also admissible as part of the evidence on which the case for or against the defendant may be made out. This is eminently the case in proceedings for perjury, in which the record of the trial at which the alleged perjury was committed is admissible as inducement, though not to prove the perjury." Whart. Crim. Ev. (8th Ed.) § 602a; 1 Greenl. Ev. (13th Ed.) § 539. But, having admitted the evidence properly, we look in vain for any instruction from the court explaining the object and purposes of its admission, and limiting the purposes for which it could legally be considered by the jury. They should at least have been told it was not to be considered as proof of the perjury. Without some such instruction, the jury may have given it weight as evidence going to establish the perjury, and doubtless they did so.

It is a general rule that whenever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a wrong, undue or improper influence upon the jury as to the main issue, injurious and prejudicial to the rights of a party, then it becomes the imperative duty of the court in its charge to so limit and restrict it as that such unwarranted results cannot ensue; and a failure to do so will be radical and reversible error, even though the charge be not excepted to. Thus, "where evidence of an extraneous crime is admitted for the purpose of showing intent or motive in the commission of the act alleged against him, it is the duty of the trial court, in charging the jury, to explain the purpose for which it was admitted, and to limit its effect to this purpose alone." *Long v. State*, 11 Tex. App. 381; *McCall v. State*, 14 Tex. App. 358; *Kelley v. State*, 18 Tex. App. 262; *Francis v. State*, 7 Tex. App. 501. Many illustrations might be given, but it is deemed unnecessary. In this instance we think it is plainly apparent that the jury were in all probability unduly and improperly influenced by the evidence, because not limited and restricted in their consideration of it.

The materiality of the matter assigned as perjury is for the determination of the court, and it is error if it be left to be ascertained by the jury. *Donohoe v. State*, 14 Tex. App. 638; *Jackson v. State*, 15 Tex. App. 579. But this objection urged by appellant's counsel to the charge is not borne out by the record.

For the error in the charge as above pointed out, the judgment is reversed, and the cause remanded.

TEXAS & N. O. RY. CO. v. BARFIELD and others.

(Supreme Court of Texas. February 1, 1887.)

NEGLIGENCE—RAILROAD—TRESPASSER ON TRACK.

A railroad company is not liable for causing the death of one who goes upon its track at a point where there was no public crossing, and from which he might

have seen an approaching train, and so near to the train that those in charge of it could not by the exercise of the highest degree of care have saved him from being run over.¹

Appeal from Liberty county.

W. N. Shaw, for appellant. *Cleveland & Lockhart*, for appellees.

STAYTON, J. The evidence shows that Henry Barfield was killed by the appellant's train in the night-time while he was on the railway track at a place where there was no public crossing. That his own negligence was the proximate cause of his death there can be no reasonable ground to doubt from the evidence. The appellant was using its track in the ordinary manner, and prosecuting its business without any shown neglect. The evidence all shows that the deceased might have seen the approaching train long before it reached the place where he was killed, and the reasonable inference to be drawn from all the facts stated by the witnesses is that he entered upon the track at a point so near the approaching train that the exercise of the highest degree of care by the servants of the railway company could not have saved him had he been seen at the time he first came on the track. The law of this case is well settled by the former decisions of this court. *Railway Co. v. Bracken*, 59 Tex. 74; *Railway Co. v. Smith*, 52 Tex. 183; *Hoover v. Railway Co.*, 61 Tex. 503; *Railway Co. v. Richards*, 59 Tex. 373; *Railway Co. v. Sympkins*, 54 Tex. 618. A discussion of the facts of this case, and of the rules of law applicable to it, could serve no useful purpose.

The judgment of the court below will be reversed, and the cause remanded.

HEIDENHEIMER and others v. ELLIS and another.

(*Supreme Court of Texas*. February 25, 1887.)

1. ACCOUNT STATED—WHAT CONSTITUTES.

Where the vendor and vendee of goods met, and agreed upon a certain sum as due on the goods, and thereupon one of the vendees, they being a firm, wrote an acknowledgment of the amount due on an account rendered by the vendor, addressed to another member of the firm, *held*, this constituted an account stated.

2. INTEREST—RIGHT TO RECOVER INDEPENDENTLY OF CONTRACT.

Interest cannot be allowed *eo nomine*, unless specially provided by statute, but it may be assessed as damages independently of statute when necessary to indemnify a party for an injury inflicted by his adversary. And so, in an action for goods sold and delivered, it appearing that the goods had been delivered, and an account stated and acknowledged, *held*, the failure of the vendee to pay was a gross injury to the vendor, for which the latter was entitled to interest on the debt from the time at which it ought to have been paid.

Appeal from Galveston county.

McLemore & Campbell, for appellants. *Burnett & Hanscom*, for appellees.

GAINES, J. Appellees sued appellants in the court below to recover of them a balance of purchase money alleged to be due for a stock of goods sold and delivered by the former to the latter on the twenty-fourth day of January, 1885. Appellees averred that the goods were to be paid for in cash upon delivery, and claimed interest from the date of the transaction. The court charged the jury, in effect, that if they believed that defendants were indebted to plaintiffs on the stated account sued on, to find a verdict for plaintiffs for the amount of the account, and interest on the same at 8 per cent. per annum from the date of acknowledgment and promise to pay the same. This charge is assigned as error, upon the alleged ground that there is no stated account set up in the petition. The assignment is not well taken. The petition alleges the sale and delivery of the goods by the plaintiffs to the defendants, the

¹See *Little Rock, M. R. & T. Ry. Co. v. Haynes*, (Ark.) 1 S. W. Rep. 774, and note; *Williams v. Southern Pac. R. Co.*, (Cal.) 13 Pac. Rep. 219.

price of the goods, and that they were to be paid for on delivery. A bill of particulars is also annexed, showing each article, and the price thereof. It is also averred that the parties had an accounting, and ascertained and agreed that the sum of \$5,084 was due upon the transaction, and that thereupon one Stone, a member of defendants' firm, wrote an acknowledgment of correctness of the amount due upon the paper containing the statement of the account, addressed to Isaac Heidenheimer, another member of the firm, and delivered it to plaintiffs. These averments clearly show a stated account, according to the strictest rule of decision upon that subject. *Neyland v. Neyland*, 19 Tex. 423. There is no statement of facts found in the record, and it must be presumed (there being the proper averments in the petition) that the evidence warranted the instruction.

It is contended, also, that the charge is erroneous in so far as it instructed the jury to allow interest from the time at which the payment was to have been made. This is a question of more difficulty. It is frequently said in the decisions of the courts that interest is the creation of the statute. In a certain sense this is true; but, as applied to one class of cases, the phrase is misleading. Interest cannot be allowed *eo nomine* unless especially provided for by statute; but in many instances it may be assessed as damages, when necessary to indemnify a party for an injury inflicted by his adversary, though the statute be silent upon the subject. In the case of *Houston & T. C. Ry. Co. v. Jackson*, 62 Tex. 209, it is conceded that our statutes do not provide for interest upon the value of the goods for which a carrier has given a bill of lading, and which he has failed to deliver; yet the court there held that the measure of damages was the value of the goods at the place of delivery, and interest thereon from the time at which they ought to have been delivered. The doctrine is fully sustained by the authorities cited in the opinion, and it is sufficient for us to refer to it. The whole subject of interest is very ably discussed by Senator SPENCER in the case of *Rensselaer Glass Factory v. Reid*, 5 Cow. 604; and the distinction between the cases in which interest is allowed *eo nomine* and those in which it is allowed only by way of indemnification made very clear. Referring to the latter, the opinion says: "In such cases it is not a necessary incident to the debt, but may be allowed, under circumstances, by way of mulct or punishment for some fraud, delinquency, or injustice of the debtor, or for some injury done by him to the creditor." This language has heretofore been thrice quoted by this court with approval. *Houston & T. C. Ry. Co. v. Jackson*, *supra*; *Fowler v. Davenport*, 21 Tex. 635; *Close v. Fields*, 13 Tex. 623. In the case last cited the suit was for money collected by the defendant for the use and benefit of plaintiff, and wrongfully detained; and interest was allowed as a part of the damages. So, also, in the case of *Commercial, etc., Bank v. Jones*, 18 Tex. 811, in which the bank converted the money of plaintiff deposited with it by their agent to its own use.

Now, let it be conceded that the claim sued upon in this case is not a "written contract ascertaining the sum payable," provided for in article 2976 of the Revised Statutes, nor yet an open account, such as is mentioned in article 2977. It is a stated account to be paid in cash upon delivery of goods, the sale of which constituted its consideration, and which had been delivered when the accounting was had. Here is a manifest delinquency on part of the debtors, working a gross injustice to the creditors, and resulting in a wrong which cannot be compensated by any sum less than the principal and the interest on the debt from the time at which it ought to have been paid. See *Davis v. Greely*, 1 Cal. 422; *Selleck v. French*, 1 Conn. 32, 1 Amer. Lead. Cas. 610, with notes, 613; *Crawford v. Willing*, 4 Dall. 286; *Adams v. Fort Plain Bank*, 86 N. Y. 255; *Bate v. Burr*, 4 Har. (Del.) 131; *Wood v. Robbins*, 11 Mass. 504; *Elliott v. Minott*, 2 McCord. 126; *People v. Gasherie*, 9 Johns. 71.

It is sometimes said that, where interest is allowable by way of damages, the allowance is in the discretion of the jury; and in the opinion from which

we have quoted (*Rensselaer Glass Factory v. Reid, supra.*) it is laid down broadly that in all these cases the discretion of the jury is absolute. Such, however, is not the rule as applicable to every case of this character. *Houston & T. C. Ry. Co. v. Jackson, supra.* But it is recognized by the court in *Close v. Fields, supra*, in which they say: "The charge is objectionable in this: that it did not leave the question of interest under the name of damages to the discretion of the jury, but treated it as one belonging to the court. And for this error we would have been bound to reverse the judgment if the statement of facts had left it at all doubtful whether the verdict of the jury could consistently with the facts have been different if the jury had been informed that it was a matter within their discretion to allow damages or not. We are, however, fully satisfied that the evidence would not have authorized a different conclusion. The fact of the jury, in the verdict, calling it interest when it was damages, is no ground for reversal." The same remarks are applicable to the case before us. It is true, there is no statement of facts here, but for that reason we are to presume that everything necessary to sustain the verdict was proved on the trial which could have been proved under the pleadings.

The cause was submitted with a suggestion of delay. Though upon an inspection of the whole record we find no error in the judgment, we cannot say the appeal was manifestly for delay. The judgment will therefore be affirmed, without the award of damages.

GROOM v. STATE.¹

(Court of Appeals of Texas. February 12, 1887.)

1. LARCENY—BRAND—EVIDENCE.

See the opinion *in extenso* for circumstances under which, in a larceny case, it was error to admit in evidence the record of a certain brand.

2. JURY—RESIDENCE.

The unorganized county of H., in this state, is attached to the organized county of W. for judicial purposes. Held that, for all judicial purposes, the two counties of H. and W. are one and the same, and a resident of H. county is a competent juror for jury service in the county of W.

3. LARCENY—OWNERSHIP.

See the opinion *in extenso* for evidence held insufficient to support a conviction for larceny, because insufficient to establish the allegation of ownership.

Appeal from district court, Wheeler county.

The opinion discloses the entire case. The penalty assessed against the appellant was a term of two years in the penitentiary.

J. N. Browning, for appellant.

The proof fails to establish the allegation of ownership. The court erred in refusing to stand aside the juror Wood, when challenged, because he was not a citizen of Wheeler county. The trial court erred in admitting in evidence the record of the brand of the Moody & Andrews Land & Cattle Company.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. On a previous day of our present term we affirmed the judgment of conviction in this case. At the time the case was considered and determined by the court we did not have the benefit of a brief or argument in behalf of the defendant. Upon this motion for a rehearing counsel for defendant has submitted an able and full brief of the case, and, at the request of the court, has also argued orally the questions relied upon by him for a reversal of the judgment. In the light of the brief and argument of

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

counsel, we have carefully and thoroughly reconsidered the record, and we are convinced that we were in error in affirming the judgment, because, in our opinion, the conviction is not supported by the evidence. We do not think the evidence establishes the allegation as to the ownership of the alleged stolen cattle. It is alleged in the indictment that Thomas T. McGee owned said cattle. It is shown by the evidence that, at the time of the alleged theft, said McGee managed the cattle in that section in the "P O" brand. He testified that he had been manager of the "P O" ranche and cattle since February, 1885. He did not claim to be the *general*, but only the *special*, owner of the cattle in the "P O" brand. By the witness Black the state proved that the alleged stolen cattle were branded "P O" on the left hip, and he thought that they were also branded on the left with a lateral or "lazy" "P," but he was not certain that they were branded with the lateral or lazy "P." There was no other evidence as to the brand upon the alleged stolen cattle. McGee testified nothing as to the ownership of the particular cattle alleged to have been stolen. No other witness except Black testified to any fact tending to identify said cattle as the property of McGee.

For the purpose of establishing the allegation of ownership, the state read in evidence the record of a mark and brand recorded in the name of R. Moody & Co., date of record, September, 1880. The mark, an underbit and overbit in each ear; the brand "P O" on the left hip, and "↵" on the left side. Black testified that the alleged stolen cattle, he *thought*, but was not sure, were in this mark and brand. If the said cattle were in fact in this said mark and brand, the evidence would sufficiently prove the ownership of the cattle to have been in R. Moody & Co. at the date of the alleged offense. But the testimony of the witness Black, as to the mark and brand of said cattle, is very indefinite and unsatisfactory, even if he was a credible witness, which the evidence clearly shows he was not.

But even should it be conceded that the alleged stolen cattle were in the recorded mark and brand of R. Moody & Co., who were the general owners of the cattle in that mark and brand at the date of the alleged theft, this does not prove ownership of the cattle in McGee. It was not proved that McGee owned, managed, or controlled the cattle in said mark and brand. He testified that he managed cattle in the "P O" brand, but it is not shown that the "P O" brand is the same as the recorded brand of R. Moody & Co., to-wit, "P O" on the left hip, and "↵" on the left side. It might be inferred, perhaps, that the two brands are identically the same, and that the witnesses, in speaking of the "P O" brand, meant the said recorded brand of R. Moody & Co. But the liberty of a citizen cannot be taken away by the mere inference of a material fact; especially when such fact, did it exist, could easily be proved. It was not for the jury to assume, in the absence of proof of the fact, that the recorded brand of R. Moody & Co. was identical with the "P O" brand which McGee testified he managed. The "P O" brand may be an entirely different one from the said recorded brand, and, if so, it was not proved that the alleged stolen cattle were in the "P O" brand; for Black, the only witness who testified as to the brand of said cattle, said that he thought they were not only branded "P O," but were branded "↵" on the side. Besides, if the "P O" brand is not identical with the said recorded brand, it was not recorded, and was not evidence of ownership.

It seems from the evidence that, after the date of the alleged theft, R. Moody & Co. sold and transferred their cattle and brand to the Moody & Andrews Land & Cattle Company, who had said brand again recorded in the name of said company. This record was read in evidence, over defendant's objections, and the correctness of this ruling of the court is questioned by a proper bill of exceptions. We cannot perceive any legitimate bearing that this record could have upon any issue in the case. At the time of the alleged theft, the Moody & Andrews Land & Cattle Company certainly did not own

the cattle in said brand, although they did own the same subsequently. We think this record should have been excluded because irrelevant. Furthermore, it was not sufficient evidence of itself to prove ownership in said company, not having been recorded in the name of said company at the time of the alleged theft. *Priesmuth v. State*, 1 Tex. App. 480; *Spinks v. State*, 8 Tex. App. 125; 21 Tex. App. 178.

It is alleged in the indictment, and the proof shows, that the venue of the offense was Hemphill county, an unorganized county, attached to Wheeler county for judicial purposes. In impaneling the jury, one J. B. Wood, a citizen of said Hemphill county, was presented to serve as a juror in the case. Defendant objected to said Wood as a juror, because he was not a citizen of Wheeler county, etc. The court overruled the objection, and, the defendant having exhausted his challenges, said Wood served as a juror in the trial of the cause, and this proceeding is presented by bill of exceptions for our revision. We are of opinion that Wood was a qualified juror, notwithstanding he did not actually reside, and could not legally vote, in Wheeler county. Hemphill county, having been by law attached to Wheeler county for judicial purposes, was, for such purposes, a part of Wheeler county, and for such purposes its citizens must be regarded as citizens, voters, and householders of said Wheeler county. For all judicial purposes the two counties are to be regarded as but one, and for such purposes Wheeler county embraced and exercised complete jurisdiction over all the territory within the boundary lines of both counties. It cannot be questioned that the impaneling and service of a jury come within the meaning of the words "judicial purposes." We hold, therefore, that said Wood was a qualified juror to serve in the trial of this cause.

Because, in our opinion, the evidence is insufficient to support the conviction, in that it does not prove the allegation as to the ownership of the alleged stolen cattle, the motion for rehearing is granted, and the judgment is reversed, and the cause remanded.

LOYD v. STATE.¹

(Court of Appeals of Texas. January 12, 1887.)

CRIMINAL PRACTICE—NEW TRIAL—INDICTMENT—CHARGE OF THE COURT.

It is as incumbent on the state to prove the material descriptive averments of an indictment as it is to prove the main issue. Failure to so charge the jury in this case was material error, and, in the absence of proof sustaining the description of the property alleged in the indictment, the trial court erred in not awarding a new trial.

Appeal from district court, Red River county.

The opinion discloses the case. The penalty assessed against the appellant was a term of two years in the penitentiary.

Sims & Wright, for appellant, maintaining the doctrine announced by the court.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. This conviction is for removing from the state mortgaged property with the intent to defraud the mortgagee. In the indictment, and also in the mortgage, the property is described as one "chestnut sorrel pony horse, nine years old, and fourteen hands high, and one Studebaker two-horse wagon." This particular description of the property was necessary in the indictment, because it was the particular description of the property mortgaged. Such description cannot be regarded and treated as surplusage. It

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identifies the offense charged, and must be proved, if not as to all, at least as to a portion, of the property. *Warrington v. State*, 1 Tex. App. 168; *Rangel v. State*, Id. 461; *Allen v. State*, 8 Tex. App. 360; *Cameron v. State*, 9 Tex. App. 336; *Simpson v. State*, 10 Tex. App. 681; *Davis v. State*, 13 Tex. App. 215.

In this case the descriptive averments in the indictment are not met and sustained by the evidence. As to the horse, the evidence is that the one removed from the state by the defendant was a *sorrel*, not a *chestnut sorrel*, as described in the indictment and mortgage; and it was further proved that there is a marked difference between the colors of *sorrel* and *chestnut sorrel*. As to the wagon, it was not proved that it was a Studebaker, nor even that it was a two-horse wagon. These defects in the evidence were called to the attention of the court by a special instruction requested by defendant, which was refused, and also in defendant's motion for new trial.

We are of opinion that the court erred in not instructing the jury as to the effect of a failure on the part of the state to prove the descriptive averments in the indictment, at least as to some portion of the property, and again erred in refusing to grant defendant a new trial upon the ground that the state had failed to make such proof. Because of these errors the judgment must be reversed, and the cause remanded. As to the other matters complained of by defendant we perceive no error.

The judgment is reversed, and the cause is reversed and remanded.

TUCKER v. SMITH.

(Supreme Court of Texas. February 25, 1887.)

1. TRIAL—EVIDENCE—CONNECTED DOCUMENTS.

In an action of trespass to try title to land, plaintiff, having filed a judicial survey and plat of the land, both of which had been recorded together, was permitted by the court to disconnect the two documents, and put the survey in evidence without introducing the plat. *Held*, that this was not error, as the court, though permitting the papers to be separated, did not allow either to be taken from the files, and the defendant had the privilege at any time of bringing the plat before the jury.

2. BILL OF EXCEPTIONS—RULING OF TRIAL COURT IN EXCLUDING QUESTION.

Unless the bill of exceptions shows what the appellant expected to prove by the witness in answer to the question, the ruling of the lower court in excluding the question cannot be revised on appeal.

3. EVIDENCE—DECLARATIONS OF DECEASED PARTIES—BOUNDARIES.

Evidence of the declarations of disinterested parties, who were dead at the time of the evidence offered, as to the location of a boundary line, is admissible in a controversy about such line, it appearing that they were in a position to know.

4. BOUNDARIES—SURVEY—RIVER.

A surveyor, in running a division line where it strikes the bend of a river, may go around the bend, and continue his line at a point on the river directly in the course of the line he was running, so as to give to the tract on each side of the line its proper quantity of land.

5. CUSTOM AND USAGE—EVIDENCE—TITLE UNDER A DEED.

Evidence of a custom is inadmissible to subvert a well-established rule of law, and the legal effect of a deed under which parties claim title to land.

Appeal from Cameron county.

Mason & Miller, for plaintiff in error. *Waul & Walker* and *Wells & Hicks*, for defendant in error.

WILLIE, C. J. This is an action of trespass to try title, and was brought to recover some 300 acres of land lying in what was formerly a bend of the Rio Grande river. A large tract of land known as "La Feria Grant," consisting of 12 leagues, was in 1843 partitioned among its various owners. This grant fronted on the Rio Grande, which is at this point very irregular

in its course; and the surveyor who ran the lines for the partition did not meander the river, but ran a base line so as to clear its various bends, and at right angles to this ran the division lines between the various part owners of the grant. The general course of the river here is from west to east, and this was about the direction of the base line. The partition lines were extended to the north boundary of the grant, and their distances from each other on the base line were made such as would have given to each owner his proper proportion of land had the base line been the true southern boundary of the survey. These partition lines were, however, intended to extend to the river, and to embrace such lands as would be included between them south of the base line, and between it and the Rio Grande, but they never actually extended to the river. Two tracts adjoining each other, which were set apart to part owners of the grants, became the property of one Neale and one Galbert, respectively, the former owning the eastern tract, and the latter the western. The point on the river at which the division line between these two tracts should end was the disputed question in this case. It was shown that in 1843 the Rio Grande changed its general course at a place a little west of south from the point where the division line of these tracts intersected the base line made by the surveyor, and ran in a somewhat northerly direction, and then, after making a curve, it ran in a direction south-south-west till it reached a point about 1,800 varas from where it left, as above stated, its general course, and then, turning and making a sharp curve, it pursued its usual easterly direction. The effect of all this was to include a long, narrow strip of land in the bend made by the river's taking a northerly and then a southerly direction as above stated, called in Spanish a "*zurron*" or "*bolsa*," and to form between the lower part of the lost line of the bend and the river, after it resumed its original course, a somewhat triangular shaped piece of land, called in Spanish a "*potrero*." This is the land in controversy. The point where the division line between Neale and Galbert struck the said base line was nearly in a north direction from the curve of the river at the upper part of the *zurron*; and it is contended by the appellant, who has succeeded to the Neale land, that an extension of their partition line to the Rio Grande would strike that stream at the upper part of the *zurron*. He claims that there the division line must stop; and, if this be so, it is clear that the *potrero* will fall within the Neale boundaries. The appellee, who owns the Galbert tract, says, on the other hand, that the division line must be so extended as to strike the Rio Grande at a point east of the place where it made the sharp curve and resumed its general eastern course. If this be so, the *potrero* will be left to the west of the division line, and will fall within the bounds of the Galbert tract. In 1859 the Rio Grande ceased to flow around the bend which formed the *zurron*, and ran directly across the south side of it, and left it on the north bank of the river. The defenses of the appellant were not guilty, and the statute of limitations. The cause was submitted to the jury, and they, under the charge of the court, found a verdict for the plaintiff, and judgment, was entered accordingly. From this judgment, Tucker has appealed; and his assignments of error are directed to the admission and rejection of testimony, and the giving and refusal of charges by the court, and the want of evidence to support the verdict.

We shall not notice the first and second assignments of error, as they relate to the introduction of testimony, and the points are not saved by proper bills of exception. District Court Rule 55.

The plaintiff filed, as part of his abstract of title, the judicial survey and partition of the La Feria grant, made in 1843, having attached to it a plat of the same made for Galbert in 1847. These two documents had been recorded together in 1848. Upon motion of the plaintiff, made at the threshold of the trial, he was allowed by the court to disconnect these two documents, and to put the partition in evidence, without introducing along with it the plat of

1847. To this the defendant objected, and reserved a proper bill of exceptions to the action of the court. This bill, however, shows that, while the court allowed the papers to be separated, it did not permit either to be taken from the file, and that the privilege was given the defendant of placing the same in evidence before the jury. The map does not appear in the statement of facts, but that shows either that the defendant did not avail himself of the privilege given him by the court, or, if he did, that he did not think the map of sufficient importance to bring it before this court. The defendant, therefore, was not injured by the action of the court.

On the trial the plaintiff asked a witness the following question: "In running the line of the Llano Grande land, would you not have had to run much further into Mexican territory than you did in running this one between Smith and Tucker's land?" Objection to the question for immateriality was overruled. To understand the object of the question it is necessary to state that the La Feria tract was bounded on the west by a tract known as the Llano Grande. Their division line, as recognized, ended upon the river at a point which could not have been reached except by crossing the Rio Grande, at the head of another *zurron* or *bolsa*, into Mexican territory, and recrossing again to its left bank, and continuing the line to its termination on the river. From the conformation of the *zurron* intersected by the line between Neale and Galbert it seems that that line would also cross into Mexican territory if the river ran as it did before the *zurron* was cut off by a change in its course. The Llano Grande line was the admitted west boundary of the La Feria grant, and of Galbert's portion of it. The eastern line of Galbert, a part of which is in dispute, was intended to run parallel with its western boundary. The fact, then, that this western boundary, as recognized, apparently crossed the Rio Grande at the head of a *zurron* into Mexican territory, and then crossed it again to the American side, and was recognized throughout its whole distance as the true western boundary of the La Feria grant, was a circumstance of some weight to show that the eastern line did not necessarily stop at the point where it first touched the river, but might be extended to the terminus claimed by the appellee, though in so doing it apparently crossed into Mexican territory. The fact is more potent when we consider that both lines were made by the same surveyor, about the same time, who likely pursued the same course in regard to lines so similar to each other in their manner of intersecting the river, and apparently crossing it, each at the head of a *zurron*, and running into Mexican territory. We think the question was proper; more especially as the surveyor was dead, and the survey was made so long ago as to almost preclude the possibility of proving anything about it by living witnesses.

The bill of exceptions not showing what the appellant expected to prove by the witness in answer to the question referred to in the fifth assignment of error, we cannot revise the ruling of the court excluding the question. *Reddin v. Smith*, 65 Tex. 28.

There was no error in permitting the witness to testify as to the statements of deceased parties, who pointed out to him posts upon the disputed line as posts placed there by the surveyor who ran the original partition lines. It is well settled by our decisions that the declarations of disinterested parties, since deceased, who were in a position to know a boundary line, are admissible in a controversy about such line. *Evans v. Hurt*, 34 Tex. 111; *Hurt v. Evans*, 49 Tex. 311; *Stroud v. Springfield*, 28 Tex. 649. These declarations were made while the parties who made them were on the line, and in view of the posts. Two of these parties were found to be dead at the time the testimony was offered, viz., Cano and Longoria. It was not shown that the two axemen were dead, but the bill of exception does not point out with certainty that their statements were objected to for want of this proof. What particular predicate was lacking to admit the proof is not shown.

As to the declarations of the axemen, and the statement of Hynes as to what he understood from Longoria about his being on Kennedy's land, we can say that, while it would have been proper for the court to have excluded them, yet, as they could not possibly have influenced the jury as to the points upon which they bore, we cannot, because of their admission, reverse a judgment so strongly and overwhelmingly supported by other evidence.

The planting of the posts by Cheval was fully proved by Longoria's and Cano's declarations; and the fact that Cheval actually ran the line was proved by two living witnesses who testified at the trial. This evidence was not contradicted; and had the jury, upon this issue, found against the plaintiff, without considering the declarations of the axemen, their verdict should have been set aside.

The conclusion of Hynes from Longoria's declarations could hardly have influenced the jury as to facts so abundantly fortified by evidence. The remarks of Judge HEMPHILL in *Patton v. Gregory*, 21 Tex. 520, are pertinent, and we may say with him that, when we look at the mass of testimony in this cause, it is obvious that this statement could not have had any effect upon a jury presumed to have ordinary intelligence. Suppose the evidence had been excluded, can it be pretended that the finding of the jury would have been changed or affected? See, also, *Cotton v. Campbell*, 3 Tex. 493; *Pridgen v. Hill*, 12 Tex. 374. We do not think the evidence could possibly have influenced the verdict, and cannot reverse because of its admission.

Smith was asked by his counsel when he first knew of any adverse claim to the land in dispute, which question was objected to by the defendant. The answer details a conflict between Smith and Tucker about the former's building a fence upon the disputed line, and some conversations between them as to the party under whom Tucker claimed. But there is nothing in all the answer that bore upon Tucker's claim under the statute of limitation, or was calculated to influence the jury in favor of either party upon any point in dispute. The testimony was not, therefore, liable to any of the objections taken to it; and, while it was unimportant, its admission did not prejudice the defendant's case.

No bill of exceptions shows what the defendant expected to prove by the witness Neale when he asked him if he conveyed the *potrero* by the two deeds he had made to Maxan. The thirteenth assignment, therefore, will not be considered.

The evidence as to a custom among Mexicans by which the bends in a river were held to belong to the owner of the land against which they abutted, was properly rejected. The rules of law applicable to the case gave to each party the land lying within the boundaries set forth in his title papers as established by proof. The proposed proof would have subverted this rule of law, as well as altered the legal effect of the deeds under which the parties claimed. That proof of custom cannot be admitted when it will have either of these effects is well settled in this state. *Meaher v. Lufkin*, 21 Tex. 383; *McKinney v. Fort*, 10 Tex. 220; *Devees v. Lockhart*, 1 Tex. 535.

The letter from Maxan to Tucker was not admissible in favor of the latter, having been written by Maxan after he parted with title to the land. 1 Greenl. Ev. §§ 180, 189.

The court refused charges asked by the defendant, to the effect that, if the division line between Neale and Galbert could not have been protracted from the point where it crossed the base line made by the surveyor to the point on the Rio Grande claimed by the plaintiff to be its southern terminus, without crossing the river, the jury should find for the defendant. These charges could not have been given under the facts before the jury, because there was testimony to show that the division line was actually run and marked by the surveyor below the *zurron*, so as to include the *potrero* within the Galbert tract; and that, nevertheless, the line did not cross the river at any place. If

a surveyor runs a division line till it strikes the bend of a river, there is no law to prevent him going around the bend, and running his survey at a point on the river directly in the course of the line he was running, so as to give to the tract on each side of the line its proper quantity of land. Chevall ran his base line for greater convenience in making the partition, but there is nothing to show that he intended to stop or did stop the lines running at right angles to it at the nearest points where, when protracted, they would strike the river; and certainly the law did not compel him to do so, especially to the injury of any part owner of the land. But the effect of the charges was to compel the surveyor to terminate the division line at the point where it first reached the river, and they were therefore properly refused. For these reasons, and those stated in considering the fourteenth assignment of error, it was proper to refuse a charge making a custom among surveyors contradict what Chevall actually did in making the division line. The tenth special charge could not have been given without assuming as a fact that the location of the bend of the Rio Grande river at the head of the *zurron* was the same in 1843 that it was after the river had cut the *zurron* off to its left bank, when there was much proof to show that the upper part of the *zurron* had, since 1843, moved forward to the east by reason of encroachments of the river. Moreover, what we have already said as to custom disposes of this charge.

The charge complained of in the nineteenth assignment, when taken in connection with the third charge, amounts to about this: that the plaintiff's deeds were *prima facie* evidence of title in him to the land in controversy, and that the plaintiff was entitled to recover upon them, unless the jury was satisfied from the evidence that he was not so entitled, or, in other words, that the *prima facie* case had been rebutted. This charge is very general, but it is law; and, if the appellant wished it more specific as to the quitclaim deed from Kennedy, he should have asked special instructions on the subject.

The appellant thinks that he should have had a new trial because the evidence showed conclusively that the plaintiff was barred by limitation, and that plaintiff was estopped from disputing his title. Both limitation and estoppel are pleas requiring much clearness of proof. The appellant's counsel, in their brief, have not stated to us the facts in evidence which render it clear that their plea of limitation was sustained by proof. They refer us to instruments and the statements of witnesses, extending over more than 50 pages of the record, to be examined as to whether or not their conclusion of law, given as a statement of fact, that the defendant and those under whom he claims have had peaceable, continuous, and adverse possession of the land long enough to bar the plaintiff's right, was sustained by the great preponderance of evidence. This assignment of error could be rejected for want of a proper statement. It may be stated, however, that we have examined the whole evidence upon the question of limitation, and find it unsatisfactory, and in some measure conflicting. It is not made clear that Neale occupied any portion of the land in controversy from 1845 to 1854, and while he lived on his part of the La Feria grant. There is proof that Galbert lived on his tract at the same time that Neale occupied his. If Neale's improvements lapped over onto the *potrero*, the extent of this is not shown, nor that its possession was notorious, visible, distinct, and hostile. He may have encroached for a short distance upon the disputed land without affecting the opposing claimant with notice that he was attempting to acquire it by limitation. In that event he could have pleaded limitation only as to the amount of land actually occupied, and this amount is not shown. *Bracken v. Jones*, 63 Tex. 184. Neale's possession cannot, therefore, benefit the defendant under his pleas of limitation; and those claiming under him did not hold adverse, exclusive possession for a sufficient length of time to bar the right of the plaintiff to the entire land. Kennedy, under whom the appellee claims, seems to have occupied the land for 15 years of the time during which he owned it,

which was from 1861 to 1877. There could have been no exclusive possession of the whole *potrero* during that time.

As to the estoppel, the record does not show sufficient facts to give it foundation. There is not in the statement of facts any map purporting to have been made for Galbert by Dupony, and of course no proof that such a map had been recorded. There was an Exhibit L. introduced in evidence, which appears to be Dupony's explanation of some map made by him for Galbert, but the map itself does not accompany it. We cannot look outside the statement of facts in this case for the evidence introduced on the trial. We cannot, therefore, say that Galbert, or those claiming under him, had ever recorded a map confining their land to the limits claimed for it by the defendant. We do not regard the making of the lane from the pasture to the *surron*, and placing a post there, as estopping the plaintiff from claiming that it should be continued further south. The lane was made for mutual convenience in driving stock to water, and the parties, at the time of making it, do not seem to have had in view any such thing as fixing the division line between them to its full extent. There was no intention on the part of Galbert to mislead any one as to his boundaries. He did not by his conduct lead any one to change his position. His line was shown by witnesses to have been marked below the place where the land terminated. Estoppels rest upon actual and constructive fraud, and the action of Galbert in reference to his line from his ranch to the *surron* could not and did not work a fraud upon any of the claimants of the land in controversy. The parties were merely making their division line between two points; and, if there is any evidence to show that they intended it to represent the entire length of that line, there is enough of testimony to render the fact sufficiently doubtful for the jury to have found against the estoppel.

The damages assessed by the jury are fully sustained by the evidence; and, while there was no proof that the plaintiff had paid taxes on the land, there was an absence of proof to show that the taxes had been paid by Tucker. The plaintiff was therefore entitled to recover rents.

There is no error in the judgment, and it is affirmed.

KREMER and others v. HAYNIE.

(Supreme Court of Texas. February 25, 1887.)

1. GUARDIAN AD LITEM—APPOINTMENT BEFORE SERVICE OF PROCESS.

In an action against infants for the partition and sale of their land, three of them residing out of the county where the suit was brought, the court, as required by statute, directed service of the citation to be made by delivering a copy of the petition as well as of the writ, but the officer making the service delivered the writ only to the infants. *Held*, that the court upon this service had no authority to appoint a guardian *ad litem* for the infants, and the guardian so appointed could not bind the infants by any decree rendered in the action.

2. PARTITION SUIT—REVERSAL OF DECREE AS TO ONE PARTY.

The decree in a partition suit, being erroneous as to one defendant, must be reversed as to all.

Error to district court, Austin county.

Chesley & Haggerty, for plaintiffs in error.

WILLIE, C. J. This was a suit by Haynie against Henry Kremer and a number of other persons for the partition among plaintiff and defendants of a tract of 695 acres of land in Austin county. The defendants did not appear, and a guardian *ad litem* was appointed to represent such of them as were minors, and three-fourths of the land was decreed to the plaintiff, and one-fourth to the defendants, to be divided among them in different proportions. Commissioners were appointed to partition the land in accordance with the

decree, and they reported setting aside to the plaintiff three-fourths of the land by metes and bounds, and the other one-fourth to the defendants. They also reported that this last tract was incapable of a fair subdivision, and recommended that it be sold, and the proceeds divided among the defendants, to whom it had been set apart. The court accordingly decreed to the plaintiff the three-fourths set apart to him by the commissioners, and ordered the one-fourth to be sold. It was sold for \$75, and all of this sum, except \$6.25, was used in paying costs incurred by the defendants, and the \$6.25 ordered to be divided among them. From this decree the defendants have sued out a writ of error. The errors assigned relate principally to the want of service upon the defendants, and the want of authority in the court to order the sale of the defendants' one-fourth of the land for the purpose of partition.

Without entering into a discussion of all the objections to the service made upon the defendants, it is sufficient that three of them residing outside of the county where the suit was pending were not served with a copy of the petition as required by the statute. The citation directed service to be made by delivering a copy of the petition as well as of the writ, but the officer making the service delivered to each of the three defendants alluded to a copy of the writ only. Two of these defendants, viz., Frank and Eugene Evans, are alleged in the petition to have been minors, and a guardian *ad litem* was appointed for them by the court, who answered and represented them in the cause. But the court had no authority to appoint a guardian *ad litem* for minors on whom the court had not acquired jurisdiction by service of process. *Wheeler v. Ahrenbeck*, 54 Tex. 535. A guardian appointed under such circumstances could not bind the minor by any decree rendered in the cause. The decree was of no more validity than if no guardian at all had been appointed for the minors. For want of service upon the parties mentioned, the judgment will have to be reversed. The reversal as to a portion of the defendants necessarily reverses the judgment as to all, especially as this is a partition suit, where no decree can be rendered unless parties having an interest in the decree to be rendered are brought into court. *De La Vega v. League*, 64 Tex. 205; *Ship Channel Co. v. Bruly*, 45 Tex. 8.

As Dr. Koester is one of the defendants upon whom no copy of the petition was served, and as new service must be had upon him, it will not be necessary to consider the question as to whether the former citation to him was defective on other grounds. It is not probable that the petition or citation will in future fail to conform to each other in giving his Christian name.

Upon another trial, should the commissioners set apart to the plaintiff his portion of the land by metes and bounds, and the balance to the defendants jointly, as they did upon the former trial, it will not be proper for the court, over the objections of the defendants, to order the sale of their portion in order to make partition among them, though the commissioners should so recommend. It may be more convenient and suitable to the defendants to hold their shares in common; and, as the plaintiff has accomplished the object of his suit in having his share severed from that of his co-tenants, it would be improper to force upon the only parties left to be affected by the decree as to the balance of the land a judgment which they do not ask, and against which they all protest.

The appellee calls our attention to the fact that the writ of error was not sued out until after the lapse of two years from the date of the decree which fixed the rights of the parties in the land, and ordered the commissioners to be appointed. It is a sufficient answer to this, without sustaining the writ on other grounds, to say that the parties suing out the writ were minors during the entire progress of the cause in the district court, and the writ was sued out within less than two years after the proceedings were finally closed in that court. The statute allows minors two years after coming of age within which to sue out a writ of error. Rev. St. art. 1389. On the face of

the record there is nothing to show that the minor defendants attained their majority more than two years before the petition in error was filed, and the fact, if such it be, has not been brought to our attention in any other way.

DE EVERETT v. TEXAS-MEXICAN RY. Co. and others.

(*Supreme Court of Texas.* February 25, 1887.)

TRUSTS—TRUSTEE GIVING LAND AWAY—RECORD.

A trustee appointed to sell lands cannot, by deed of gift or deed made upon a merely nominal consideration, pass any title. Such a deed is a breach of trust, and conveys no right to the donee or grantee as against the *cestui que trust*; and, the instrument creating the trust being of record, it is immaterial that the donee or grantee did not actually know of it.

Appeal from district court, Duval county.

Bryant & Coymer, for appellant.

WILLIE, C. J. This case is similar in most of its features to that of *De Everett v. Henry*, *ante*, 566, (lately decided.) The property sued for was part of the same trust-estate vested in the defendants Perez and Collins, as trustees, by a decree of the district court of Nueces county. In this case, however, the land in controversy was not purchased by one of the trustees, but was conveyed by them to the appellee for the mere nominal consideration of one dollar. The petition seeks to set aside this conveyance as having been executed in violation of the trust, and to remove the cloud which it casts upon her title, and to recover the land. The trustees above named were, according to the allegations of the petition, appointed under the said decree for the purpose of selling the lands mentioned in it, including that in controversy, and were not authorized to part with the title for such a consideration, which was merely nominal, and the conveyance amounted to no more than a deed of gift. The demurrer having admitted these facts, the conclusion necessarily follows that the deed to the railroad company passed no title to it as against the plaintiff. The trustees could not give away property when their only power was to sell it for a valuable consideration. Such a gift was a breach of trust, and the donee became a trustee for the original *cestuis que trustent* under the decree of the district court. This would follow whether the company had notice of the trust or not, as it had not paid value for the land. *Perry, Trusts*, § 241. But they had notice of the trust, as we have held in *De Everett v. Henry*, and there cannot be the least doubt that the petition set forth a good cause of action, and the general demurrer should have been overruled.

For the error of the court in sustaining the demurrer the judgment will be reversed, and the cause remanded.

ARMENDAIZ v. STILLMAN and others.

(*Supreme Court of Texas.* March 1, 1887.)

1. EVIDENCE—MAP OF SURVEY OF RIVER.

In an action by the owner of land abutting on a river to recover for the act of defendant in placing a jetty in the river which so changed the current as to cause it to flow against plaintiff's land, and thereby do the injury complained of, the map of a survey of the river made some years after the injury is competent, although it appeared that the river often suddenly changed its course. The map enabled the court to apply other evidence; and the fact that that evidence has but a slight bearing upon the issue to be tried is no reason for excluding it altogether, if it be otherwise relevant.

2. EXPERT WITNESS—VALUE OF OPINION.

Where an expert witness bases his opinion upon a state of facts which he has heard other witnesses testify to, and not upon actual knowledge of his own, the value of his opinion depends upon the existence of those facts, and their existence must be determined by the court or jury, and not by the expert.

8. RIPARIAN OWNERS—BUILDING JETTIES.

In an action by the owner of land abutting on a river to recover for the act of defendant in placing a jetty in the river which so changed the current as to cause it to flow against plaintiff's land, causing the injury complained of, evidence showing that defendant could not have foreseen that the injury would result from the jetty is inadmissible, as defendant, in order to protect his own bank, had no right to place an artificial obstruction in the stream causing the current to strike plaintiff's land on the opposite bank; and, having done so, it is immaterial that he did not foresee that particular injury as likely to follow.

Appeal from district court, Cameron county.

Waul & Walker, for appellant. *Wells & Hicks*, (*Jas. R. Cox*, of counsel,) for appellees.

STAYTON, J. This action was brought to the February term of the district court for Cameron county, by the appellant, to recover damages claimed to have resulted to him from the destruction of property owned by him on the Mexican side of the Rio Grande. The plaintiff alleged that he was the owner of improved real property opposite the city of Brownsville, and that in the year 1878 the defendants placed a jetty in the Rio Grande, which so changed the current of that river as to cause it to flow against his property, which it had not theretofore done, whereby his property was destroyed. The cause was tried without a jury, and the conclusions of fact and law found were as follows:

"(1) The defendants, in the spring of 1878, constructed the work in question, called 'The Field's Jetty,' and the same was constructed on their own land, and solely with the object and purpose of protecting the city of Brownsville from threatened and imminent danger from the effect of the eddy, which cut away and destroyed the Brownsville or Texas bank or shore during high water in the river, and that said work accomplished said object, and protected the front of said city of Brownsville.

"(2) That, at the time of the erection of said Field's jetty, the defendants did not intend injury or damage to the opposite or Mexican bank of the river, or the property of plaintiff, but only to protect the front of the city of Brownsville, and that, with ordinary prudence and foresight and judgment, defendant could not foresee that said Field's jetty was at all likely to produce, occasion, or cause any damage, washing away, or loss to plaintiff's property on the opposite side of the river, or to apprehend any probability of any such damage.

"(3) I further find, as a matter of fact, that the said works of defendants, being the said Field's jetty, did not cause, occasion, or produce the said loss or damage to plaintiff's property, or to any portion of the same, but that the said loss and damage were produced and caused by other agencies.

"(4) I further find, as a matter of fact, that the plaintiff has sustained damage to the amount substantially as claimed in his pleadings, and that he was the owner of the property so damaged and destroyed.

"As a conclusion of law I find that the defendants were in law justified in erecting the works complained of in the manner and form, and under the circumstances, and for the purpose of its erection, as shown by the evidence in this case; and that, if the damage complained of by plaintiff had resulted therefrom, (which it did not,) it would have been *damnum sine injuria*, and the defendants not responsible therefor in this action.

"J. C. RUSSELL, Judge Twenty-fifth Judicial District."

The injury to the plaintiff's property occurred mostly in the year 1878.

There was much and conflicting evidence as to whether the jetty placed in the river by the defendants caused the destruction of the plaintiff's property; and it is here claimed that the evidence so heavily preponderates in favor of the affirmative of that proposition that upon this ground the judgment should be reversed. In view of other questions in the case, it will not be necessary to examine and decide that question, or to express any opinion upon it.

The cause was not tried until the February term, 1884, and in the month preceding an engineer made a survey and map of the river, showing its depth, breadth, and general outlines for some distance above and below the place of the injury, and at that place. This survey was made when the water was low; and when the map was offered in evidence, in connection with the testimony of the person who made it, explanatory of it, both were objected to on the grounds that the evidence was irrelevant; that it had been shown that the river often suddenly changed its course; and for the reason that the evidence did not show the depth, breadth, and course of the river at high water, at the time the injury complained of occurred. The objections to the evidence were overruled, and we think correctly. It was relevant to the issue to be tried, and served at least to give the court a general knowledge of the river. The other evidence tending to show changes in the river occurring between the time of the injury and the making of the survey and map, and showing the general flow of the river at low and high water, was all before the court, and the map, if it served no other legitimate purpose, tended to enable the court to apply properly the entire evidence. That evidence may be very weak, and have but slight bearing upon the issue to be tried, is no reason for excluding it, if it be relevant.

John S. Clark, who qualified himself to testify as an expert, having no knowledge of the river prior to the month preceding the trial, in that month examined the river above, below, and at the place of the injury, and, after hearing the evidence of the witnesses for the plaintiff and defendants, which was conflicting, was asked the following question: "Is it your opinion that the Field's jetty of 1878 produced or brought about, or had any part in producing, any part of the damage described as having been sustained by plaintiff?" This evidence was objected to on many grounds, but the objections were overruled, and the witness answered: "In my judgment, the Field's jetty did not and could not have had any effect in producing the damage." The ground given for overruling the objection was: "Because witness was now testifying as an expert, and had heard all the testimony, and seen all the maps." This is a character of evidence which, while admissible under given restrictions, unless carefully confined within the rules regulating its admission, may lead to great abuses. In the case before us the expert knew nothing of the facts existing at the time the injury complained of occurred, except as he could ascertain them from the evidence of the other witnesses who had testified in the case, and from an examination made long after the injury. The evidence of these witnesses, upon the vital questions in the case, was as conflicting as evidence well could be. The answers of the witness show that he based his opinion largely on what he had heard from other witnesses during the trial, and that in some respects he assumed to decide that the evidence offered by the plaintiff was not true. If a witness who is offered as an expert has knowledge of facts on which he bases an opinion, he may be permitted to give his opinion upon the state of facts which he assumes to be true, but, if he states the facts, it rests with the court or jury trying the case to determine whether his assumption of fact be true; and, if that be found to be untrue, his opinion is of no value. If such a witness bases his opinion on a state of facts which he has heard other witnesses testify to, the value of his opinion depends upon the actual existence of the facts on which he bases it, and whether the facts so existed must be determined by the court or jury, and not by the expert. In cases in which the evidence is conflicting on the facts on which the opinion of the expert is founded, he cannot be permitted to determine what the facts actually were, and to give an opinion upon his own conclusion upon such conflicting evidence; for it is the province of the court or jury trying the case to determine the existence or non-existence of the facts on which the expert's opinion is based. The evidence conflicting, if the defendants desired the opinion of the expert upon the state of facts which the evidence offered by

them, including the evidence of the expert in so far as he stated facts, tended to establish, then they should have sought his opinion upon the hypothetical case thus made. This they did not. They simply asked for and received an opinion based upon conflicting evidence, which necessarily required the witness to pass upon disputed facts. If the facts stated by the witnesses for the plaintiff were true, the opinion of the expert was erroneous; for the evidence of the witnesses who testified to facts within their own knowledge and observation, if true, established facts which would render the correctness of the opinion of the expert impossible. The answer of the witness should not have been received, and the ruling of the court in this respect will require a reversal of the judgment.

The record shows that, while the court below found that the injury to the plaintiff did not result from the building of the jetty by the defendants, and on this ground rendered a judgment in their favor, yet that the judgment would have been the same had it been found that the injury did so result, unless it was made to appear that, "with ordinary prudence, foresight, and judgment, defendants could have foreseen that the jetty was likely to produce, occasion, or cause any damage, washing away, or loss to plaintiff's property on the opposite side of the river, or to apprehend any probability of any such damage." Evidence tending to show that defendants could not have foreseen that injury would be caused by the erection of the jetty was admitted over the objections of the plaintiff, which arise from the manner in which proof of this fact was sought to be made; we are of the opinion it should have been excluded. It is the right of any owner of land fronting on a flowing stream to have it continue to flow in its natural channel, and any obstruction placed in such a stream, which so diverts it as to cause injury to the land so fronting, is an injury for which an action will lie; and that great care may have been used by the person diverting the stream, and that he may have been unable to foresee that his act would injure another, in no way affects the right of the injured person to compensation for the injury done to his property, unless it be in cases in which the diversion is made in pursuance of legislative authority granted to secure some work of public utility. This case does not call for an examination of the exception above stated, which has sometimes been recognized; nor does it call for a consideration of the exception to the general rule above stated, which exists when the water of a flowing stream is put to a use not unreasonable, by another riparian proprietor. If the river was cutting away the land of the defendant, it was his right to protect his own bank in any method which would but confine the river to its natural channel; but if, in protecting his own property, he and those assisting him put such obstructions in the river as caused the current to strike the land of the plaintiff and carry it away, which but for such obstructions it would not have done, then the defendants are liable for such injury as the plaintiff has sustained by their act, without reference to the degree of care used by the defendants, or to their ability to foresee what would be the result of their acts, or to their intentions. We have deemed it proper to notice this matter in view of another trial, and because the counsel for defendants insists that the defendants are not liable if they caused the injury, if it resulted from work carefully done in protection of the property of one of the defendants.

For the error noticed, the judgment will be reversed, and the cause remanded.

CLEVELAND v. BATTLE.

(*Supreme Court of Texas. March 1, 1887.*)

1. PARTNERSHIP—CHANGE OF FIRM—ASSIGNMENT—RIGHTS OF CREDITORS.

A. having made a secret conveyance of his interest in a partnership, at a time when the firm was insolvent, to B., who was a creditor, C., his copartner, upon

learning of the transfer, took B. in, and continued the business with him, without notifying creditors of the change, until the firm was compelled to make an assignment, which they did as the act and deed of the new firm, and for the benefit of the creditors of that firm. *Held*, that the assignment was void as a conspiracy on the part of the partners to defraud the creditors of the old firm.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—EXACTING RELEASES—PARTNERSHIP.

An assignment by partners for the benefit of creditors which exacts releases of accepting creditors is valid only when it conveys all the firm and individual property of the members, excepting only such property as is exempt from forced sale. If all the property is not conveyed, creditors may proceed to enforce their claims just as if no conveyance had been made.¹

Appeal from district court, Wharton county.

Scott & Levi, for appellant. *W. W. King*, for appellee.

WILLIE, C. J. The appellee sued Cleveland to recover the value of certain goods alleged to have been in possession of appellee as assignee of Frank Page and F. E. Gregory, and attached and converted by Cleveland to satisfy a debt due him by said Page and Gregory. Appellant pleaded that the assignment under which the appellee claimed was fraudulent or of no effect to vest title to the goods in the latter as against the appellant, and that the goods were subject to the levy made upon them to satisfy the appellant's debt. The judge to whom the cause was submitted, rendered judgment in favor of the assignee for the proven value of the goods, and from that judgment this appeal is taken. There is no statement of facts in the record, but the judge's conclusions of fact show about this state of case: From January, 1884, till November 20, 1884, Frank Page and W. D. Gregory were doing a mercantile business as partners under the style of Page & Gregory; that at the last-named date they were insolvent, and W. D. Gregory on that day conveyed his share of the partnership property to one F. E. Gregory, which conveyance was in fraud of the creditors of the firm, as was well known to the party receiving the conveyance. The appellant was at that time one of the creditors of the firm. The said conveyance was effected without the knowledge of Page, but it was made known to him on the ninth of December, 1884. At the same time he learned that the firm then doing business was insolvent. Page undertook immediately to make an assignment, but it was abandoned, and on the fifteenth of December, 1884, the assignment under which the appellee claims the goods in controversy was executed. Up to this date, the transfer from W. D. to F. E. Gregory was known to no one except these two parties and Page. The assignment in question was made by Page and F. E. Gregory as partners, and purported to convey all their property, and provided that accepting creditors should release their claims.

The appellant contends that the judge's conclusions of fact required a finding, as conclusions of law, that the assignment was void as to the goods levied on, and that they were subject to the attachment. The conveyance from W. D. to F. E. Gregory was found to have been fraudulent as to the creditors of the firm of Page & Gregory. Prior to the execution of the assignment to Battle, Page became cognizant of this conveyance, and at the same time discovered that the firm of Page & Gregory was insolvent. These facts came to his knowledge less than 20 days after the conveyance was made; yet he kept the fact to himself, accepted F. E. Gregory as a partner, continued the business with him under the old firm name, and finally made the assignment in question as the act and deed of the new firm and its individual members. Having full knowledge of the conveyance, and of its necessarily fraudulent character, it was his duty to protect the creditors of the old firm, and see that its property went towards the payment of their debts. This he might have done by preventing his interest in the partnership from becoming complicated

¹See *Collier v. Davis*, (Ark.) 1 S. W. Rep. 684; *McReynolds v. Dedman*, Id. 552, and note; *Aylesworth v. Dean*, (Cal.) 12 Pac. Rep. 241.

with the grantor of the fraudulent conveyance. His own share of the partnership property was of course liable to execution for firm debts. His former partner's interest was still liable, because his conveyance was, as to them, fraudulent and void. The creditors were in a position to enforce their debts against the partnership estate, but were wholly ignorant of the attempt of W. D. Gregory to deprive them of this right by a fraudulent conveyance. But Page was aware of this fact, kept it as a secret between himself and the Gregorys, and sanctioned the fraud by accepting the fraudulent grantee as his partner. This was a clear case of conspiracy between the partners of the two firms to defraud the creditors of the original partnership; to place the goods where the creditors of that partnership would be hindered and delayed in subjecting them to their demands. The usual consequences of such an attempt must be visited upon the property thus sought to be placed beyond the reach of creditors. So far as their holding claims against the old firm were concerned, the goods were left in the same position, as to ownership, as they were before the fraudulent conveyance was made. They were, as to such creditors, still the property of the firm composed of Page and W. D. Gregory. As the property of that firm, these goods were of course subject to a general assignment executed by the parties composing the firm. But this was not the character of the assignment made to the appellee. W. D. Gregory did not join in it, or even assent to it as a member of the firm. Page did sign it, not purporting to convey the partnership property of that firm, but the property of a new firm which owed its existence to a fraud perpetrated on the creditors of its predecessor in which the members of both firms participated. This assignment, not intending to convey the firm property of Page and W. D. Gregory, did not have that effect. It passed no more than the partnership property of the firm composed of Page and F. E. Gregory, and the individual estate of each of these parties. But, as to Cleveland, as we have seen, the goods in question were not the property of the last-mentioned firm, but of the one of which W. D. Gregory was a member; and hence did not pass to the appellee under the assignment, unless they did so because that instrument was executed by Page, who was a member of both partnerships. The assignment not purporting to convey the property of the old firm, the execution of it by Page passed no more than his individual interest in the goods, which interest was his share in what was left of them after the partnership debts were all paid. *Still v. Focke*, 2 S. W. Rep. 59, (Tyler term, 1886;) *Burrill, Assignm.* § 88. The firm, however, was insolvent. Hence there was nothing to be left to Page after the payment of partnership debts, and no interest whatever in the goods could possibly pass to the assignee.

But, if we regard the instrument in question as an assignment by one partner acting on behalf of the firm, it cannot be sustained as to the property of the original firm; for W. D. Gregory did not sign it or assent to it, and his individual estate did not pass under the instrument. It was an assignment exacting releases of creditors, and such a condition is valid only when it conveys all the firm property as well as that of the individual members composing it, excepting, of course, property exempt from forced sale. If either member's individual estate is not conveyed, objecting creditors may enforce the debts against the property in the same manner as if no assignment had been attempted. *Donoho v. Fish*, 58 Tex. 169. For these reasons we think the goods were liable for the partnership debts of the firm composed of W. D. Gregory and Frank Page. The court should have so determined under the facts found by it to have been proved, and its finding in behalf of the appellee was erroneous.

For this error the judgment will be reversed, and rendered here for the appellant; and it is so ordered.

SMITH v. STATE.¹

(Court of Appeals of Texas. November 17, 1886.)

1. CRIMINAL PRACTICE—CONTINUANCE.

Failing to allege that the absent testimony could not be obtained from another source, and that the accused had reasonable expectation of procuring it at the next term of court, the application for a second continuance was insufficient.

2. SAME—APPEAL—INSTRUCTIONS.

Charge of the court, in the absence of a proper bill of exceptions, will be examined only with reference to fundamental errors, or such as, under all the circumstances of the case, were calculated to injure the rights of the accused. A bill of exceptions taken generally to the charge of the court, specifying no particular error, has no standing in this court.

3. MURDER—FORMER CONVICTION OF LOWER DEGREE.

A former conviction of murder in the second degree operates as an acquittal of the higher grade, and should limit the charge on a subsequent trial to murder in the second degree, and such inferior grades as may be indicated by the evidence.

4. CRIMINAL PRACTICE—APPEAL—INSTRUCTION.

Charge of the court, with respect to its sufficiency, is to be tested as a whole, and not in parts or paragraphs. Omissions in one part of the charge become immaterial if supplied in another so as to correctly present the issue involved.

5. MURDER—SELF-DEFENSE.

Self-defense not being an issue raised by the evidence in this case, the trial court properly refrained from charging the jury on that subject.

6. INSANITY—CHARGE OF THE COURT—CASE APPROVED.

Note the approval of *Leache's Case*, ante, 539, to the effect that the trial court properly refused a special instruction to the effect that, insanity being shown to have existed prior to the homicide, the presumption obtains that the insanity continued to exist, and that, unless such assumption be rebutted, the jury should find the defendant insane at the time of the homicide.

7. MURDER—FACT CASE.

See the statement of the case for evidence held sufficient to support a conviction for murder in the second degree.

Appeal from district court, Nueces county.

The indictment in this case was presented by the grand jury of Webb county, Texas. It charged the appellant with the murder of one Thomas Riley, in the said Webb county, Texas, on the fifteenth day of February, 1882. A change of the venue to Nueces county was awarded, and at the trial in that county the appellant was convicted of murder in the second degree; his punishment being assessed at a term of five years in the penitentiary.

The effect of the state's testimony in this case was to establish the facts that the defendant, deceased, and another spent the whole of the night preceding the homicide gambling in the rear room of a saloon. The defendant drank heavily, and, according to the testimony of the third party to the game, was in a wretched mental condition throughout the night. This witness did not consider him right in his mind, and knew that he had long been regarded as mentally unsound. This witness and deceased conspired together to and did cheat and win from the defendant all of his money. Defendant then played against the bank dealt by deceased, on credit, until about 10 o'clock in the morning, when deceased declined to extend further credit. Thereupon defendant reached across the table, and seized a number of betting checks. Deceased attempted to prevent the defendant from taking them, when defendant drew his pistol, and fired several shots, killing deceased. Several witnesses for the defense testified that they had known the defendant since his early childhood, and knew that he had always been generally regarded, if not actually insane, afflicted with recurrent insanity; and when excited, or under the influence of liquor, incapable of distinguishing right from wrong. Each witness recited instances of eccentric conduct on the part of the defend-

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

ant, indicating his insanity at the various periods covered by their testimony.

Stanley Welch and *E. J. Hamner*, for appellant, contending that the proof on the part of the defense filled the measure of the burden of proof to establish insanity, fixed by law upon the defendant, and that, therefore, the verdict was against the evidence.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. 1. There was no error in refusing to grant defendant's application for a continuance. It was his second application, and it does not comply with the statute, in that it fails to state that the absent testimony could not be procured from any other source, and that defendant had reasonable expectation of procuring the same at the next term of the court. Code Crim. Proc. art. 561. It appears from the evidence adduced on the trial that the material facts which defendant expected to prove by the absent witness were proved on the trial by other witnesses, and there is no ground for supposing that he was probably injured in his rights because of the refusal of the court to continue the cause. Viewed in the light of the evidence adduced on the trial, the absent testimony was immaterial, and could not have benefited the defendant. Besides, it was not made clearly to appear that the testimony of this witness could not have been obtained by deposition, before she became paralyzed, and yet at a time when defendant knew that, by reason of her age and infirmity, she might not be able personally to attend and testify on the trial.

2. There is in the record a general exception to the charge of the court,—to the entire charge, not pointing out any particular error complained of, not calling the attention of the court definitely to anything. Bills of exception, when too indefinite to point out distinctly the matter complained of as error, will not bring such matter properly before this court for review. *Walker v. State*, 19 Tex. App. 176; *Phillips v. State*, Id. 158; *Davis v. State*, 14 Tex. App. 645. The primary purpose of a bill of exception to a charge of the court is to direct the attention of the trial judge to the particular error or errors complained of, thus affording him an opportunity to correct the error or errors in time to prevent prejudice to the defendant's rights. This purpose is not accomplished by a general exception to the whole charge. A secondary purpose of such bill is to enable this court, on appeal, to readily perceive the error or errors complained of, without having to examine other portions of the record. A general exception to an entire charge affords this court no aid or information whatever in determining the correctness of the charge. Such being the character of the bill of exception in this case, we are not called upon to consider any errors in the charge which are not fundamental, or which were not in our judgment calculated to injure the rights of the defendant. *Mace v. State*, 9 Tex. App. 110; *Smith v. State*, 15 Tex. App. 139; *Gilly v. State*, Id. 287; *Lewis v. State*, 18 Tex. App. 401; *Phillips v. State*, 19 Tex. App. 158.

3. After a careful scrutiny of the charge, we find no fundamental error in it. The court unnecessarily and improperly defined murder in the first degree and express malice. This was no part of the law of the case, the defendant on a former trial having been acquitted of murder in the first degree. The charge should have been limited to murder in the second degree. *West v. State*, 7 Tex. App. 150; *Baker v. State*, 4 Tex. App. 223. We cannot imagine, however, how this error in the charge could prejudice the defendant, as the jury were clearly and positively instructed that the defendant could not be convicted of murder in the first degree. Even if the evidence showed him to be guilty of murder in the first degree, he is not entitled to have the conviction set aside if the evidence and the law warranted a conviction of murder in the second degree. *Baker v. State*, 4 Tex. App. 223.

4. Another error is found in the definition of *implied malice*, as given in

the charge. The word "excusing" is omitted from said definition, and this defect in the charge was one of the grounds upon which a former judgment of conviction in this cause was reversed. *Smith v. State*, 19 Tex. App. 95. In the former opinion in this case a proper definition of implied malice was given, which definition the trial judge followed in his charge on the second trial, except that he omitted, inadvertently, we suppose, the word "excusing." This omission in the charge on the former appeal was held to be material error, because it was not supplied in any other portion of the charge,—because the jury were nowhere informed by said charge that homicide committed by an insane person is *excusable*. In the charge now before us, the defect in the definition of implied malice is fully supplied by other portions of the charge, so that the jury could not have failed to understand that, if the defendant was insane at the time of committing the homicide, such homicide was excusable, and they must find him not guilty. Considering the whole charge, the error in the definition of implied malice is immaterial, and was without prejudice to the defendant.

5. There was no evidence fairly raising the issue of self-defense, and therefore it was not error to refuse to give the special instructions upon this subject requested by defendant.

6. Upon the defense of insanity, the charge of the court is sufficient. It is a copy of a charge approved by this court in *Clark v. State*, 8 Tex. App. 350.

7. It was not error to refuse the special charge requested by defendant, to the effect that, when insanity has been proved to have existed prior to the homicide, the law presumes that it continued to exist, and unless this presumption be rebutted, the jury must find that defendant was insane at the time of the homicide. This same question arose in *Leache's Case*, ante, 539, (decided by this court at its present term,) and was there thoroughly examined and discussed. We refer to the opinion in that case for our views and reasons in full, and the authorities in support thereof. In accordance with our decision in that case, we hold that the court properly refused to give the special charge above mentioned.

8. That the evidence sustains the conviction, we have no doubt. While there is evidence in support of defendant's plea of insanity, it by no means clearly establishes such plea. On the contrary, we think the evidence establishes that, at the time of the homicide, he possessed that degree of sanity which rendered him legally responsible for the homicide. As to the character of insanity which will excuse crime, we refer again to *Leache's Case*, supra, where the subject is exhaustively treated.

Finding no error in the conviction for which it should be disturbed, the judgment is affirmed.

SONNENTHIEL v. SKINNER and others.

(Supreme Court of Texas. March 1, 1887.)

NEGOTIABLE INSTRUMENTS—ORDER DRAWN ON AND ACCEPTED BY CITY.

Neither a certificate of indebtedness issued by a city to one of its creditors, nor an order drawn by the creditor on the city for the amount due him, and accepted by the city, is a negotiable instrument, so that its indorsement or sale to one for value will cut off the plea of equities as against him.

Appeal from district court, Galveston county.

Appellant, Julius Sonnenthiel, brought this action against appellees, Thomas M. Skinner, Gus Schultz, and the city of Galveston, alleging that the latter were indebted to him in the sum of \$1,500, with interest thereon at the rate of 8 per cent. per annum from May 1, 1886; that on April 30, 1884, the defendants Skinner and the city of Galveston entered into a written contract whereby the former sold to the latter the entire plant of the Gamewell Fire-alarm Telegraph System as it then existed in said city, and any addi-

tions thereto that might thereafter be made, for the sum of \$7,500, which the city agreed to pay Skinner in five annual installments of \$1,500 each, on May, 1, 1885, 1886, 1887, 1888, and 1889, and Skinner retained a lien for the unpaid purchase money; that the city paid to Skinner the first installment of \$1,500, which became due May 1, 1885; that on May 3, 1885, the city duly issued to Skinner, by its proper officers and under its corporate seal, a certificate of indebtedness for the second installment of \$1,500, which was to become due May 1, 1886, and delivered the same to Skinner, and on May 5, 1885, Skinner drew an order on the city directing it to pay to the defendant Gus Schultz the sum of \$1,500, due on his (Skinner's) contract for 1885-86, which was accepted by the city, and shortly afterwards, before its maturity, the same was delivered by Skinner for a valuable consideration to said Schultz; that afterwards, on or about August 27, 1885, for a valuable consideration, said certificate of indebtedness indorsed by Skinner, and the said order drawn by Skinner and indorsed by Schultz, were transferred and delivered by them to plaintiff, who is the legal owner and holder of the same, and entitled to receive the said installment of \$1,500 due May 1, 1886, but that the city had refused to pay the same at its maturity, as also had defendants Skinner and Schultz. The city answered, alleging that Skinner had failed to comply with his contract in several particulars as to keeping the fire-alarm in proper running order, and in making repairs, etc., and that he had finally, in November, 1885, abandoned his contract, and that one Hall had taken possession of the fire-alarm system as owner under a power of attorney from Skinner and contract with him, and that Hall claimed and was entitled to the \$1,500, being the second installment due May 1, 1886, under the original contract between Skinner and the city. The city prayed that Hall be interpleaded, and that the court determine who was entitled to the said installment. Hall intervened, and adopted the answer of the city as his own. The court rendered judgment for plaintiff against Skinner and Schultz for \$1,570 and costs, and also adjudged that plaintiff take nothing as against the city, and that Hall recover of the city \$1,500. Plaintiff excepted, and appealed.

Labatt & Noble and Chas. Hume, for appellant. Wheeler & Rhodes, for Hall, appellee.

STAYTON, J. The instruments dated May 3 and 5, 1885, were not negotiable, and, with the indorsements thereon, but evidence of the right of the appellant to maintain whatever claim Skinner might enforce against the city of Galveston for the installment falling due, under his contract with the city, on May 1, 1886. As against the city of Galveston, the contract between it and Skinner was the sole foundation on which the latter, or any one claiming through him, could assert any right. Whether the facts existed which authorized Hall to take possession of the fire-alarm system was passed on by the court below, and there is no assignment of error which calls for a revision of the finding on that point. The power conferred on Hall by Skinner through the contract between them, and the power of attorney given by the latter to the former, was very broad, and from an examination of the record we see no reason to doubt that Hall had the right to assume control of the fire-alarm system. Hall seems to have been the owner of the subject-matter of the contract between the city of Galveston and Skinner, which, however, he subsequently agreed to sell to the latter on terms agreed upon. The city agreed to pay Skinner the sum of \$7,500 for the system as it was and as Skinner contracted to make it, the same to be paid in five equal annual installments. It further agreed to pay to Skinner a like sum, in equal monthly installments, for his services and material and other things to be by him supplied and used in keeping the system in good order during a period of five years. The first annual payment was made to him, and all the monthly payments were made to him which became due before December 1, 1886. Prior to that time, Hall took possession

of the fire-alarm system under the power given to him by Skinner, and under the contract between them, and from that time operated the system, and under this state of facts it is now contended that Skinner was entitled to receive such proportion of the second year's annual payment as the time he operated the fire-alarm system during that year bears to the second year, and that the appellant is entitled to this by reason of the assignment under which he claims.

If such was the right of Skinner, it would seem that such would be the equitable right of appellant; but we are of the opinion that, under the agreements between Hall and Skinner, the former became entitled to whatever right the latter had under his contract with the city, in so far as settlement had not been made between the city and Skinner prior to the time Hall took possession.

There may have been equities between Hall and Skinner growing out of the contracts between them, of which, had they been properly asserted in this case, the appellant might have had the benefit. If so, such equities were not asserted in this case.

We find no error in the judgment, and it will be affirmed.

MOSER v. HUSSEY and others.

(*Supreme Court of Texas. March 1, 1887.*)

TRESPASS—TO TRY TITLE—AGAINST TENANT—LANDLORD NOT A PARTY.

The landlord cannot be dispossessed of his property by judgment rendered in an action to try title brought against his tenant to which he was no party, and of which he had no notice; and upon his application the judgment in such case should be set aside, himself let in as a party defendant, and the whole action tried *de novo*.

Appeal from district court, Galveston county.

Burnett & Hanscom, for appellant. *Frank M. Spencer* and *J. B. Stubbs*, for appellees.

GAINES, J. Appellees brought an action of trespass to try title against Annie Lowell and Robert Houston to recover certain real estate in the city of Galveston. At the February term, 1886, the defendants in that suit having been served and having failed to answer, judgment by default was taken against them. A writ of possession was issued; and appellant filed a petition in the court where judgment was rendered, setting forth the facts just stated, and also alleging that the defendants in the original suit were her tenants, and that she had no notice that suit had been brought against them until the writ of possession issued. She also averred that she was owner of the property, and that the said defendants had no interest in it except as her tenants; and, further, that she was then in possession of that part of the premises occupied by Annie Lowell at the time the original suit was instituted. The prayer was that the writ of possession be stayed, and that the judgment be held for naught as to her, and for general relief. On the trial below it was admitted that the judgment was rendered and the writ issued as alleged in the petition. Evidence was also introduced upon the question of notice to plaintiff in this suit of the pendency of the former action. This plaintiff also introduced a deed to herself, and an abstract of a chain of title from the government down to her vendor. The court below found that the plaintiff had no notice of the former suit, and adjudged that the writ of possession be restrained as to appellant, but that it should continue in force against all other persons, and that appellant recover her costs. To this judgment appellant excepted on the ground that it did not reopen the case and permit her to defend the original action, and thereupon gave notice of appeal. The refusal of the court to grant appellant a new trial of the original action is shown by a bill of exceptions, and is assigned as error.

We think the assignment is well taken. The precise question arose in this court in the case of *Hough v. Hammond*, 36 Tex. 657; and it was there held that the court below should have granted the landlord a new trial. The judgment was accordingly reversed, and the cause remanded, with instructions to hear and determine the original suit with the landlord as defendant. The decision in that case is well supported by reason and authority. No one is concluded by a judgment in a suit to which he is not a party, unless he held under one of the parties by right acquired after the action is brought. And it would be unjust to permit a landlord to be dispossessed by suit against a tenant of which he has no notice, and to be forced in this manner to take the laboring oar in a new suit, in order to regain his property. It is accordingly held, even at common law, that, after judgment against his tenant, he has the right, by application to the court in which the judgment is rendered, to have it set aside, and to have himself let in to defend the original action. This is distinctly laid down by leading text writers, and by courts of the highest authority. *Adams*, Ej. 252; *Tyler*, Ej. 451-453; *Wait*, Act. & Def. 85; *Freem. Judgm.* 185; *Jackson v. Stiles*, 4 Johns. 493; *Rollins v. Rollins*, 76 N. C. 264; *Douglas v. Fulda*, 45 Cal. 592.

We are of opinion that the court below should have followed by analogy the practice in original actions for a new trial upon equitable grounds, and should have heard and determined the whole litigation upon the hearing of appellant's application. *Roller v. Wooldridge*, 46 Tex. 485. But the court, however, found that appellant was the landlady of the tenants in the original suit, and that she had no notice of the proceedings before the judgment was rendered. So much of the judgment now appealed from will be permitted to stand. It will otherwise be reversed, and the cause remanded, with instructions to the district court to set aside its judgment in the original suit, and to proceed to trial of the action *de novo*, with appellant as defendant to the action.

LONG and others v. McCAULEY.

(Supreme Court of Texas. March 4, 1887.)

1. DAMAGES—PLEADING—LOGS AND LOGGING.

In an action upon a contract for the floating and delivery of logs, if damages are claimed for breach of the contract in permitting the logs to clog the skidways, and consequently obstruct the business of the mill, or in failing to supply the logs fast enough, and consequently causing the stoppage of the mill, a general allegation of the damages caused by such breaches, respectively, is sufficient.

2. SAME.

In an action upon a contract for the floating and delivery of all logs put into a river by A. during a certain time, to recover for breach thereof by A., a petition alleging the number of logs put into the river, the contract price per thousand feet for floating them, and the cost of floating and delivering them, and claiming the difference between the estimated cost and contract price as damages, is not open to objection on the ground of not properly alleging the damages.

3. SAME—MEASURE—CONTRACT.

The measure of damages in such case is the contract price, less the cost to the contractor of performing the contract, including in such cost the value of his own services, as well as necessary outlay of money.

4. PLEADING—CONTRACT—ALLEGATION OF PERFORMANCE.

In an action to recover for breach of a contract, it is sufficient for plaintiff to allege a general compliance with the contract on his part, without alleging specifically and in detail the performance of every act required to be done by him.

5. EVIDENCE—OPINION—LOGS AND LOGGING.

One familiar with a river, and who has had experience in rafting logs on it, may give his opinion as to whether he can accomplish a certain work in rafting logs on the river in a certain time.

6. TRIAL—INSTRUCTIONS—JURY.

The court should construe a written instrument, and not leave the construction to the jury. If parol evidence has been admitted to explain the instrument, the court should give a construction applicable to each phase of the case developed by the evidence.

7. SAME—SPECIFIC INSTRUCTION—CONTRACT.

In an action for breach by defendant of a contract for work and labor in refusing to accept performance by plaintiff, there being a conflict of evidence as to whether plaintiff failed to comply with the contract before defendant discharged him, *held*, that defendant was entitled to an instruction that such failure in any essential particular would justify defendant in discharging him, and was not obliged to be satisfied with a general instruction that plaintiff could not recover unless he complied with the contract.

8. SAME.

A special charge based upon a single expression selected from a conversation as related by a witness, *held*, not required to be given upon a matter already covered by a general charge.

9. COSTS—SECURITY—AFFIDAVIT.

An affidavit of plaintiff stating that he is unable to give security for, or to make a deposit sufficient to cover, all the costs, but that he cannot swear that he is unable to pay the costs as they accrue; that he has paid all accrued costs, except a small balance to cover which he has made a deposit with the clerk, who failed to give him the exact amount, is a sufficient answer to a rule for costs under Rev. St. Tex. art. 1438.

Appeal from district court, Liberty county.

O'Brien & John and R. H. Leonard, for appellants. *Hal W. Greer*, for appellee.

GAINES, J. This is an action brought in the court below by appellee against appellants to recover damages for the alleged breach of a contract for the floating and delivery of logs by the former for the latter. The defense, in part, was that appellee had failed to comply with a certain stipulation in the written contract between them by which he bound himself to "run and deliver all logs put into the river by Long & Co. into a boom near Bunn's bluff; said logs to be run as often as it may be practicable so as not to allow any delays that would cause the mills to run out of logs." In setting up this defense, appellants answered, among other things, that, at the date of the agreement, they were engaged in furnishing, under contract of sale, other mills besides their own mills, and that this was known to appellant, and, in effect, that the agreement was that appellant would make delivery so as not to permit any of these mills to run out of logs. Exceptions were sustained to such parts of the answer as alleged that other mills were to be supplied under the contract in addition to those of appellants; and this action of the court is assigned as error.

Considering the nature of their defense, it was a matter of importance to appellants to show to what mills the contract referred, if this could be done by extrinsic evidence. Parol testimony is always admissible to explain a latent ambiguity in a written instrument. It is also well settled that the contrary rule, which is ordinarily applied to ambiguities which are patent, is subject to a very distinct qualification. This is that, when persons or things are designated in a writing by terms which are of equivocal or uncertain signification, extrinsic evidence may be reverted to in order to ascertain the intention of the parties. *Roberts v. Short*, 1 Tex. 373; *Thorington v. Smith*, 8 Wall. 1; *Hinnemann v. Rosenback*, 39 N. Y. 98; *Stoops v. Smith*, 100 Mass. 63; *Miller v. Stevens*, Id. 518; *Swett v. Shumway*, 102 Mass. 365; *Macdonald v. Longbottom*, 23 Law J. Q. B. 293, 1 El. & El. 978. It was competent, therefore, for appellants to show to what mills the terms of the agreement applied, by proving all the facts and circumstances out of which the contract arose, including the situation and relation of the parties. If other mills as well as their own were meant, and if appellant failed to float a suffi-

cient supply for all, as he had contracted to do, then these were essential facts which it was proper for them to plead in order to give the plaintiff notice of the defenses upon which they relied. If they had alleged simply that by the terms "mills," in the contract, was meant, not only their own mills, but others which they had bound themselves to supply with logs, we are clearly of opinion that the allegation should not have been stricken out. But it may be questioned whether the specific allegations in relation to this matter are not obnoxious to the same objection as those that were held on the former appeal in this case to have been properly rejected. *McCauley v. Long*, 61 Tex. 74. It is not necessary to decide this question in view of the disposition which we shall make of the case upon other grounds. We suggest to counsel that upon another trial it would be better to allege the fact as to which mills are meant by the terms of the contract, (according to their view of the case;) and to adduce in evidence proof of the circumstances set out in his plea, which has been excepted to, in order to establish the truth of his averment.

The exception to so much of paragraph 4 of defendants' answer as claimed punitive damages of plaintiff for the alleged fraud practiced by the latter was properly sustained.

The third assignment of error is well taken. If plaintiff, in violation of his contract, permitted the logs to jam and clog around the skidways so as to interrupt and delay defendants in putting in logs, it would follow, as we think, that a loss to defendants from the obstruction of their business was a direct consequence of plaintiff's failure to comply with the contract in this particular, and that a general allegation of the amount of damages is sufficient. The same may be said of the allegation of damages by reason of the stoppage of defendants' mills. It is not to be supposed that a business of this character could be brought to a standstill without loss, and that a more specific allegation of the damages than that alleged need not be set forth.

The court did not err in holding the plaintiff's affidavit a sufficient answer to the rule for costs. He swore that he was unable to give security for or to make a deposit of a sufficient amount of money to pay the costs, but stated that he could not swear that he was unable to pay the costs as they accrued. He also deposed that he had paid all costs that had been incurred up to that time, except a small balance, and that to cover this he had made a deposit with the clerk, who had failed to give him the exact amount. We think that this was a reasonable and substantial compliance with the statute. Rev. St. art. 1438.

The eighth assignment of error is not well taken. The exception to the petition on the ground that the damages were not properly alleged was correctly overruled by the court. The petition stated the number of logs that were actually put into the river by defendants during the time for which the contract was to continue in force according to its terms, the contract price per thousand feet, and the cost of floating them and delivering them at Bunn's Bluff, and claimed the difference as his damages. This was sufficient. *Waco Tap R. Co. v. Shirley*, 45 Tex. 356.

Plaintiff sufficiently alleged a compliance with the contract on his part. It was not necessary that he should have averred specifically and in detail the performance of every act which he had agreed to do. A general allegation to this effect was not only sufficient, but commendable for its brevity. Prolixity of pleading tends to confuse rather than to enlighten the courts and juries, and should be avoided.

The twelfth assignment is that "the court erred in refusing to sustain the objections of defendants to the following question to, and answer of J. W. McCauley, plaintiff, thereto, to-wit: 'Could you have run the remainder of the timber put in during the contract period? A. I could. I could have run ten times as much.'" The objections were that the question was leading, and

that it was calculated to elicit a mere matter of opinion. As to the latter ground, it is to be remembered that the testimony shows that the witness was thoroughly familiar with the river, and had considerable experience in rafting logs upon it. We are of opinion, therefore, that the fact sought to be drawn out by the question was sufficiently within the range of his immediate knowledge to render his answer admissible. A similar question was so decided in *Tompkins v. Toland*, 46 Tex. 584. It is not clear, however, that the form of the interrogatory is not objectionable. No definition of a leading question has yet been given which is applicable to every case. It is defined by our courts as a question which admits of being answered in the affirmative or negative, and suggests the answer desired. *Abie v. Sparks*, 6 Tex. 350; *Mathis v. Buford*, 17 Tex. 152; *Tinsley v. Carey*, 26 Tex. 350. It is said in *Greenleaf on Evidence* (volume 1, § 434:) "Questions are also objectionable as leading which, embodying a material fact, admit of an answer by a simple negative or affirmative." We also quote from *Best on Evidence*, (§ 641:) "It is sometimes said that the test of a leading question is whether an answer to it by 'yes' or 'no' would be conclusive upon the matter in issue; but although such questions undoubtedly come within the rule, it is by no means limited to them." But such questions are held not necessarily leading by the courts of other states. *Spear v. Richardson*, 37 N. H. 23; *Kemmerer v. Edelman*, 23 Pa. St. 143; *Wilson v. McCullough*, Id. 440. An interrogatory which can be answered directly in the affirmative or negative enables a witness to answer in the language of the question, and places it in the power of counsel to give an undue effect to the testimony by putting words in the mouth of his witness. This is especially so when, as in this case, the party is testifying in his own behalf. The form of the question may, however, be changed upon another trial, and it is not necessary for us to decide the point.

The assignments from the sixteenth to the thirty-fifth, inclusive, complain of alleged errors in the charge of the court, and in its refusal to give certain special instructions asked by appellees. We shall consider only such of them as we deem most important.

The twenty-second and twenty-third allege that the court erred in the eighth paragraph of the charge, in this: that the court in that paragraph left the contract sued upon to be construed by the jury. These assignments are well taken. It is the duty of the court to construe all written instruments admitted in evidence upon the trial of a cause. If extrinsic circumstances or other testimony have been adduced in order to explain the instrument for the purpose of making certain the subject-matter to which its terms apply, the determination of the issues so presented should be left to the jury. But the court should construe the writing, and apply such construction to each phase of case developed by the testimony upon the special issue so raised.

In regard to the alleged error complained of in the twenty-sixth assignment, we will say that we think the twelfth paragraph of the charge in the main correct. The court should perhaps have been more specific in laying the predicate of appellee's right to recover, by instructing the jury that, to entitle him to a verdict, he should not only have begun the improvement of the river, but that he should have completed such improvement, as far as it was possible and necessary, before appellants took the work of delivering the logs out of his hands. The measure of damages laid down is substantially correct. Appellee's loss was the contract price, less the cost to him of carrying it out. This cost includes the value of his own services, in addition to the outlay of money on his part necessary to carry out the stipulations of his agreement, and it would have been proper for the court to so have instructed the jury.

The twenty-seventh assignment is that the court erred in refusing to give special charges Nos. 1 and 2 asked by appellants. These instructions were to the effect that, if plaintiff had failed to comply with the terms of his contract before defendants took the control of the business from him, these defend-

ants had the right to consider the contract at an end. We think that, although the jury were not authorized by the general charge to find damages for plaintiff unless they believed that he had complied with the agreement on his part, yet, under the conflict of evidence in the case, defendants should have had an affirmative instruction to the effect that, if he had failed to comply with his contract in any essential particular before defendants discharged him from the work, then they were not liable in damages for its breach.

We are of opinion that special charge No. 3 asked by defendants was properly refused.

The court did not err in declining to give defendants' special instruction No. 4. This, however, was sufficient to have called the court's attention to the fact that an instruction was needed explanatory of the rule for the measure of damages laid down in the general charge. This was that the value of plaintiff's services should be added to the expense on his part of carrying out the contract in estimating the cost of such compliance.

Neither did the court err in refusing special charge No. 5. If this had been a suit for breach of a contract for personal services, the charge might have been proper.

The court did not err in refusing to give special charge No. 6 asked by defendants. The jury had already been instructed in the general charge that, if plaintiff had abandoned his contract, he could not recover damages for its breach by defendants. It would have been improper to select one expression from a conversation between plaintiff and Fletcher, one of defendants, as testified to by the latter, and to make the question of abandonment depend upon this alone.

For the errors pointed out, the case will have to be reversed; and we think it unnecessary to consider the other assignments of error. The judgment is accordingly reversed, and the cause remanded.

WILLIE, C. J., did not sit in this case.

MAYOR, ETC., OF THE CITY OF HOUSTON v. ISAACS.

(*Supreme Court of Texas. March 4, 1887.*)

1. MUNICIPAL CORPORATIONS—DEFECT IN STREET—WRITTEN NOTICE—CHARTER.

A provision in a city charter exempting the corporation from liability to any person for damages caused by a street being out of repair through the gross negligence of the corporation, unless the same shall have remained so for 10 days after special notice in writing to the mayor or street commissioner, does not apply where the city having put a contractor to work upon the street, and after he had commenced work, and made an excavation in the street, rendering it unsafe for travel, discharged him, and left the work in an unfinished condition. A person injured in consequence of such defect in the street may recover of the city though he has not given the 10 days' notice. The city having by its own procurement made the street unsafe, and knowingly left it so, cannot escape behind the charter provisions, as it might if the defect had resulted from any extrinsic cause.

2. SAME—CARE BY WAYFAREER.

In an action against a city brought by one injured while driving through one of its streets owing to a defect in the street which the city had negligently left unrepaired, it is not sufficient to exempt the city from liability to the injured party that, if he had known of the defect, he might have avoided the accident by careful driving. One is not obliged to look out for and provide against defects in the streets of a city.

Appeal from district court, Harris county.

C. Anson Jones, for appellant. *B. P. Hamblen*, for appellee.

GAINES, J. This is a suit against appellants by appellee to recover damages for a personal injury received by the wife of the latter. Appellee, who had his wife with him, was driving his wagon along one of the streets of the

city of Houston, and ran into a hole. By a jolt caused by the depression, the wife was thrown from the vehicle, and thereby injured. One Hatter had entered into a contract with the city to gravel the street, and, in pursuance of his agreement, had made an excavation about eight inches deep at the place where the accident occurred. The authorities of the city, becoming dissatisfied with the manner in which he was performing the contract, had stopped the work, and the excavation was left as he had made it.

The cause was submitted to a jury, and it is assigned that the court erred in failing to charge that plaintiff could not recover unless written notice had been given to the mayor or street commissioner of the city of the defect in the street before the time of the alleged injury, and in refusing to give special instructions to that effect asked by defendants. It is admitted that no such notice was given. In support of the assignment, we are referred to section 24 of the amended charter of the city, which reads as follows: "That said corporation shall not be liable to any person for damages for injuries caused from streets, ways, crossings, bridges, or sidewalks being out of repair from gross negligence of said corporation, unless the same shall have remained so for ten days after special notice in writing given to the mayor or street commissioner." Sp. Laws 1879, p. 22. The provision is a most stringent one, and its practical effect would seem to be to exempt the city from all liability for such defects as ordinarily accrue. But we cannot say that it should not be enforced in a case in which it is applicable. We are of opinion, however, that it does not apply to the case before us. There may be some reason in requiring notice to the city authorities of a defect accruing from ordinary causes; such as the action of floods, the use of the street by the public, or it may be said from any cause except by the action of the city itself. But in the present case the city put a contractor to work upon the street, stipulating to have an excavation made which was to be filled with gravel, and after the work had begun, and the street rendered unsafe for travel, discharged the contractor, and left the work in an unfinished condition. This action was taken by the very officers to whom the charter required the notice of defects to be given. The city is not sought to be held liable for an injury caused by a defect accruing from any extrinsic cause whatever, but for having by its own procurement made the street unsafe, and knowingly left it in that condition. The street commissioner himself testified on the trial that he "made no repairs" of the defective street because he considered it the duty of the contractor to do it. Under these circumstances, we are of opinion that no proof of a written notice was necessary in order to hold the city liable for the injury complained of in this case, and in this view we are sustained by the case of *City of Springfield v. Le Claire*, 49 Ill. 476, in which a like provision in the charter of that city was held not to apply under a very similar state of facts to those presented by the record before us.

The fifth assignment of error complains that the charge of the court assumes that the street was in a bad condition. The court charged the jury, among other things, that "if further satisfied from the evidence that the injuries to plaintiff's wife resulted from and were caused by the bad condition of the street, as alleged in the petition, * * * find for plaintiff." The assignment is not well taken. The charge neither assumes the fact, nor was it calculated to mislead the jury, as is claimed in the proposition under the assignment.

It is further claimed, however, that since Hatter was an independent contractor, and not an agent of the city, the latter cannot be held liable for his acts. But the evidence shows clearly that the city had discharged its contractor, and then took no steps to repair the injury that had been done to the street by the excavation. It would seem, however, that the weight of authority is against appellant's proposition, as applicable to a case where the work itself to be done is attended with danger to the public. See *City of*

Springfield v. Le Claire, supra; 2 Dill. Mun. Corp. (3d Ed.) §§ 1029, 1030.

We think the evidence sufficient to sustain the verdict. It is true that the testimony for appellant showed that many persons had crossed with vehicles the street at the place of the excavation without injury; and it may be that a person who knew of the defect could have avoided danger by careful driving.

We do not see that appellee was guilty of any negligence in not being on the lookout for holes in the street of a city, and especially when the street at that place was in good condition the last time he had passed over it. The undisputed fact that his wife was thrown from his wagon by the jolt caused by the excavation is sufficient proof of its dangerous character.

There is no error in the judgment, and it is affirmed.

CRAWFORD and others v. WILCOX and others.

(*Supreme Court of Texas. March 1, 1887.*)

1. JUDGMENT—ENTRY—MISTAKE IN INITIAL LETTER OF PARTY'S NAME.

There is no material variance where a judgment is entered in favor of "Laura Wilcox, guardian of W. L. Wilcox," when the correct name of the infant is W. B. Wilcox.¹

2. SERVICE OF PROCESS—IN ANOTHER COUNTY—DELIVERING COPY OF PETITION—REV. ST. TEX. ART. 1220.

Under Rev. St. Tex. art. 1220, providing that the officer serving process on a defendant outside the county where suit is pending shall deliver to him a certified copy of the petition, the officer must deliver the certified copy, whether the citation so commands or not.

Error to district court, Waller county.

Harvey & Browne, for plaintiffs in error. *C. R. Breedlove*, for defendants in error.

WILLIE, C. J. The defendants in error sued J. A. Peebles, R. W. Crawford, and W. F. Durr on a promissory note made payable to "Laura S. Wilcox, guardian of W. B. Wilcox, minor, and Fannie J. Wilcox;" and alleged that Peebles was a resident of Waller county when the suit was brought, and that the other two defendants were residents of Harris county, but temporarily in the county of Waller. Citations for all the defendants were issued to Waller county, but those for Durr and Crawford were returned without service. *Aliases* were issued immediately to Harris county, the returns upon which showed that these two defendants had each been served with a copy of the citation, and also a certified copy of the petition. All the defendants having failed to answer, judgment by default was taken against them, in which Laura Wilcox was described as the guardian of W. L. Wilcox, minor; and from this judgment the present writ of error was sued out.

The assignment of error which objects to the judgment for a variance in the initial letter of the minor's middle name hardly deserves to be noticed. This letter was of no importance in identifying the minor; and, besides, the addition of "guardian," etc., after Laura Wilcox's name was a mere *descriptio personæ*, and might be rejected altogether without affecting her right to sue and obtain judgment upon the note.

There was no necessity for a supplemental petition to authorize citations to issue to Harris county. The statute says that citations may issue to the county where the defendant is alleged to reside or be, and Crawford and Durr were alleged to reside in Harris county. A supplemental petition could have alleged no more, and hence could not have given better directions to the clerk as to where he should send the process than was already contained in the petition on file.

¹See note at end of case.

Articles 1215 and 1443 of the Revised Statutes prescribe what the citation shall command. There is nothing in either of these articles which requires that the writ shall order the officer to whom it is directed to deliver to the defendant a certified copy of the petition. Article 1220 does prescribe that the officer serving a defendant outside of the county where the suit is pending shall deliver to him a certified copy of the petition. This is made his duty by the statute, and must be done whether the citation so commands or not. The officer's return shows that he fully and literally complied with this provision of the statute; and, the citations following in all respects the form prescribed in articles 1215 and 1443, the process and service were good, and the judgment by default was properly taken. This disposes of all the objections taken by the plaintiff in error.

The judgment will be affirmed; but, as it is not apparent that the case was brought here for delay, as suggested by the defendants in error, no damages will be awarded.

NOTE.

Where a judgment has been taken against a party personally served, and by mistake, but without fraud, the plaintiff's name is given as John W. instead of James W., it cannot, on collateral attack, be treated as a nullity. *McGaughey v. Woods*, (Ind.) 7 N. E. Rep. 7, and note. A judgment duly rendered against one whose name is misspelled, is, when docketed, a lien on his real estate, unless as against those who can claim that, by reason of the misspelling, the docket is no notice to them. *Fuller v. Nelson*, (Minn.) 28 N. W. Rep. 512, and note.

As to misnomer in an indictment, see *Walter v. State*, (Ind.) 5 N. E. Rep. 735, and note.

LISKOSKI v. STATE.¹

(Court of Appeals of Texas. February 16, 1887.)

1. MANSLAUGHTER—CHARGE OF THE COURT.

See the opinion *in extenso* for a state of proof in a murder trial whereunder the omission of the trial court to instruct the jury upon the law of manslaughter was fundamental error.

2. SAME—INSTRUCTION.

The evidence in this case presented the issue of an acting together by the defendant and another in the perpetration of the homicide, upon which the court properly instructed the jury. But note that the evidence also presented the issue of an independent homicide by the third party; the failure of the trial court to charge upon that phase of case being fundamental error.

Appeal from district court, Wilson county.

This conviction was in the second degree for the murder of Frank Mandrill. A term of 10 years in the penitentiary was the penalty awarded. The opinion discloses the entire case.

W. K. Dial and *L. S. Lawhon*, for appellant.

The failure of the trial court to instruct the jury upon the law of manslaughter was fundamental error. *Johnson v. State*, 43 Tex. 612; *McLaughlin v. State*, 10 Tex. App. 340.

Asst. Atty. Gen. Burts, for the State.

HURT, J. This is an appeal from a verdict and judgment of conviction for the offense of murder of the second degree found and rendered against the appellant at the December term, 1886, of the Wilson county district court. It is assigned as error (1) that the whole law of the case was not given in charge to the jury; and (2) that the court failed to instruct the jury as to the law of manslaughter.

It is contended that there was sufficient evidence upon which to base the theory of manslaughter, and that, therefore, the court should have instructed

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

upon this view. It therefore becomes necessary to examine the evidence as presented in the statement of facts,—a statement which, it may be said, presents some remarkable features.

It was in evidence that Mandrilla, the deceased, had been, up to a short time before the homicide, in the employ of the appellant as a laborer, but that the employment had terminated; that, on the day of the homicide, appellant, deceased, and one Kruse, who appears to have been living with appellant, were at the neighborhood store of one Theodore Felix, a few miles distant from the appellant's house; that while there deceased purchased two bottles of whisky from Felix,—appellant and Kruse remaining at the former's wagon, while deceased went for the whisky; and that the three then started in the direction of appellant's house, the three seemingly sober and friendly. This was shortly after midday of June 20, 1886. About 3 o'clock P. M., the wife of appellant went over to the house of a neighbor, one Plock, living a few hundred yards distant, with the report that the deceased had come to their house drunk, and had fallen over dead, and desiring to have a coffin made for his interment. About half an hour afterwards, Mrs. Plock went to appellant's house, and there found Mandrilla lying dead on the gallery, his body covered with a wagon sheet, and his face discolored as though bruised. Save for one place, there was no blood on the gallery, nor was the clothing of the deceased bloody, nor was there on the gallery or clothing any sign of recent wetting. Defendant, at this time, appeared to be drunk, and was walking about cursing Mandrilla for dying on his premises.

On the night of the said June 20th, Kruse and one Piedola went to the house of A. McClung, a justice of the peace, and the former, through the latter as interpreter, stated that Mandrilla had died as before stated, and asked that an inquest be held, and the justice informed him that, if he had died as stated, there was no necessity for an inquest. The addition of the fact that appellant had stated to Felix, who came on the morning of the 21st to see to the burial of the deceased, that they had buried his body in a grave five feet deep, inclosed in a coffin they had made, summarizes the undisputed facts, and brings the evidence down to the point of divergence and conflict.

The officer holding the inquest on the day following the homicide testified that, "at the back side in the north corner of the field, on the Cibolo creek, we came to the place where the body was buried. We dug it up. The body was in a hole about two feet deep, and just wide enough to crowd the body into. The body was buried without a coffin, or a board or plank of any kind about it. The grave was perfectly level with the ground. There was nothing to indicate that a human body was buried there, except that the dirt immediately over the body appeared to have been recently dug or loosened up." It was further in evidence that the face, head, and neck were black under the skin from bruises, and that the surgical examination developed that the vertebral column was broken at or about the point of junction with the head.

The wife of appellant testified on the trial as to the facts of deceased, her husband, and Kruse coming home together; that they drank together, the deceased being drunk, and the other two sober; that they sat down together to dinner, when deceased went into the kitchen and picked up a butcher knife; that she told him to put it down; that he "made no reply, but walked out with the knife into the yard, and laid down on a bed, with the knife stuck about him somewhere. I went into the house where my husband was, and told him that Mandrilla had taken the knife out of the kitchen. He [appellant] got up, and picked up his gun, and went out to where Mandrilla was lying down on the bed, and told him to give up that knife or he would kill him. Mandrilla raised up and threw the knife away, and he and my husband then got into a scuffle, and both of them had hold of the gun. Kruse came out then, and stopped them, and my husband carried the gun back into the house. * * * In a little while Mandrilla came into the room where

Kruse was sitting reading, and called him a 'son of a b——h,' and Kruse got up, and threw him down on the floor, and Mandrilla got up, and was staggering around the room, and Kruse caught him again, and threw him to the floor, and got on him, and caught him by the head, and knocked his head against the floor, and twisted his head around twice, and let him alone. I then went over to Mr. Antonio Plock's. * * * I told Mr. Plock that Mandrilla had fallen down on the floor dead, or was dying," etc.

Upon cross-examination, and for the purpose of contradicting the witness, the following was elicited: "I testified before the jury of inquest, and did not tell that Kruse threw Mandrilla to the floor and twisted his head. I told the jury of inquest that Mandrilla came to my house drunk and fell dead. I did testify * * * that I did not see my husband, Kruse, or Mandrilla drink any whisky. I also stated * * * that I was in the kitchen when Mandrilla fell dead; also * * * that my husband was drinking, but knew what he was doing. * * * I did testify that in the morning before they left home I saw my husband pay Mandrilla \$1.50 due him. My husband was not owing Mandrilla anything; he had paid him for his work the sum of \$5.75 when he quit work. * * * I was in the kitchen when Kruse threw Mandrilla to the floor, and twisted his head. There is one room between the gallery and kitchen, but I could see the front gallery. * * * My husband and Kruse put the body on a sled the next day, and carried it off. I also testified before the jury of inquest that my husband and Kruse were within two steps of Mandrilla when he fell dead. * * * It was about four o'clock when Mandrilla fell dead." The state then put in evidence such portions of Mrs. Liskoski's testimony as she had been questioned about, the testimony being about as indicated by the questions and answers propounded and elicited, as a predicate for impeachment.

This testimony of appellant's wife, it is to be observed, is the only evidence in the record purporting to be given by a witness to the transaction. Kruse was also present, but he has not spoken; and it is to be inferred that he is either dead, has left the country, or has been rendered incompetent as a witness by indictment for the same offense. That the palpable and material conflicts between Mrs. Liskoski's testimony on the trial and that given by her upon the inquest cast grave suspicion upon her entire credibility, is not to be denied. Yet, granting to this its proper legal force in reaching a conclusion upon the general question of guilt or innocence, does not her testimony, in some of its parts, present the theory that the killing, if there was a killing, was upon sudden quarrel and without malice? We conclude that it does; and, in so concluding, it is not said that the appellant is not guilty, if guilty at all, of a *higher grade* of offense than *manslaughter*, or that he *is* guilty of *that* offense; nor was it necessary that either deduction should have been drawn by the trial judge below, nor is it now by us here. Any theory legitimately arising out of the evidence in a case imposes upon the court the duty of submission by appropriately instructing upon the law governing it; and this, without regard to the strength or weakness of the supporting facts. Uniform with the previous rulings of this court is the doctrine here declared, viz.: The charge of the court must make a pertinent application of the law covering every theory arising out of the evidence; that the duty is not dependent upon the court's judgment of the strength or weakness of the testimony supporting the theory, it being the prerogative of the jury to pass upon the probative force of the testimony. The court should have given an instruction upon the law of manslaughter, and its failure to do so was error.

The testimony presents still another theory of the case, viz., that the contest between the appellant and deceased had terminated, (the struggle over the butcher knife and gun,) and that a new and independent difficulty had arisen between Kruse and deceased, in the course of which Kruse twice bore the deceased to the floor, pounding the floor with his head, and twisting his

neck from side to side. The learned trial judge, having already properly instructed the jury upon a homicide based upon the theory that Kruse and appellant acted together in its commission, should have also instructed upon the alternative theory arising out of this last-mentioned evidence, viz., a homicide in which Kruse acted alone. This omission to do this was also error; and, though neither this nor the error before discussed was excepted to at the time, they were such as require reversal as being calculated to prejudice the rights of appellant.

The judgment is reversed, and the cause remanded.

MCCONNELL v. STATE.¹

(Court of Appeals of Texas. November 17, 1886.)

1. MURDER—INDICTMENT.

It is a well-settled principle of criminal pleading that if, eliminating surplusage, an indictment so avers the constituents of the offense as to apprise the defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution, it is good, in substance, under our Code. See the opinion *in extenso* for an indictment, with surplusage eliminated by the court, held sufficient to charge murder in the first degree; and see the statement of the case for the charging part of the indictment in full.

2. SAME—EVIDENCE.

It was objected by the defense, in a murder trial, that the court erred in permitting the state to prove by four witnesses the condition of the body of the deceased after exhumation. Two witnesses present at the exhumation of the body having testified to its condition when they saw it, the state was permitted to prove its condition by two other witnesses, one of whom was a physician. *Held*, that there was no error in the action of the trial court.

3. SAME—PRIVILEGE OF COUNSEL.

The abuse of the privilege of argument by counsel, in order to authorize a reversal of a conviction, must appear to have been so gross in the use of words, terms, and epithets unwarranted by the evidence that they were calculated to injure materially the rights of the defendant. See the opinion *in extenso* for the remarks employed by the state's counsel held, though reprehensible, not to constitute *per se* such an abuse of the privilege of argument as to require the reversal of the conviction.²

4. SAME—INSANITY.

Charge of the court properly omitted to instruct the jury upon the law of insanity, when there was a total absence on the trial of any evidence tending to raise that issue.

5. SAME—NEGLIGENT HOMICIDE OF THE FIRST DEGREE.

Trial courts are required by statute to charge the jury upon the whole law of the case, and it becomes imperative upon the court to instruct upon every phase of case raised by the evidence, however impotent such evidence may appear to be. Exception to an omission to charge the whole of the law devolves upon this court the duty of reversing a conviction without inquiry as to the effect of such error upon the trial. See the statement of the case for evidence held to demand of the trial court a charge upon the law of negligent homicide of the first degree.

Appeal from district court, Parker county.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

² Respecting misconduct of counsel in argument as a ground for granting a new trial, see *Hopt v. People*, 7 Sup. Ct. Rep. 614; *Bullard v. Boston & M. R. R.* (N. H.) 5 Atl. Rep. 838, and note; *Felix v. Scharnweber*, (Ill.) 10 N. E. Rep. 16; *People v. Carr*, (Mich.) 31 N. W. Rep. 591; *Gallinger v. Lake Shore Traffic Co.*, (Wis.) 30 N. W. Rep. 790; *Henry v. Sioux City & P. R. Co.*, (Iowa,) Id. 630, and note; *Manning v. Bresnahan*, (Mich.) Id. 189; *Palmer v. Utah & N. Ry. Co.*, (Idaho,) 13 Pac. Rep. 425; *Moore v. State*, (Tex.) 2 S. W. Rep. 887; *Huckshold v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) Id. 794; *Stone v. State*, (Tex.) Id. 585; *Little Rock & Ft. S. Ry. Co. v. Cavenesse*, (Ark.) Id. 505, and note; *Brennan v. City of St. Louis*, (Mo.) Id. 481; *Willis v. Lowry*, (Tex.) 2 S. W. Rep. 449; *State v. Forsythe*, (Mo.) 1 S. W. Rep. 834; *State v. Robertson*, (S. C.) 1 S. E. Rep. 443.

The verdict in this case found the appellant guilty of manslaughter, and awarded him a term of four years in the penitentiary, under an indictment for murder, the charging part of which reads as follows, the words eliminated by this court being in italics: " * * * That one Eli McConnell, late of said county, on, to-wit, the fifteenth (15th) day of November, A. D. 1882, in said county of Parker and state of Texas, *not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil*, and of his malice aforethought, contriving and intending one Viola Hunt McConnell to deprive of her life, did then and there with force and arms make an assault upon the body of the said Viola Hunt McConnell, and a certain pistol, the same being a deadly weapon, which he, the said Eli McConnell, in his hands then and there had and held, which said pistol, as aforesaid, was charged with gunpowder and leaden bullets, he, the said Eli McConnell, did then and there discharge and shoot off to, at, and against her, the said Viola Hunt McConnell, *a female child in being within the state of Texas aforesaid, feloniously, willfully, and of his, the said Eli McConnell's, express malice aforethought, inflict one mortal wound in and upon the head of her, the said Viola Hunt McConnell, of which said mortal wound she, the said Viola Hunt McConnell, then and there died.* And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Eli McConnell, in manner and form aforesaid, feloniously, willfully, and of his express malice aforethought, did kill and murder the said Viola Hunt McConnell, contrary to the law, and against the peace and dignity of the state."

The testimony for the state discloses substantially the following facts: The defendant, his wife and children, lived in the town of Weatherford. His father and family lived in the country some miles distant. Domestic trouble arose between the defendant and his wife as the result of discoveries made by defendant exciting his suspicion of her conjugal fidelity. Resulting quarrels terminated in their agreement to go to the house of defendant's father, for the purpose of consultation and settlement. Defendant, his wife, and an infant left Weatherford in a buggy on the evening of November 15, 1882. The defendant, who was then under the influence of whisky, took a small flask of the liquor with him. Over the protest of his wife, and parties at his house when he left, he also took his pistol. At a point on the road near the house of one of the witnesses, a lady's hat was seen to fall from the buggy. The buggy stopped a few yards on the road from where the hat fell out, and the defendant got out of the buggy, and started back after the hat. Defendant had not reached the hat, when Mrs. McConnell plied the whip to the horses, and started them full speed up the road. Defendant turned and ran on foot in pursuit of the buggy. He was but a short distance behind, and to the side of the buggy, when they passed beyond the view of the witnesses. A few minutes later several reports of a pistol fired in the direction pursued by the buggy and defendant were heard. Some hours later, the buggy passed back over the same route going towards Weatherford. Defendant and his wife arrived at defendant's father's house about dusk. The infant was passed from the buggy dead. Defendant explained that he accidentally overturned his buggy in a creek, and that the child was killed by falling head first on a stone. The infant was buried next day. Defendant and his wife returned to their home on the evening of the day of the funeral, and the defendant, in the presence and hearing of his wife, explained to the lady he left in charge of his house that his child was killed by the accidental overturning of the buggy in the creek. A week or two later the body of the child was exhumed, and the cause of its death ascertained to be a gunshot through the head. The testimony for the defense tended to present the theory that the defendant was exasperated by his wife, who threw her hat out of the buggy in order to get him out of it, and then fled from him, and that he fired at the horses, designing to disable one of them, and thereby stop the flight of his wife. Defendant's par-

ents testified that, upon the arrival at their house of the defendant and his wife, the wife explained that the defendant struck at her with his pistol, missed her, and struck the child, then in her arms, on the head, and accidentally killed it, the hammer of the pistol penetrating the child's brain.

Hood, Lanham & Stephens, for appellant, maintaining the doctrine announced in the last head-note of this report, and controverting the others.

Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. Motions were made by defendant both to quash and in arrest of judgment for supposed fatal defects in the indictment. There is no question but that the indictment is inartistic, and in some unnecessary averments rather confusing. With regard to pleading in a criminal case, it is well settled that if, eliminating surplusage, an indictment so avers the constituents of the offense as to apprise the defendant of the charge against him, and enable him to plead the judgment in bar of another prosecution, it is good, in substance, under our Code. *Coleman v. State*, 2 Tex. App. 512; *Burke v. State*, 5 Tex. App. 74; *Mayo v. State*, 7 Tex. App. 342; *Holden v. State*, 18 Tex. App. 91; *Moore v. State*, 20 Tex. App. 275. Now, eliminating as far as we can all mere verbiage, confused matter, and surplusage from the indictment in this case, it reads as follows, (omitting formal portions:) That the accused, "late of said county, on, to-wit, the fifteenth (15th) day of November, A. D. one thousand eight hundred and eighty-two, in said county of Parkar, state of Texas, * * * and of his malice aforethought, contriving and intending one Viola Hunt McConnell to deprive of her life, did then and there with force and arms make an assault upon the body of the said Viola Hunt McConnell, and a certain pistol, the same being a deadly weapon, which he, the said Eli McConnell, in his hands then and there had and held, which said pistol as aforesaid was charged with gunpowder and leaden bullets, he, the said Eli McConnell, did then and there discharge and shoot off to, at, and against her, the said Viola Hunt McConnell. * * * And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Eli McConnell, in manner and form aforesaid, feloniously, willfully, and of his express malice aforethought, did kill and murder the said Viola Hunt McConnell, contrary to law, and against the peace and dignity of the state." In our opinion, it is evident that the indictment, thus eliminated, sufficiently, fully, and explicitly charges murder of the first degree. See Willson, Crim. Forms, form 388, p. 173. The motions to quash and in arrest were properly overruled.

Bills of exception 1 and 2 were taken to the action of the court in permitting the prosecution, over objections of defendant, "to prove by *four* witnesses the same harrowing facts attending the exhuming of the deceased child's body, and to permit the county attorney in his closing address to the jury to abuse the defendant for making his defense."

As to the first bill. The evidence shows that the child was killed one evening. It was privately and hastily buried the next day. Some time afterwards it was disinterred with a view of ascertaining what, if any, wounds appeared upon the body. Two of the witnesses who were present on that occasion had testified to what they had seen, and the other two, one of whom was Dr. Le-grand, the only medical witness who testified, were also permitted to give evidence as to the condition of the body, and the nature and character of the wounds found upon it. We can perceive no error in this. It was clearly correct to have the testimony before the jury of the only physician who could testify as a medical expert, if necessary.

In his closing address the county attorney said: "The defendant in this case has stooped so low as to drag before you, on the trial of this cause, the infidelity of his dead wife, and publish her before the court-house as a prostitute." We cannot deny that this remark was "unfair." A defendant has

a right, unquestionably, to introduce all such matters of defense as are admissible and calculated to mitigate, excuse, or justify his actions; and while the prosecuting officer has the right to comment upon the nature and character of such defenses, still in doing so it is most improper to denounce and vilify him on account of his defenses, which oftentimes accused parties are compelled, from stress of circumstances, unwillingly to interpose, or forced to avail of, as drowning men will catch at straws. Counsel representing the state have been admonished time and again of the injustice and wrong of such practices, and the danger they incur in such course of imperiling convictions which would otherwise be irreversible. See Posey, Crim. Dig. "Privilege of Counsel." To make vituperation and abuse, however, grounds for reversing a judgment, it must appear that the remarks indulged in were grossly unwarranted and improper; that they were of a material character, and calculated injuriously to affect the defendant's rights. *Pierson v. State*, 18 Tex. App. 524. While the remark here complained of was reprehensible and unjustifiable, we do not think it should be held so grossly so as to constitute *per se* sufficient cause for reversal of the judgment.

No evidence having been adduced tending to establish insanity, it was not error for the court to decline or fail to instruct the jury on that branch of the law. That defendant's mind was greatly excited by a knowledge, in the first instance, of his wife's infidelity, and that such natural excitement was inflamed, if possible, by the free use of intoxicants, is, perhaps, abundantly shown; but there is not the slightest evidence of legal insanity, or that degree of mental aberration showing a want of knowledge of right or wrong, and sufficient to drive him with uncontrollable impulse to homicidal deeds. His conduct towards his wife may readily be accounted for as the result of anger, rage, and resentment,—those natural emotions common to all men of ordinary temper, which in no manner are indicative of a state of mind irresponsible for its actions. *Leache v. State*, ante, 539.

The jury were fully and properly instructed as to the law of drunkenness, and its effect upon crime. They were further fully instructed in the law relating to homicide of one party when the intention was to kill another, and of homicide in the performance of an *unlawful* act. *Ferrell v. State*, 43 Tex. 503; *McConnell v. State*, 13 Tex. App. 390; *Clark v. State*, 19 Tex. App. 495; *Musick v. State*, 21 Tex. App. 69. The law of murder of the second degree, manslaughter, and *negligent homicide of the second degree* were directly applied, and ably, to the facts in the case.

But, though appellant has been convicted of manslaughter, great stress is laid upon a supposed radical defect of omission in the charge with reference to that branch of the case, and the persistency with which the objection is urged induces us to discuss it. As stated in the able brief of counsel, it is that the charge entirely fails to submit or willfully ignores "the theory of an *accidental* (?) killing under such passion as would make the crime manslaughter." The word "accidental" is probably inadvertently used instead of "unintentional." It is an established rule that "if the act done is the unintentional homicide of a different person from the one intended, but without malice, and while the mind is under the immediate influence of sudden passion arising from an adequate cause, such as anger, rage, sudden resentment, etc., rendering the mind incapable of cool reflection, the crime is manslaughter, because the one intended would be manslaughter." *Clark v. State*, 19 Tex. App. 495. We do not think the rule is applicable or properly invoked in this case. Defendant's anger or rage at his wife could scarcely be termed "sudden," since at least it is shown to have been in an active, uninterrupted state of existence from the time they left Weatherford for Staggs', a distance of over eight miles, if, in fact, it does not show the existence of such condition for several days prior to that time. Suppose, however, that this passion had subsided and become cool, and that it was again suddenly aroused when, hav-

ing gotten out of the buggy to pick up his wife's hat, defendant finds she is whipping up the horses, is rapidly driving off, leaving him, and, unable to control his passion, he fires at her and kills the child. We take it that this is the only possible view of the evidence to which the rule invoked is applicable. Do the facts support that view? On the contrary, defendant himself told Staggs that he did not shoot at his wife at that time, but "at the horses, and tried to cut one of them down." If such was his purpose, and the child was killed in pursuit of such purpose, the crime was negligent homicide of the second degree. Pen. Code, arts. 588-592. But, no matter what his purpose may then have been, his shooting at that time did not kill the child. After this shooting the parties were at Staggs' house, and the child was then well and drank milk, as Mrs. Staggs testifies. No portion of the evidence, besides the declarations of defendant and his wife, definitely fix either the time, place, manner, or circumstances under which the child was shot. That it was killed from being shot is made plainly to appear. Our reading of the facts furnishes us with no evidence requiring the instruction claimed as radical error of omission as to the law of manslaughter. If, however, such omission had been error, how does it appear appellant was injured thereby when his conviction was for manslaughter?

But the court did fail to charge upon the law of negligent homicide of the first degree. "If any person, in the performance of a lawful act, shall, by negligence or carelessness, cause the death of another, he is guilty of negligent homicide of the first degree." Pen. Code, art. 579. To constitute this crime the act in which the party committing it is engaged must be lawful, yet it must be one coupled with an apparent danger of causing death, and at the same time there must be no apparent intention to kill, and the homicide must be the consequence of the act done. Pen. Code, arts. 580, 581, 584, 585. Now, both defendant and his wife, when they arrived at his father's house, stated that the child was killed by the upsetting of the buggy. Whether true or untrue, that was the evidence as to their statement, it was part of the evidence in the case; it was defendant's theory of the death. Now, whatever may be thought of this theory in view of the fact that the body had a bullet hole through its brains, it was one phase of the defense, and appellant had the right to have the jury plainly, affirmatively, and pertinently instructed upon the law applicable to it as part of the case. It was not for the court to ignore it; it was matter for the jury to pass upon, and the court should have charged upon it. Having failed to do so, and defendant having promptly reserved an exception to the charge for the specific error in omitting to give it, the error becomes fatal. It is expressly provided by statute that the charge of the court shall distinctly set forth the law of the case. If it fails to do so, and an exception is reserved to it, and shown by a proper bill on appeal to this court, then it becomes the duty of this court to reverse the case for error, without inquiry as to the effect such error may have had upon the result. *Niland v. State*, 19 Tex. App. 166; *Bravo v. State*, 20 Tex. App. 188; *Clanton v. State*, Id. 616; *Paulin v. State*, 21 Tex. App. 436, 1 S. W. Rep. 453; *Smith v. State*, ante, 684.

Because the court erred in not submitting the law of negligent homicide of the first degree, the judgment is reversed, and the cause remanded.

THOMAS, Guardian, v. LEAKE, Guardian.

(Supreme Court of Texas. March 8, 1887.)

MUTUAL BENEFIT SOCIETIES—"CHILDREN" BENEFICIARIES—AFTER-BORN CHILDREN.

An applicant for membership in a mutual benefit association requested that his certificate of membership be issued payable to his children, naming them, upon his death. The certificate as issued was payable to his children generally, without naming them. Held, that the certificate included children born after its issuance, as well as

those in existence at the time of issue, it appearing that one of the main objects of the association was to provide a fund for the benefit of the entire family of a member, and not to restrict it to a portion, and that the charter contained no provision allowing an applicant to designate the beneficiary, or to change him at pleasure.

Appeal from district court, Grimes county.

Lock McDaniel and Burnett & Hanscom, for appellant. *Boom & Cobles*, for appellee.

WILLIE, C. J. The general rule as to life policies of insurance is: If the policy expressly designates the persons who are to receive the insurance money, it is conclusive upon that question. *Bliss, Ins. § 817*. The same general rule must apply to certificates issued by a benefit society, and we do not understand this to be disputed in the present case. There are, of course, some exceptions to this rule, both as to policies of insurance and benefit certificates. None of these, however, need be considered; the only question in this case being as to what persons are designated as beneficiaries in the certificate. Upon its face the benefit money is made payable to Thomas' children. If this were an ordinary policy of insurance, it would include as well a child born to him after the issuance of the policy as those in existence before that time. *Ricker v. Charter Oak Ins. Co.*, 27 Minn. 193, 6 N. W. Rep. 771. This, too, is a well-settled principle in reference to wills, which take effect upon the death of the testator, and are treated as speaking from that time. 2 Redf. Wills, 10-12; *Shotts v. Poe*, 47 Md. 513; 2 Jarm. Wills, 156; *Davidson v. Dallas*, 14 Ves. 576.

A benefit certificate takes effect, so far as to vest in the beneficiaries an absolute right to the benefit money, at the death of the party to whom it is issued, and hence the same rule should hold as to them which prevails as to wills and life policies of insurance. The application for the certificate in question requests that the benefit money be paid to the children of the applicant, naming them. The certificate issued to "his children," without naming them. Under the construction which we have shown the law gives to the term "children" as used in the certificate, it does not mean certain named children then in existence, but those together with such as may thereafter be born to the applicant. It is clear, therefore, that, if the application does not limit the meaning of the term "children" found in the certificate, each does not refer to precisely the same beneficiaries; in other words, the application does not necessarily include all the parties embraced in the certificate. The case presented would be that of an application for a certificate for the benefit of certain named parties, and the issuance of a certificate for the benefit not only of them, but of other beneficiaries also.

What would be the effect of such a transaction? The applicant would not be bound to accept it, but, if he did, the beneficiaries would be those designated in the certificate, and not those named in the application. It would be a case where a proposition for a contract was made by one party to another which was accepted in a materially modified form. The party proposing would not be bound to accede to the altered contract; but, if he did, it would be binding upon him according to its modified terms. Thomas did accept a certificate different from that for which he applied, and it would seem that the effect of the contract was to entitle all of his children to participate in the relief fund upon his death, and not those only who were alive at the time the certificate was issued.

But the appellee contends that we must construe the application as explanatory of the certificate, and must modify the legal sense of this word "children" so as to make the application and the certificate harmonize with each other; that Thomas having applied for a certificate for the benefit of all his children then in existence, and the society having issued him a certificate for the benefit of "his children," we must conclude that the certificate was intended to

accord with the application, and this would exclude any child born to the applicant in the future. There would be some force in this suggestion if we are to look to the application and the certificate as alone constituting the contract between the parties; but in all cases of contracts formed by reason of obtaining membership in a mutual aid society, its constitution and by-laws enter into the contract, and it must be read in the light afforded by these, in order to arrive at a true construction of its terms. *Splawn v. Chew*, 60 Tex. 534.

Article 2, § 3, of the constitution of this society, states that one of its objects is "to establish a benevolent and relief fund for the protection of the families of deceased members, and to assist them in distress and in sickness." Article 3, § 11, makes the benefit money payable, on the death of a member, to "his family or his heirs." By-law No. 7 is to the same effect. These and other provisions of these instruments show conclusively that one of the main objects of the society is to confer its benefits upon the entire family of a member, and not to restrict them to a portion, to the exclusion of the remainder. There are no provisions, such as are found in the laws of similar institutions, allowing an applicant to designate the persons to whom the benefit money is to be paid, or to change them at his pleasure. It may be that a member, with the express consent of the society, could direct his benefit money to be paid to a portion of his family, to the exclusion of the remainder, but the consent of the society would have to appear in some clear and unmistakable way. It would not appear from doubtful words,—much less from those whose legal construction would evidence a dissent from the member's request,—and the issuance of a certificate more in accord with the spirit and intention of the constitution and by-laws of the society. This is the state of case we have under decision; and we cannot say that the trustees who signed a certificate, which, on its face, made all the children of Thomas, no matter whether then in existence or not, the beneficiaries of the money to fall due upon the death of the applicant, intended to restrict it to a favored portion of the family. The true construction of the whole transaction seems to be that Thomas applied for a certificate not in accordance with the spirit and design of the order. If his family remained as at the time it was applied for, it would inure to the benefit of all the parties protected by the society; if other children should be born, they would receive no benefit therefrom. The trustees guarded against this by so wording the certificate as to bring within the beneficent provisions of the order all of the children who were entitled to relief under its laws upon the death of the applicant. They certainly did not use language which, in its ordinary as well as in its legal sense, would carry out the principles of the order for the purpose of violating these principles; and that, too, at the solicitation of a member who had no right to force the benefit money to go to a portion of his children, to the exclusion of the balance.

We think the certificate on its face includes after-born children, and that it is more in consonance with the spirit and intention of the constitution of the society to so construe it than to exclude from its benefits the after-born children of the applicant. We are of opinion, therefore, that the court below erred in rendering judgment for the appellee, and the judgment will be reversed, and rendered for the appellant.

GALVESTON CITY R. CO. v. HEWITT.

(Supreme Court of Texas. March 8, 1887.)

1. NEGLIGENCE—STREET RAILWAYS—DUTY OF CAR-DRIVERS—INFANT TRESPASSER.

Street railways have no exclusive right to the use of that part of the street covered by their tracks, but all persons have the right to use the street for the purposes for which streets are ordinarily used; and it is incumbent upon the railway, and those in charge of its cars, to use the highest degree of diligence to ascertain whether the tracks are clear in advance of the car, and to use every degree of care to prevent in-

jury to one on the track. But it may be assumed, until the danger becomes imminent, that such person will leave the track before the car reaches him. No such presumption, however, can be indulged as to the conduct of an infant only 19 months old seen playing on the track.

2. SAME—EXCESSIVE DAMAGES.

In an action against a street railway to recover for injuries to an infant 19 months old, caused by a car running over him, the company held liable, although it did not certainly appear that the driver saw the child on the track. In such case a verdict against the railway for \$7,500 is not excessive.¹

3. SAME—INSTRUCTIONS—INCORRECT AS ABSTRACT LEGAL PROPOSITIONS.

A judgment will not be reversed on account of an instruction correct when applied to the facts of a particular case, though, as an abstract legal proposition, it might not be correct when applied to a different state of facts.

Appeal from district court, Galveston county.

The appellee, James M. Hewitt, a minor, suing by Richard Hewitt, his father and next friend, brought this action against the appellant, the Galveston City Railway Company, claiming \$30,000 damages for personal injuries caused by the gross carelessness and negligence of appellant's agent, the driver of one of its street cars, so operating the car that it ran over appellee, he then being only 19 months old, and on appellant's tracks without fault or knowledge of his parents. The jury found for appellee, and fixed his damages at \$7,500, and the railway company appeals.

F. Charles Hume, for appellant. *M. E. Kleberg* and *E. D. Cairn*, for appellee.

STAYTON, J. The charge of the court complained of in the second assignment was correct, and there was evidence which made the charge applicable to the case. The appellee, a child of 19 months of age, was seen on the track of appellant's street railway in advance of an approaching car, which ran over him. Whether the driver saw the child does not appear, but the inference, from the fact that he did not stop the car until he had reached the next corner after running over the child, is that he did not. The only person who testified in the cause that saw the accident, at a distance of about 100 feet from the approaching car, saw the child on the track between herself and the car, and gave a warning cry of danger, which was unheard or unheeded. The driver was on the car, but whether at his post or inside of the car is left in doubt. The animal drawing the car seems to have seen the danger, which the driver ought to have seen, and ran off to one side of the track. The accident occurred in a public street about 4, 5, or 6 o'clock on a bright afternoon. The charge given, without request, made the right of the appellee to recover to depend upon the fact that his injury resulted from the negligence of the driver, and it assumed no fact. It informed the jury that "negligence is the want of such care and prudence as prudent persons observe under similar circumstances, and negligence is a question of fact to be proved just as any other fact," and that the burden of proving its existence rested upon the plaintiff. At the request of the defendant, the court gave the following instructions: "If you believe from the evidence that the plaintiff was injured by being run over by the car, you will find for the defendant, unless it appears to your satisfaction that the running over of the plaintiff by the car was by reason of the negligence of the driver." "If you believe from the evidence that the plaintiff was injured, but do not believe that such injury resulted from the plaintiff being run over by the car, you will find for the defendant." The brief and argument for appellant assert that the charge "absolutely assumes—presupposes—that the plaintiff was injured by the defendant, and

¹See, as to excessive damages in actions for injuries to the person, *South Covington & C. St. R. Co. v. Ware*, (Ky.) 1 S. W. Rep. 439, and note; *Fitzgerald v. Dobson*, (Me.) 7 Atl. Rep. 704; *Knapp v. Sioux City & P. Ry. Co.*, (Iowa,) 21 N. W. Rep. 188.

that the injury was due to defendant's negligence." The charges contain no such assumptions, and are remarkably free from such defects.

At request of counsel for appellee the court instructed the jury as follows: "The jury are instructed that it was the duty of the defendant company to exercise the highest degree of diligence towards a child of tender years and without discretion, and that slight negligence would make defendant company liable in damages." This charge is assigned as error.

Since the case of *Coggs v. Bernard*, 2 Ld. Raym. 909, three degrees or grades of negligence, with their equivalent grades of diligence, have been recognized by English and American text writers, and by the courts; but, however correct in theory the classification may be, the utmost difficulty has been found by the courts in applying it to the ordinary affairs of life; and many of the most learned have regretted their recognition, while all, in the actual adjudication of cases, have more or less ignored the classification. While to the mind of the learned jurist trained to theoretical refinements, and capable of making nice distinctions, grounds on which the grades may stand may be perceived, yet the same minds, when called upon to apply the theories to the facts of given cases, will be unable to fix the point in fact at which the one grade ceases to exist and another begins. Theories which cannot be given a practical effect, even by those most skilled in technically correct theorizing, certainly ought not to be given much weight in the adjudication of the multifarious affairs of life which must be conducted through persons of ordinary intelligence, largely without any theoretical or technical learning. When a person inadvertently omits or fails to do some act required in the discharge of a legal duty to another, whether such duty arises from contract or from the nature of the employment in which the person is engaged, then such an omission constitutes actionable negligence if, as an ordinary or natural sequence, it produces damage to another. The omission may be classified as gross or slight negligence, or simply as negligence, or as a failure to use the highest, ordinary, or slight degree of diligence; but the legal obligation, at all events, to make compensation to the injured person, exists if the omission was a breach of duty and the proximate cause of the injury. What facts will constitute that diligence which the law requires, must depend on the circumstances of each particular case. The omission must be considered in relation to the business in which the person whose duty it is to exercise care is engaged. If the business be one hazardous to the lives of others, the care to be used must be of a nature more exacting than required when no such hazard exists; the greater the hazard, the more complete must be the exercise of care. The exercise of that care requisite to the discharge of legal duty towards an adult person of intelligence, and not wanting in physical ability to take care of himself, if exercised towards a child of tender years, wanting in intelligence and ability to take care of itself, would often amount to what is usually termed gross negligence.

A railway carrier of passengers may, without subjecting itself to the charge of negligence, permit an adult passenger to pass and repass from one passenger car to another while in motion, or to select his own seat or position in a car, if there be not some danger in the position not open to the observation of the passenger; but, were an infant of tender years, and without discretion, traveling with its parents, to escape from their control, and it attempted to do the same things, it would evidently be the duty of the servants of the carrier, if they knew of it, to restrain the act of the infant in these respects, or any other from which injury to it was likely to result, and a failure to do so would be negligence which would render the carrier liable for any injury that might result from such neglect. It is frequently said that a carrier of passengers is bound to exercise a high degree of care for their safety; and that for an injury resulting to them from what is termed negligence or slight negligence the carrier will be liable, and that the duty to exercise extreme

care results from the contract of carriage, express or implied. This is true, but it is not the whole truth; for the duty arises from the hazardous character of the business, and the fact that human life is imperiled by it. The contract creates the relation of carrier and passenger, but that is not the main source from which springs the duty of the carrier to exercise a high degree of care. It has sometimes been said that a carrier owes no duty to persons other than passengers and employes, other than that it must not intentionally, willfully, or wantonly injure them. This doctrine has not been sanctioned in this state. Ordinary railway companies using cars propelled by steam have the exclusive right to the use of their tracks, except at such places as they are intersected by public crossings, or such private ways as they may permit, and they may therefore expect that no one will violate this right, and may rely upon a clear track; but it is very generally held that, notwithstanding this, such is the hazardous nature of the business in which they are engaged that it is the duty of such carriers, not only for the safety of their passengers, but for the safety of any one who may be on the track, to keep a lookout.

Street railways have no exclusive right to the use of the part of a street covered by their track, but all persons have the right to use the street for the purposes for which streets are ordinarily used, and from this fact such companies may expect that other persons will use the street as they have the right to do, and it is therefore incumbent upon them to ascertain whether the track be clear. This duty the law casts upon them as one of the conditions on which they are permitted to use streets, which, to some extent, they divert from the more ordinary uses for the private advantage of the carrier as well as the public convenience. This duty is as firmly fixed on this ground, and upon the ground of the hazardous character of such a business conducted in the street of a town or city, as is the duty of the carrier of passengers by steam fixed by the hazard of that business to human life, or by the contract for carriage. If a person be seen on the track of either class of railway, it may be assumed, if the person be an adult, that he will leave the track before the train or car reaches him, and this presumption may be indulged so long as danger does not become imminent, but no longer. From the time that danger is seen to be imminent, it becomes the duty of such a railway company to use the highest degree of care to avert it, and a failure to do so will constitute culpable negligence, which may or not fix liability as that question may be affected by the contributory negligence of the injured person. No such presumptions, however, can be indulged as to the prudent conduct of an infant of no greater age than was the plaintiff at the time he is alleged to have been injured.

It may be assumed, as matter of law, that it is the duty of a street-railway company to know that the track in advance of its car is clear, and that it will be liable for any injury resulting from the want of this knowledge, unless its liability is defeated by the contributory negligence of the injured person, or unless it appears that the person injured went upon its track at a place so near to the approaching car that the driver, by the exercise of care, could not avoid the injury after the person was seen, or might have been seen. This involves the proposition that such a railway company is bound to use such diligence as will enable it to know whether the track in front of its car is clear; and, if to this end the exercise of the highest degree of diligence is necessary, it must be used. If it be seen that a person is on the track of such a railway company in advance of its car, it must use such care as will avoid injury to such person, if this can be done; and for a failure to do so it will be liable for the injury resulting, unless such liability is defeated by the contributory negligence of the injured person. The care requisite to avoid injury in such a case embraces every degree.

The charge of a court must be considered in relation to the facts of the particular case. In the case before us the uncontroverted fact is that the

child was on appellant's track in advance of the car. Whether it was seen by the driver is not shown; but we concur in the opinion of counsel for appellant, after a careful examination of all the evidence, that the driver did not see it. It was his duty to exercise the highest degree of diligence to ascertain whether persons were on the track in advance of the car, and, in so far as the charge complained of affects this question, it was correct. If the driver saw the child on the track in advance of the car, it was his duty to exercise all the diligence then possible to avoid injury to it, and in this aspect of the case the charge was not erroneous.

It is insisted that "the reasonable and probable conclusion is that the child placed itself suddenly on the track immediately in front of the car, so that he was not discernible by the driver, or, being discernible, was seen too late to enable the driver to avert the catastrophe;" and that "this inference is strengthened by the further fact * * * that the mule drawing the car ran off to one side of the track. The child must have placed himself suddenly and immediately in front of the mule, so near that the momentum of the car hurried it over him, and concealed him from the view of the driver at the very moment of the animal's abrupt rearing to one side." Whether this was so, was for the jury to determine. If, however, such was the fact, it was still proper that the appellant should have been held to that degree of care required by the charge, under which the jury may have come to the conclusion, even though the child suddenly entered upon the track but a short distance in front of the car, that the injury might have been avoided had the driver used such care as the charge required after the child was seen, or ought to have been seen. A judgment will not be reversed on account of a charge correct when applied to the facts of the particular case, though, as an abstract legal proposition, it might not be correct when applied to a different state of facts.

It is insisted that "the verdict of the jury is not sustained by and is contrary to the evidence, in this: *First*. There was no evidence that the car ran over plaintiff through the negligence of the driver. *Second*. There was no evidence directly to the allegation that plaintiff's injury was caused by the car running over him; and the only support to that allegation was the theoretical inference arising from the bare fact that the car ran over him. *Third*. The verdict of the jury is for a sum enormous, extortionate, unreasonable, and oppressive, and shows upon its face that it was inspired by partiality, tenderness, and compassion for the plaintiff, and by passion and prejudice against, and a desire to punish, the defendant, and was not the result of fair, deliberate, and just consideration of the evidence."

We are of the opinion that the evidence was sufficient to authorize the jury to conclude that the car ran over the plaintiff through the negligence of the driver. If the appellant desired to rebut the case made by the uncontradicted evidence, or to show more fully the circumstances attending the injury, it should have called, as a witness, the driver, who may be presumed to know the facts bearing on the question of his negligence. This was not done, nor his absence accounted for.

The evidence tending to show that the injury to the plaintiff was caused by the car running over him is not of that direct character which may be offered in most cases; but we are not prepared to hold that the jury, from the evidence, was not authorized to find that the injury resulted from the cause alleged. The testimony of the medical expert was based upon the condition of the child long after the injury; but his condition, from the time the car ran over him until the time of the trial, was made known to the jury, and the surgeon, who based his opinion as to the nature of the hurt from which the injury resulted upon his own examination of the child while under his treatment. Other physicians saw and treated the child soon after the cars ran over him; and if the appellant desired to controvert the statements of the parents of the child as to his condition, or desired the opinions of these per-

sons as to the probable cause and nature of the injury, they might have been called as witnesses. This was not done, nor any reason shown why it could not be done. Under such circumstances the jury was authorized to draw all such inferences from the evidence brought before them as were reasonable, and we cannot say that their conclusion is not sustained by the evidence.

The verdict is large, but the evidence shows that the injury is one from which the appellant can never recover. He must pass through life an invalid, and most probably will not reach the length of days to which but for the injury he might attain. We cannot set the verdict aside on the ground that it is excessive.

The judgment is in favor of the appellee, and furnishes no authority to the next friend to receive the sum to be collected under it. The execution should run in the name of the appellee; and the money to be collected on it paid to such person as may have qualified as guardian of the minor's estate; and, if there be no such guardian, then it should be paid into court, and there remain until a guardian qualifies, or the minor becomes 21 years of age.

The judgment will be affirmed.

WHITE v. STATE.¹

(Court of Appeals of Texas. February 16, 1887.)

1. MURDER—REASONABLE DOUBT—CHARGE OF THE COURT.

With respect to the doctrine of reasonable doubt as applied to murder of the second degree, the rule is that the evidence must show beyond a reasonable doubt the absence of facts which will reduce, excuse, or justify the killing, and the charge of the court so stating the rule is correct.²

2. SAME—DANGER.

A charge of the court is correct or incorrect according as it applies or misapplies the law to the facts in proof. If the evidence upon a trial for murder discloses the homicidal act to have been performed in the presence of actual *danger* to the slayer, the charge properly omits to instruct the jury with respect to imaginary danger.

3. CRIMINAL PRACTICE—EXCEPTION TO CHARGE.

An erroneous charge should be excepted to, or its correction sought by special instruction. Otherwise such error will be revised only if, under the facts, it is calculated to injure the rights of the accused.

4. MANSLAUGHTER—SELF-DEFENSE.

See the opinion *in extenso* for instructions upon the law of self-defense and manslaughter held erroneous in view of the proof.

Appeal from district court, Victoria county.

The appellant in this case was convicted in the second degree for the murder of Dolph Mathena, and his punishment was affixed at a term of five years in the penitentiary.

It appears from the testimony of one of the state's witnesses that, on the night preceding the killing, the defendant and three or four other parties, all intoxicated, went to the oyster saloon of the deceased, and ordered oysters. While eating them, the several parties got into a dispute and fight among

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

² That the guilt of a prisoner must be established beyond a reasonable doubt, and what is such reasonable doubt, see *State v. Elaham*, (Iowa,) 31 N. W. Rep. 66; *Heldt v. State*, (Neb.) 30 N. W. Rep. 626; *People v. Stuebenvoll*, (Mich.) 28 N. W. Rep. 890, and note; *State v. Thurman*, (Iowa,) 24 N. W. Rep. 511, and note; *State v. Meyer*, (Vt.) 3 Atl. Rep. 201, and note; *U. S. v. Jackson*, 29 Fed. Rep. 503; *U. S. v. Searcey*, 26 Fed. Rep. 442, and note; *Brown v. State*, (Ind.) 5 N. E. Rep. 905, and note; *Stitz v. State*, (Ind.) 4 N. E. Rep. 145, and note; *Com. v. Leonard*, (Mass.) Id. 93, and note; *People v. Guidici*, (N. Y.) 3 N. E. Rep. 496; *U. S. v. Bassett*, (Utah,) 13 Pac. Rep. 237; *State v. Jones*, (Nev.) 11 Pac. Rep. 318, and note; *Clair v. People*, (Colo.) 10 Pac. Rep. 799, and note; *Minich v. People*, (Colo.) 9 Pac. Rep. 4, and note; *Leonard v. Territory*, (Wash. T.) 7 Pac. Rep. 872, and note; *State v. Payton*, (Mo.) 2 S. W. Rep. 394; *Humbree v. State*, (Ala.) 1 South. Rep. 548.

themselves, which resulted in overturning the table, and the breaking of a pewter spoon and a plate. All of the parties except the defendant then left the saloon. From the front or saloon room, the defendant went to the door of the cook-room, in front of which a calico curtain was hanging. He grasped the curtain to steady himself, when the witness, who was the cook, cautioned him against pulling on the curtain. Defendant said, "D——n the curtain," tore it down, and left. The deceased arrived at his saloon some time afterwards, and, when informed of the damage done to his property, said that he would see the parties next day, and compel payment, or secure their indictment. Another witness testified that, on the morning of and a short time before the killing, he heard the deceased tell the defendant, who was then standing near the oyster saloon, that he must pay for the damage he had done the night before. Defendant asked how much he was to pay. Deceased replied: "Five dollars." Defendant replied that, before he would pay five dollars, he would kill deceased. Deceased said that unless he was paid he would have defendant indicted. Defendant replied that in that event he would kill deceased. This witness thought at the time that defendant was talking in jest. The parties then separated, defendant going towards Owen's drug-store, and deceased towards his saloon.

Several witnesses testified that from their different positions with reference to deceased's oyster saloon, just before the killing, they saw Taylor White (not this defendant) and one Franklin pass rapidly out of the saloon, and run off down a street. A few minutes later they heard the report of a pistol. Within a minute or two they saw the deceased fall with his head and shoulder out of his saloon. Defendant stepped over the deceased's prostrate body, and walked up the street, remarking: "I killed the d——d son of a b——h, because he made at me with a hatchet." One of the witnesses (Washington) stated that, looking through the saloon window from his position just after the shot was fired, he saw the defendant, with his pistol extended, standing in front of deceased's counter, while the deceased, who was behind the counter, was backing, with both hands held up in a supplicating attitude. He backed until he reached the front door, when he fell. Witnesses both for the state and defense testified that experiment demonstrated the utter falsity of Washington's statement, inasmuch as a man standing where he stood could not possibly see into the saloon through the window or other opening. The several witnesses testified that when they went into the saloon just after deceased fell and defendant left, they found a common hammer and nails lying on the counter, and a hatchet behind and at the end of the counter. One of the witnesses stated that the dust on the hatchet and about it showed that it had not been disturbed for several days. Another witness testified that, just before the killing, the defendant went into Owens' drug-store, and looked through the drawers behind the counter, saying that he was looking for something. Taylor White testified that he and Franklin were in the oyster saloon when defendant entered it, shortly before the killing. Defendant called several times for oysters. Deceased finally said that he had no oysters. Witness and Franklin then went into an adjoining establishment. Witness soon heard the report of a pistol, and he and Franklin fled. It was proved that either the hammer or hatchet could be wielded as a deadly weapon.

The defendant's first witness testified that he was in deceased's saloon on the night before the killing, and after the departure of the parties who broke the deceased's dish and spoon, and tore down his curtain. Deceased, who was then in the saloon, told witness that his cook reported the conduct of the defendant and his friends to him. He then said that he wanted defendant to stay away from his saloon, and that, if he (defendant) came there again and "cut up," he (deceased) would kill defendant. Another witness for the defense testified that he saw deceased and defendant together at Ward's store on the morning of and shortly before the killing. Witness asked deceased

why he looked angry. Defendant said: "He is mad at me for the damage done to his property last night, and I propose to pay for it. He has been after me three times about it, and I am tired of it, and propose to pay for it." Deceased said: "What do you propose to pay,—two bits?" Defendant asked: "How much are you damaged?" and deceased replied: "Five dollars." Witness then left, but a short while after stopped in front of deceased's oyster saloon door. He then saw defendant sitting on a table. Deceased was nailing his curtain up. Defendant several times asked for oysters. Deceased finally looked over his shoulder angrily, and said he had no oysters. Witness, thinking defendant's angry looks foreboded a fight, started off down the street, and soon heard the report of a pistol. Another witness testified that, when he reached a certain point in range of the oyster saloon door, going from one point to another, he heard quarreling in the oyster saloon. He then saw the defendant and the deceased confronting each other across the counter, quarreling. He presently left, and soon the shot was fired, and defendant walked to Ward's store. He was soon arrested, and in answer to the officer said: "Yes, I killed the d—d son of a b—h, because he was making at me with a hatchet." Witness spoke to the officer saying: "That is true, for I saw it."

J. D. Owen and G. A. Staples, for appellant, controverting the first three and maintaining the fourth ruling of this court.

Asst. Atty. Gen. Burts, for the State.

HURT, J. Appellant was indicted and tried in the court below for the murder of Dolph Mathena, the trial resulting in a conviction for the offense of murder in the second degree. Of the errors assigned, though all have received our patient and careful consideration, but four are thought necessary to be discussed.

1. It is objected to the charge of the court that, in defining the elements of murder of the second degree, the doctrine of reasonable doubt is infringed upon, and in support of the objection we are cited to the *Morgan Case*, 16 Tex. App. 593. A comparison of the two charges develops a radical difference. In the *Morgan Case*, the charge was so framed as to require the facts of reduction to be *evident*; whereas the true rule is that, to convict of murder of the second degree, the proof must show beyond a reasonable doubt the absence of the reducing, excusing, or justifying facts. Considering the definition of murder of the second degree given in the charge in this case in connection with the charge directly applying the law to the facts of the case, there is not the slightest probability that the jury was misled as to the application of the doctrine of reasonable doubt.

2. It is urged that the court should have instructed the jury as to the rights of appellant in a case of "imaginary danger;" that the charge given on this subject confined the jury to a case of *actual* danger. A charge is correct or incorrect, as it applies, or fails to apply, the law to the case made by the evidence. In very many cases the danger may not in fact be real, and yet appear so to the defendant. When this is so, the rule urged by appellant's counsel becomes of the highest importance, and should be given in the charge to the jury. In other cases the danger is evident,—patent; and in these the rule has no application. How stand the facts in this case? Without doubt, the danger, if danger there was, was not imaginary, but patent and real to the appellant.

3. The jury was not instructed that the appellant was not bound to retreat, and the omission to so charge is assigned for error. No such charge was requested, nor was the court's omission made the subject of exception. While the court should have given this law in charge, still it does not of necessity follow that the omission will work a reversal of the judgment. If the facts show that the danger was imminent, leaving no opportunity of safe retreat,

it is improbable that the jury would hold this defendant obliged to retreat. This is the doctrine laid down in *Bell's Case*, 17 Tex. App. 538.

4. In giving in charge to the jury the law of self-defense, the learned trial judge says: "While it is the inalienable right of every man to protect his person from violence, yet this right does not in every case justify the party assaulted in defending himself to the extent of taking the life of his assailant; but one is only justified in taking the life of an assailant when he himself is without fault." This proposition may or may not be correct, and will be discussed further on. The court carries the same proposition, framed in different language, into its charge on manslaughter, viz.: "And if, therefore, the jury should find from the evidence that the defendant went into the saloon of the deceased, and provoked an altercation between himself and the deceased, but without intending to kill the deceased, and deceased assaulted the defendant, or by some act done gave the defendant reasonable apprehension of loss of life, or of great bodily harm, and defendant killed the deceased to protect himself from the apprehended injury, the killing, under these circumstances, would not be justifiable, but [defendant] would be guilty of manslaughter." To condense the proposition, the instruction is this: If the defendant is in "fault" or "provoked" an altercation, and kills to save himself, he would not be justified, but will be guilty of manslaughter. What "fault" or measure of provocation would deprive one of self-defense? The nature and quality of the act, the "fault," the "provocation," the doing of which will deprive one of the right to defend himself, is not given nor explained to the jury. Just what acts will abridge one's right of self-defense, or deprive him of it altogether, can never be determined.

A very clear and simple rule upon this question will be found in the notes to *Stoffer's Case*, Hor. & T. Cas. 227: "If he provoke the contest, or produce the occasion, in order to have a pretext for killing his adversary, or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat. But, if he provoked the combat or produced the occasion without any felonious intent, intending, for instance, an ordinary battery merely, the final killing in self-defense will be manslaughter only."

It will be observed that the *intent* with which the contest or occasion was sought or produced is of the highest importance. Suppose a defendant provokes a combat, or produces an occasion, without intending to do so; or let us suppose his acts or language did in fact provoke the contest, but were not intended to have that effect, nor were they such as would usually and naturally lead to a contest. If, under these circumstances, he kills to save himself, or to prevent serious bodily harm, will he thereby be deprived of the full and perfect right of self-defense? In *Selfridge's Case* it was held that "no words nor libelous publications, however aggravating, will compromise his right of defense, if, in consequence of the same, he is attacked; for no words, of whatsoever nature, will justify an assault." Hor. & T. Cas. 24. See, also, *Cartwright v. State*, 14 Tex. App. 486.

The rule laid down in the note to *Stoffer's Case*, which we take to be the correct one, clearly indicates that there must be a *purpose* behind the provocation, and impelling to it. It is also evident that, notwithstanding the defendant may have provoked the combat or produced the occasion by his own wrongful acts, yet, if those acts were not clearly calculated or intended to have such effect, his right of defense is not thereby compromised. It is not every wrongful act that will deprive the doer of his right of self-defense.

Applying these rules to the court's charge in this case, the charge will be found to contain an erroneous proposition, which, under the facts, may have seriously prejudiced the appellant's rights. Appellant had threatened the life of the deceased, and this was undeniably wrong. He had, with others, on the night before the homicide, in a drunken carousal, destroyed the property

of the deceased. This, too, was a "fault." May not the jury have compromised his right of self-defense because of those wrongful acts? Taking this view of the charge of the court, (at least with regard to the threats,) appellant's counsel asked the court to instruct the jury, in effect, that threats made by defendant against deceased did not operate to deprive defendant of his right of self-defense. This instruction was clearly rendered necessary by the view taken by the court in its charge, and should have been given. *Parker v. State*, 18 Tex. App. 72.

Because of the error indicated, the judgment is reversed, and the cause remanded.

Ex parte ENGLAND.¹

(Court of Appeals of Texas. February 16, 1887.)

BAIL—MURDER—HABEAS CORPUS.

The fact that a single trial of an accused for murder resulted in the disagreement of the jury will not authorize the refusal of bail. But the failure of the proof to establish satisfactorily a killing upon express malice, entitles the applicant to bail.

Appeal from district court, Eastland county. *Habeas corpus*.

The opinion discloses the case. The evidence, though sufficient to inculpate the applicant as the slayer of the deceased, does not furnish "proof evident" that the killing was upon express malice.

Davenport & Truly, for applicant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. Appellant was indicted for the murder of one W. R. Todd. Upon a trial under said indictment, the jury having failed to agree, a mistrial was ordered, and they were discharged by consent of parties. Appellant then obtained a writ of *habeas corpus* upon an application for bail, which having been heard in term-time by the Hon. J. C. RANDOLPH, judge of the Thirty-fifth judicial district, he was denied bail, and remanded to custody to await another trial. From this judgment he has appealed to this court.

All prisoners are bailable "unless for capital offenses when the proof is evident." Const. Tex. Bill of Rights, § 11. Does a mistrial upon the disagreement of the jury as to a verdict in a capital case establish *per se* the fact that the proof is not evident, and that, therefore, the accused is entitled to bail? Mr. Bishop says: "If there has been a trial before a petit jury failing to agree, and especially if there have been two such trials, that will be a strong fact moving to a granting of bail." 1 Bish. Crim. Proc. (3d Ed.) § 262. In his valuable work on Habeas Corpus, Mr. Church says: "But the court will not, as matter of course, admit to bail because the jury in a trial for murder have not agreed upon a verdict. * * * Where a jury have disagreed twice upon a question of guilt, a doubt may well be raised." Section 408; citing *People v. Tender*, 19 Cal. 539; *People v. Cole*, 6 Parker, Crim. R. 695; *State v. Summons*, 19 Ohio, 139; *Ex parte Pattison*, 56 Miss. 161; *People v. Perry*, 8 Abb. Pr. (N. S.) 27.

On the simple fact alone in this case that a trial had been had, and the jury had failed to agree, we do not think appellant was entitled to bail. But, upon the evidence as exhibited to us in this record, we are of opinion appellant was entitled to bail. This evidence will not be discussed.

The judgment of the court below refusing bail is reversed, and appellant will be admitted to bail upon his executing a bond in the sum of \$3,500, with good security, conditioned as the law directs; and, upon the execution by him of said bond, the sheriff of Eastland county, having him in charge, will release him from custody. Judgment reversed, and bail allowed in the sum of \$3,500. Ordered accordingly.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

HARTWELL v. STATE.¹*(Court of Appeals of Texas. February 16, 1887.)*

CRIMINAL PRACTICE—INSTRUCTIONS.

Charge of the court should be limited to the case as made by the evidence, and should carefully omit all issues not arising upon the testimony.

Appeal from district court, Grayson county.

The indictment charged the appellant with murder, and the conviction was for manslaughter, the penalty assessed being a term of two years in the penitentiary.

The sole question adjudicated on this appeal is the correctness of the charge of the court under the evidence in the case. The court charged the substance of article 615 of the Penal Code, which provides that "where the circumstances attending a homicide show an evil or cruel disposition, or that it was the design of the person offending to kill, he is deemed guilty of murder or manslaughter, according to the other facts of the case, though the instrument or means used may not in their nature be such as to produce death ordinarily." The position of the appellant is that the trial court erred in failing to charge articles 612 and 614 in connection with said article 615. Article 612 reads as follows: "The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears." Article 614 reads as follows: "Where a homicide occurs under the influence of sudden passion, but by means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery."

The evidence in the case was sufficient to show the character of the weapon (a knife) as used, and the intent with which it was used, but was not sufficient to raise the issues defined in articles 612 and 614, *supra*.

S. Hars and *A. C. Turner*, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. On a previous day of this term, the judgment of the court below convicting the appellant of manslaughter was affirmed in an oral opinion. A motion has been made for a rehearing, and to have the said affirmation set aside, and for a reversal of the judgment. Four grounds of supposed error are relied upon in the motion, and they are based upon supposed errors in the charge of the court to the jury. No special exceptions were reserved to the charge as given, nor any to the refusal of the requested instructions asked in behalf of the defendant. It is insisted, however, that the errors complained of consisted of omissions of law to which appellant was clearly entitled as applicable to the facts. In other words, it is claimed that, inasmuch as the court charged, in substance, the rule of law declared in article 615 of the Penal Code, it should have charged further the rules announced in articles 612 and 614, with regard to an instrument not necessarily a weapon, unless its use and manner of use was accompanied by an intention to kill. We are of opinion that, in so far as the question was raised by the evidence, the charge was amply sufficient.

We have maturely reconsidered the charge of the court in connection with the motion for rehearing, the brief of counsel, and the entire record as it is presented to us, and we have found no error of omission or commission in it.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

demanding a reversal of the judgment. It appears to us a clear, fair, and explicit enunciation of the principles of law involved in the case, and as favorable to appellant as he had the right to expect. The motion for a rehearing is overruled.

HONEYCUT v. STATE.¹

(Court of Appeals of Texas. February 9, 1887.)

CHATEL MORTGAGE—FRAUDULENT DISPOSITION—PROPERTY—VARIANCE.

The indictment described the mortgaged property disposed of as four bales of cotton. The mortgage, read as evidence for the state, over objection, described the property as a "crop of cotton to be raised during the year 1886." *Held*, that the variance between the description of the property as contained in the mortgage and that stated in the indictment was fatal to the competency of the mortgage as evidence, and it should have been excluded.

Appeal from district court, Bell county.

The opinion discloses the case. The penalty assessed by the verdict was a term of two years in the penitentiary.

Rosborough Bros., for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. It is charged in the indictment that the defendant, with intent to defraud, sold and disposed of four bales of cotton, personal and movable property, upon which he had previously executed and delivered to one Staton a valid mortgage in writing, etc. Upon its face the indictment is a good one. On the trial of the case the state offered and read in evidence, over the objections of the defendant, a written mortgage executed by the defendant to said Staton, dated May 11, 1866. This mortgage describes the property mortgaged as a crop of cotton to be raised by defendant during the year 1886. It is not a mortgage upon four or any other number of bales of cotton. It was objected to as evidence because it was not the mortgage described in the indictment. We are of the opinion that the objection should have been sustained. There is a material difference between a crop of cotton and cotton in the bales, with respect to this prosecution. A growing crop of cotton, it is true, may be mortgaged, and a fraudulent disposition of the same, when mortgaged, is now an offense against the law. Gen. Laws 19th Leg. 85. But the indictment does not allege that the mortgage was upon a *growing crop of cotton*, but upon *four bales of cotton*. The mortgage read in evidence does not correspond with the allegation in the indictment as to the character of the property upon which a mortgage was executed by the defendant. To have met the facts of this case the indictment should have averred that the mortgage was executed upon a growing crop of farm produce, to-wit, cotton, describing it as it is described in the mortgage, and that the defendant, with intent to defraud, sold and disposed of said crop, or a portion thereof. But, the indictment having described the property mortgaged as bales of cotton, it was error to admit in evidence the mortgage describing the mortgaged property as a crop of cotton. The allegation and the proof were materially variant. *Osborne v. State*, 14 Tex. App. 225; *Davis v. State*, 13 Tex. App. 215; *Randle v. State*, 12 Tex. App. 250; *Gray v. State*, 11 Tex. App. 411.

Other errors complained of on this appeal have been considered, but are not deemed tenable, nor of sufficient importance to require discussion.

Because the court erred in admitting the mortgage to be read in evidence, the judgment is reversed and the cause is remanded.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

WIMBERLY v. STATE.¹*(Court of Appeals of Texas. December 4, 1886.)*

1. LARCENY—LIMITATIONS—CHARGE OF THE COURT.

Prosecution for felonious larceny is barred by the lapse of five years between the commission of the offense and the presentment of indictment therefor. See the opinion for a state of case demanding of the trial court a correct charge upon the statute of limitations as applied to felonious larceny.

2. SAME—CONFESSIONS.

Note the opinion for circumstances under which an application for a continuance, made at a previous term of court, so far partakes of the nature of a confession or admission, that it cannot be used against him on his subsequent trial, unless he was warned that it might be so used.

Appeal from district court, Navarro county.

The conviction in this case was for the theft of an estray horse on the twentieth day of May, 1881. The penalty assessed was a term of five years in the penitentiary. The case is stated in the opinion.

Beale & Antrey, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. The indictment in this case, which was for theft of a filly, was presented and filed in the district court on the third day of February, 1886, and the alleged theft, as therein charged to have been committed, is averred to have been so committed on the twentieth day of May, 1881. It will be noted that from the date of the alleged commission of the theft (May 20, 1881) to the filing of the indictment (February 3, 1886) was about four years, eight months, and seventeen days. At the trial the defendant's witnesses testified most positively and emphatically that defendant had taken possession of, claimed, and used the animal from the fall of 1880; and one of his witnesses, George Gillis, swears that he (witness) sold the animal to defendant in the fall of 1880. If defendant stole the animal, or bought and took possession of her in the fall of 1880, then more than five years had elapsed from such taking to the finding of the indictment; in which case the prosecution would be barred by limitation, our statute declaring that "an indictment for theft punishable as a felony may be presented within five years, and not afterwards." Code Crim. Proc. art. 198.

Upon the question of limitation thus raised by the evidence, this court simply charged the jury that if they believed "from the evidence that the defendant, George Wimberly, did, in Navarro county, Texas, on or about the twentieth day of May, 1881, or at any time within five years prior to the third day of February, 1886, the date of the finding of the indictment in this case, fraudulently take," etc. Special requested instructions upon the subject, which were asked by defendant's counsel and refused by the court, and bill of exceptions saved, were as follows, viz.: "If you believe from the evidence in this cause, or if you have a reasonable doubt as to the same, that this defendant acquired possession of the animal more than five years before the third day of February, 1886, you will find the defendant not guilty, whether you believe he actually took said animal or not, as, under such circumstances, the offense is barred by limitation." "If, under the instructions before given you, you should find that the alleged taking was under such circumstances as would constitute theft, your next inquiry would be as to the time of such taking; and if you should find that such taking occurred prior to the third day of February, 1881, or if you have any reasonable doubt upon this point, then you should find the defendant not guilty."

The learned judge explains his refusal to give these instructions to be because they were given in substance in the general charge. We do not think

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they were. "A defendant is entitled to a distinct and affirmative, and not merely an implied or negative, presentation of the issues which arise upon his evidence." *Irvine v. State*, 20 Tex. App. 13, and authorities cited. It was error to refuse the instructions.

A defendant's application for a continuance, made at a previous term of court, provided he was in actual custody at the time, and not merely upon bond, has been held to be so far in the nature of a confession or admission as that the same cannot be used subsequently against him unless he was previously warned that it might be so used. *Austin v. State*, 15 Tex. App. 388. See, also, *Adams v. State*, 16 Tex. App. 162. The question is not affected by the fact that, since the continuance was moved for, the indictment was quashed for invalidity, and a new one found for the same offense. But in this case defendant was not in actual custody, but on bail, and there was no error.

Other errors are assigned and ably presented by appellant's counsel; but, inasmuch as they are not likely to arise on another trial, they will not now be discussed.

For the errors above mentioned with regard to the refused instructions, the judgment is reversed, and the cause remanded.

NEW ORLEANS INS. CO. v. GORDON.

(*Supreme Court of Texas*. March 15, 1887.)

1. INSURANCE—FIRE—CONDITION—SOLE OWNERSHIP.

A policy of fire insurance provided that if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company; otherwise the policy shall be void. The insured, previously to taking out the policy, had conveyed the property to A. for the purpose of enabling him to negotiate a loan for the insured with a homestead company of which A. was a member, and insured was not. He did not mention this conveyance to the insurance company. A., however, was unable to secure the loan, and the insured, though intending to have the property reconveyed to himself, failed to do so until it was burned. *Held*, that the conveyance was not such a one as avoided the policy.

2. SAME—ASSIGNMENT—ACTION—PARTIES.

Where the insured assigns his policy to a creditor as collateral security for the debt due the creditor, suit on the policy may be in the name of the creditor alone as assignee, or in the name of the insured for the use of the creditor.

Appeal from Harris county.

Hutcheson, Carrington & Sears, for appellant. *W. P. Hamblen*, for appellee.

WILLIE, C. J. H. O. Gordon brought this suit for the use of Theodore Keller against the appellant to recover \$700 for the loss by fire of a store-house insured by the latter; the policy having been assigned by Gordon to Keller after the fire occurred. It seems that the policy was issued August 3, 1884, and contained, among others, the following provisions: "If the property be sold or transferred, or any change take place in the title or possession, (except by succession by reason of the death of the assured,) whether by legal process or judicial decree or voluntary transfer or conveyance, this policy shall be void. * * * If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of the policy; otherwise the policy shall be void." About three days previous to the issuance of the policy, viz., on July 31, 1884, Gordon had made to Keller a deed for the property insured, which deed was acknowledged and recorded on August 6, 1884, subsequent to the date of the policy. This deed was made for the purpose of enabling Gordon to obtain a loan of money

for Keller from the Houston Homestead & Loan Association. Gordon could not do this directly, because he was not a shareholder in the company. Keller was; and the company, with knowledge of the purpose for which the deed was made, were willing to loan the money; but, upon examination, Gordon's title was found defective, and so the loan failed. Gordon, however, thought he might remedy the defects in his title, and so let the deed to Keller stand, so that, if he should succeed, the loan could be effected. The defects, however, had not been remedied up to the time of the fire, and hence the apparent title remained at that time in Keller, but he subsequently reconveyed to Gordon. There was evidence to show that Gordon was indebted to Keller at the time the deed was made, and there was some evidence to the effect that Keller expected to get some of the benefit of the money loaned to Gordon in payment of what the latter owed to Keller. Keller, however, says that the money was to go towards work done on the property conveyed, and that was what it was wanted for. Keller did not know whether Gordon would have given him any of the money or not. He supposed it was to pay him and the carpenters. Keller seems to have had no recollection as to having possession of the deed until he went with Gordon to the homestead association to procure the loan. When the policy was offered in evidence, it was objected to, because it had been fully assigned so as to place the legal title in Keller, and was not evidence of any right in Gordon to bring this suit, or to recover the insurance money. This objection was overruled by the court. Judgment was rendered for the plaintiff.

Upon the state of case made by the evidence, the defendant claims that the policy was avoided, whether the deed to Keller was made before or after the execution of the policy. It is very true that if the deed conveyed any interest or ownership in the land, or burdened the title of Gordon with conditions within the meaning of the policy, it would be in violation of one or the other of the clauses of the policy which we have recited, and be violative of its provisions, no matter which of the two instruments was first in taking effect. The main argument of the appellant to support its position, that the deed did have this effect, rests upon the assumption that it was in the nature of a mortgage to secure an indebtedness of Gordon to Keller. The evidence of Keller is to the contrary. He shows nothing but a mere hope or supposition that Gordon would pay him some of the money borrowed from the association. It will certainly not be necessary to produce argument or authority to prove that this was not a binding obligation, and created no lien upon the property. It is true that there was testimony tending to show that there was an undefined agreement between Gordon and Keller as to the latter's having some sort of claim upon the borrowed money, but it was too indefinite to create a lien. But, even if it would have created a lien, this testimony is in conflict with that of Keller, and we must give effect to the latter as being in support of the judgment. The judge did not make a record of his conclusions of law and fact, and we must treat the case as if he found in favor of the evidence which authorized the judgment rendered by him. As the loan was not effected, there was no mortgage of the property to the association, and the question of whether a mortgage or other lien upon the property would change the interest of Gordon therein, or incumber that interest with conditions within the meaning of the policy, is eliminated from the case.

The only matter to be considered is whether a mere deed, not intended by either party to convey title, and under which the grantee was to take no interest, effected any change in the ownership of the property. To state this proposition is to decide it in the negative. The most that can be said of it favorable to the appellant is that it put the apparent legal title in Keller; but to hold that this changed the ownership of the land, rendered it conditional, made it inure to the use or benefit of any person but Gordon, or transferred or conveyed the title to Keller within the meaning of the policy, is to give a

technical construction to that instrument for the purpose of destroying the rights of the assured. The rule is directly to the contrary. The language of the policy, being the language of the insurers, is to be construed most strongly against them, so as to give to the assured the indemnity for which he has bargained. When the policy required entire and sole ownership, it must have meant an ownership in which no one else shared, and against which no one else could claim an interest. When it required that ownership to be unconditional, it must have meant an ownership which depended upon the performance of no condition whatever. When it required that this should be for the use and benefit of the assured, it must have meant that the full equitable title should exist in the assured. When it required that the property should not be sold or transferred, or any change take place in the title or possession by conveyance, it certainly did not mean that a conveyance which did not transfer the title, or make any change in it whatever, should defeat the policy. Gordon's title after the deed was made was substantially, if not literally, such a one as was required by the policy. If his ownership after its execution was not as great as before, then the deed must have conveyed to the grantee some interest or right which he could assert to the property by reason of the deed, and yet no right of that kind existed, as was fully shown by the evidence. Keller could not have claimed any right whatever as against Gordon, either as plaintiff or defendant, in a suit with reference to the property.

"The object of providing against a transfer or change of title is to guard against a diminution in the strength of the motive which the insured may have to be vigilant in the care of his property." May, Ins. § 278. Vigilance in the care of the property is not likely to be diminished when the assured is the only one who can possibly suffer by its destruction. "If there is no change in the fact of title, but only in the evidence of it, and if this latter is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to burn, or diminish the motive to guard the property from loss by fire, the policy is not violated." *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 185.

There is a vast difference between having a deed and having title to land. The former is evidence of the latter, but may exist without it; and here, while Keller had a deed for the property, the title remained in Gordon for all purposes, and especially for any purpose connected with its insurance against fire. Numerous authorities could be cited to sustain these positions, but it will not be necessary, as it is believed that none can be found to hold that such a conveyance changes the title. Those cases which hold that a deed not intended to convey title does pass any interest out of the grantor in violation of a policy such as the present are either cases where the deed was intended as a gift, a mortgage, or some similar instrument; and even as to some of these there is a conflict of decision. *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279; *Savage v. Insurance Co.*, 52 N. Y. 502; *Shepherd v. Insurance Co.*, 38 N. H. 232. We think the entire interest in the property, and its full ownership as contemplated by the policy, remained in Gordon after delivery of the deed, and that it was not in violation of any of the provisions of the policy, and there was no error in the judgment in so declaring.

Nor was there error in overruling defendant's objections to the admission of the policy in evidence. The proof showed that it was transferred to Keller as collateral security for a debt due him from Gordon, and that the plaintiff, therefore, had an interest in its proceeds. While the suit might have been brought by Keller alone, yet, as was said in *East Texas F. Ins. Co. v. Coffee*, 61 Tex. 287, the equitable right of Gordon entitled him to be a party plaintiff in the cause. His suing for the use of the latter made him the real party plaintiff, and the judgment bound both him and Gordon, and the insurance company was fully protected.

There is no error in the judgment, and it is affirmed.

SARGENT v. WALLIS.

(Supreme Court of Texas. March 11, 1887.)

GUARDIAN AND WARD—LIABILITY OF GUARDIAN—SURETIES.

A person indebted to an infant's estate, and thereafter being appointed and accepting the guardianship of the estate, as he cannot sue himself, must, in legal contemplation, be considered as having paid the debt to himself, and both he and his sureties are answerable therefor as for money actually received.

Appeal from district court, Galveston county.

Lobatt & Noble, for appellant. *Davis, Davidson & Minor*, for appellee.

STAYTON, J. Prior to the time G. O. Cherry became guardian of the estate of the appellee, he took into his possession United States 4 per cent. bonds, amounting to \$3,000. This was done under an agreement with his wife, who was then the guardian of the estate of the minor to whom the bonds belonged. At the time he received the bonds, he executed an instrument as follows: "Know all men by these presents that I have this day borrowed from my wife, Mrs. C. C. Cherry, guardian of the estate of minor Kate Lee Wallis, three thousand dollars in United States 4 per cent. bonds, which I promise to pay to her, or their equivalent in money, at market value when due, December 1, 1891, less the amount for her maintenance and support; it being understood and agreed to by me that the interest on said bonds is to be used towards the support of said minor in so far as they will contribute to this purpose. Given under my hand and seal this, the thirtieth day of October, 1878, in the city and county of Galveston, state of Texas." Subsequently to the execution of this instrument and receipt of the bonds, he hypothecated them, and, after this, was appointed and qualified as guardian, and, having been required to do so, he, on July 18, 1882, executed a new bond as guardian, to which the persons who are made defendants with him became sureties; but, prior to the time the last bond was executed, the debt for which the bonds had been hypothecated not having been paid, their holder disposed of them. On the seventh day of August, 1884, Cherry was removed from the guardianship, and the person who sues as guardian in this case was appointed and qualified in his stead. From the time that Cherry qualified until the last report made by him, and inclusive of that, he charged himself with the face value of the bonds as so much money in hand, but credited himself with the maintenance of his ward and some other matters, which more than equaled the interest due on the bonds, but he never had on hand the money which his reports showed to be on hand, nor did he ever regain possession of the bonds. He was directed to turn over to his successor the ward's estate which he showed to be in his hands, and this he failed to do, whereupon this action was brought against him, and the sureties on his bond, to recover it. The petition is such as to authorize a recovery against the guardian and his sureties, under any view of the case, if the law affects them with liability under the facts. A judgment was rendered against the principal and all the sureties, and from it only the surety Sargent appeals.

The transaction through which Cherry obtained the bonds from his wife was unauthorized, and the bonds remained a part of the ward's estate, and he may be held either as a debtor to his ward, that relation attaching before he became guardian, or because it was his duty to recover the bonds from any person holding them, as the present guardian may insist. The petition is so drawn as to hold the former guardian as well as his sureties liable on either or both grounds if the law renders them liable under the facts.

The bond of the guardian bound him, not only to account for and pay over such money or other effects of his ward as came into his hands, but also to faithfully discharge the duties of guardian of the estate of his ward according to law. The bonds were the property of his ward, and it was his duty con-

tinually, from the time of his first qualification, to acquire and maintain the possession of them; and the fact that his own act, before he became the guardian, rendered such action necessary, in no way relieved him from that duty. For the faithful discharge of this duty the sureties on the last bond were as much bound as were those on the first. If the person who held the bonds through the hypothecation, or any other person, came into their possession through illegal means, with which the guardian was in no way connected, before his appointment or afterwards, it certainly would have been his duty to recover them, as any other property belonging to the ward's estate; and the fact that he was an actor in the illegal diversion certainly cannot relieve him or his sureties from liability for his failure of duty in this respect. "The guardian of the estate shall use due diligence to collect all claims or debts owing to the ward, and to recover possession of all property to which the ward has a title or claim: provided, there is a reasonable prospect of collecting such claim or debts, or of recovering such property; and, if he neglects to use such diligence, he and his sureties shall be liable for all damages occasioned by such neglect,"—is the plain declaration of the statute. Rev. St. arts. 2546, 2616.

If we regard the guardian as having been a debtor to his ward's estate on account of what transpired before his appointment, the position of himself and sureties would be no better. If a person appointed executor, administrator, or guardian be a debtor, admittedly, at the time of his appointment, to the estate of which he is made the representative, having voluntarily assumed the trust, and his sureties having obligated themselves that he will faithfully execute it, and thus prevented the appointment of any other person, and being unable to sue himself, he must, in legal contemplation, be considered to have paid the debt to himself, and to continuously hold the money so long as his representative character continues; and his sureties, as well as himself, are therefore liable for it. *Winship v. Bass*, 12 Mass. 199; *Leland v. Felton*, 1 Allen, 593; *Mattoon v. Cowing*, 13 Gray, 387; *Ipswich Manuf'g Co. v. Story*, 5 Metc. 813; *Stevens v. Gaylord*, 11 Mass. 263; *Avery v. Avery*, 49 Ala. 193. The indebtedness of the guardian would be assets, for which, as other assets, he and his sureties must account.

The rule that sureties are not liable for the misappropriation of assets made before they became sureties is not applicable to this case; for the duty violated, whether it consists in failure to recover the bonds or to account for assets, if the guardian be deemed to have been a debtor, and therefore to hold for his ward a sum of money equal to his indebtedness, is one continuous in character.

There is no error in the judgment, and it will be affirmed.

WILLIE, C. J., did not sit in this case.

GULF, C. & S. F. RY. CO. v. POMEROY.

(Supreme Court of Texas. March 15, 1887.)

1. RAILROADS—CULVERTS—NEGLIGENCE.

In an action to recover for injuries to crops caused by the construction of insufficient culverts in defendant railroad's embankment, whereby the waters of a neighboring river, overflowing, were dammed up, and forced onto plaintiff's land and crops, *held*, that if the overflow was of such an extraordinary character that railroad engineers of ordinary care and prudence in the construction of the embankment and culvert could not reasonably be expected to have anticipated and provided against it, then the railroad company was not liable; but if, although the overflow was extraordinary, it might reasonably have been anticipated and provided against, the railroad was liable.

2. SAME—EXTRAORDINARY OCCURRENCE—FLOOD.

It appearing that there were in 1833, 1843, and 1852 similar overflows to the one which caused the damages complained of in this case, in 1885, this was sufficient evidence to warrant the jury in finding that the one in question ought reasonably to have been anticipated.

Appeal from Galveston county.

This is a suit to recover damages to plaintiff's (appellee's) crops, alleged to have been caused by insufficient culverts in defendant's (appellant's) railroad embankment, which he alleged held or forced the waters of the Brazos river, coming over its banks in an overflow of the river, in June, 1885, at a point near Thompson's switch, in Fort Bend county, onto his (plaintiff's) land and crops. Judgment for plaintiff, and defendant appeals.

Ballinger, Mott & Terry, for appellant. *Wheeler & Rhodes*, for appellee.

GAINES, J. We think the exceptions to the petition upon the ground that the land upon which plaintiff's crops were growing at the time of their alleged destruction is not sufficiently described, were properly overruled. The allegations in question are that plaintiff and one Renschlow were "engaged in farming and cultivating cotton, corn, and other produce on a certain tract of land near the Brazos river, and in said county of Fort Bend, and near about half a mile north-east of Thompson's switch, in said county; said tract of land being well known, and marked on the map of said county as the 'Old Thompson Place' or 'Tract,' and owned by Yandell Ferris, of said county, and by plaintiff leased from said Yandell Ferris, containing about fifty acres, a portion fronting on the Brazos river, and the whole of said tract lying and being situated between the said river and the railroad track and railroad bed of the said defendant company,—said track being about a mile distant, and running parallel with said river." Further on it is alleged that the plaintiff was cultivating certain crops on his own account on the same tract of land, and that he had rented to one Geohan "the balance of said tract, to-wit, about thirty-five acres of land; the same being near and adjoining the land cultivated by plaintiff and the said Renschlow, hereinbefore fully described." Plaintiff having purchased the claims of his partner and tenant, sued to recover damages for the loss of the crops upon all the land so described. The description is certainly sufficient to apprise the defendant of the locality of the crops, the destruction of which constituted the foundation of the action, and to identify them with reasonable certainty. It is also definite enough to enable defendant to plead the judgment in bar of another suit without the aid of parol evidence, which may be resorted to in a proper case under that plea, in order to show the identity of the subject-matter of the two actions.

The second and third assignments of error are directed to the charge of the court, and are as follows:

"(2) The court erred in charging the jury: 'If the overflow was of such an extraordinary character that railroad engineers of ordinary care, prudence, and caution, in the construction of the embankment, could not be reasonably expected to anticipate it, then the defendant company would not be liable for damages; but if you believe from the evidence that, although the overflow was extraordinary, yet that such an overflow could have been reasonably anticipated by railroad engineers of ordinary care, prudence, and caution, and, in the construction of the railroad embankment for its road-bed, could have so constructed it so as not to have caused damage to plaintiff's crop, then the defendant company would be liable,'—because under no circumstances was defendant liable for an extraordinary overflow, and because the charge made defendant's liability depend on the bare fact as to whether the embankment could have been so constructed as to have avoided the damage, without regard as to whether such construction could have been reasonably required.

"(3) The court erred in not more clearly defining to the jury what is meant

by an extraordinary overflow, and erred in not giving in its charges some guide to the jury to determine whether or not the overflow was extraordinary; and erred in refusing to give the third special charge asked by the defendant, because the same announces the correct rule for determining whether the overflow was of such extraordinary character as not to require defendant to guard against it."

The whole charge, taken together, is favorable to the defendant; and the extract complained of in the above assignments we think forcibly presented the law of the case upon the proposition contained in it. The ground upon which a railroad company or other corporation is exonerated from liability in certain cases of this character is not, as we may be led to believe by some expressions in the opinions of the courts, that a prudent man under like circumstances would not have provided against the danger. A careful person, in constructing a like improvement which endangered his own property, might prefer to take the risk of a loss from either ordinary or extraordinary floods to incurring the certain expense necessary to make an effectual provision against them. But this rule certainly would not do when the property of others is subjected to the risk of destruction or damage. In our opinion, the true test is: Considering all the circumstances, and especially the history of the stream, would a prudent man have anticipated such a flood as caused the damage? If not, the loss will be deemed the act of God, for which no action arises. The statute requires railroad companies, in constructing their embankments, to provide such culverts and sluices as may be demanded by the natural lay of the land for its necessary drainage. Rev. St. art. 4171. We construed this to mean that provision need not be made for such extraordinary floods as could not have reasonably been foreseen; but such as may have been reasonably anticipated must be guarded against, without reference to the frequency of their occurrence. Knowing that an extraordinary inundation has occurred more than once, and for that reason that it may occur again, a party who has constructed a work which obstructs its outflow, and causes it to submerge the property of another, to his damage, will not be permitted to defend against the wrong by setting up the fact that the floods not provided for have occurred only at long intervals. In his opinion in the case of *Mayor of New York v. Bailey*, 2 Denio, 483, Chancellor WALWORTH says: "The dam should therefore have been constructed in such a manner as to resist such extraordinary floods as might have been reasonably expected occasionally to occur; and, if the flood of 1841 was not much higher than any which had been known to occur upon the stream within the memory of man, those who had charge of the construction of the dam should have anticipated such a flood, and should have provided a dam that would have been sufficient to resist the operation of that flood." These extracts indicate the correct rule in these cases. If, when the work is being constructed, extraordinary inundations have occurred within the memory of men then living, their recurrence should be anticipated, and provision made against the danger likely to result from the works should a recurrence of the flood take place. For the reasons stated we think there is nothing in the charge of which the appellant has the right to complain.

The sixth assignment of error is to the effect that "the verdict is against the evidence, because the flood was extraordinary, and one that could not have been reasonably anticipated; it appearing from the evidence that no flood of similar extent had occurred before for a period of thirty-two (32) years." There was ample evidence to show that there were similar overflows in the Brazos river in 1833, in 1843, and in 1852. From what we have said it is apparent that, in our opinion, this was sufficient testimony to warrant the jury in finding that the flood in question ought reasonably to have been anticipated by defendant's agents when they constructed its road, and to authorize them to hold defendant responsible to plaintiff for any loss which resulted to him

from the combined action of such embankment and flood. But it appeared further in evidence in the case that when the flood was about at its highest point, and the danger to plaintiff's crop was apparent, the defendant company, in order to protect its track, raised its embankment, which obstructed the outflow, and narrowed the culverts with sand-bags, and thereby protracted the inundation which caused the damage. The evidence shows that this contributed to the injury. However extraordinary the flood might have been, the defendant, after seeing its effect, certainly had no right to obstruct its outflow, to plaintiff's damage. It would seem, therefore, that defendant has no cause to complain of the judgment in the case.

We find no error in the proceedings of the court below, and the judgment is therefore affirmed.

WOOTERS v. HALE and another.

(*Supreme Court of Texas. March 18, 1887.*)

ESTOPPEL—JUDGMENT—EJECTMENT—DISCLAIMER.

In an action to try title to land, defendant's disclaimer admits plaintiff's title to the land, and, nothing further appearing, plaintiff is entitled to judgment for the land, and defendant to judgment for his costs; and in a subsequent action between plaintiff, or those claiming under him, and defendant, as to title to the same land, defendant is estopped by his disclaimer in the former suit, unless he can show that he has since acquired title.

Appeal from Houston county.
Nunn & Denny, for appellant.

STAYTON, J. This is an action of trespass to try title, brought by J. C. Wooters against W. T. Hale and S. C. Arledge to recover a labor of land originally granted to William Sherman. W. T. Hale claims 137 acres of the land through a verbal gift from his father, Robert Hale, claimed to have been made in 1867, since which he has made valuable improvements on the land. He also claims title through an adverse possession for 10 years. The defendant Arledge claims 40 acres of the land through a conveyance from Robert Hale, made January 23, 1882, which was not filed for record until May 3, 1883. The plaintiff claims under a conveyance made by William Sherman to J. H. Kirchoffer, made November, 1838, and under a conveyance made to him by the heirs of Kirchoffer on March 8, 1882. He also claims under a conveyance made to him on March 8, 1882, by Robert Hale. He is shown to be a purchaser for valuable consideration, paid without notice of any claim by the defendant Arledge. How Robert Hale derived title does not appear. In 1874 the heirs of Kirchoffer brought an action against Robert Hale, the defendant W. T. Hale, and J. H. Burnett to recover the labor. The two latter disclaimed, and in 1879 a judgment was rendered in favor of the defendant Robert Hale, reciting that the plaintiffs failed to make out their case, and in favor of W. T. Hale and J. H. Burnett for costs, based on the fact that they had filed disclaimers. This action was brought September 17, 1886, and it appears that W. T. Hale has been in possession of the land claimed by him since some time in the year 1867. The appellant paid Robert Hale for the land \$885, of which \$265 was paid in money, and the residue was credited on a debt due from Hale.

The charge of the court was such as to induce the jury to believe that they were at liberty, under the evidence, which was in no way conflicting, to find that the consideration paid was not such as would entitle the appellant to protection as an innocent purchaser, if he bought without notice of the conveyance from Robert Hale to defendant Arledge. We think this was error, for there was no evidence from which the jury could have found that the appellant did not pay such consideration as would sustain, as against the defendant Arledge, his claim to be an innocent purchaser, if he had no notice of

the conveyance to Arledge. There is no evidence tending to show that the appellant had any notice that Robert Hale had conveyed to Arledge, and in so far the verdict in favor of Arledge is without any evidence to support it, and should have been set aside.

The jury were instructed as to the facts which would make the verbal gift to W. T. Hale valid, and in that immediate connection they were instructed, if they found these facts to exist, to find for the defendant Hale; but in a subsequent part of the charge the jury were instructed as follows: "You are further instructed that the effect of the judgment rendered by the district court of Houston county on September 19, 1879, in case of *Catherine Kirchoffer et al. v. Robert Hale et al.*, vested the title to the land in controversy in Robert Hale, and the defendant Hale is restricted in his claim to said land to such rights as may have accrued to him since the rendition of said judgment, and you will consider the former portions of these instructions with this." The evidence does not tend to show that Robert Hale gave the land to W. T. Hale after the rendition of the judgment in his favor against the heirs of Kirchoffer, nor would it have been possible for 10 years to have elapsed between that judgment and the institution of this suit; and from this it follows, had the jury regarded the charge of the court, that the verdict should have been against the defendant Hale. As between persons claiming under the heirs of Kirchoffer and persons claiming through Robert Hale through conveyance made since September 19, 1879, it must be held that Robert Hale had the superior title to the land at that date. The plaintiff holds whatever title Robert Hale had at that time, so far as the record shows. It therefore only remains to consider the effect of the disclaimer filed by W. T. Hale in the former action, in connection with the judgment which he took in that case.

A disclaimer admits the title of the plaintiff to the land, which, nothing further appearing, would entitle the plaintiff to a judgment for it, and the defendant to a judgment for costs. A plaintiff, however, may assert that the defendant was in possession of or claiming the land when the action was brought; and, if this be found in his favor, the defendant will not be entitled to his costs. The judgment in the former action determines that W. T. Hale neither had adverse possession of the land nor asserted title to it pending the former action; for he took judgment, on his disclaimer, for costs, which he could not have done had he been asserting an adverse claim or possession. Having taken such a judgment on his disclaimer, he is now estopped from setting up title against one claiming through the heirs of Kirchoffer, unless he can show that he has acquired title since the former action was decided. It would seem, had he not taken judgment for costs on his disclaimer, that its entry of record would estop him from asserting title against the plaintiff. *Prescott v. Hutchinson*, 18 Mass. 443. If the disclaimer was in any way qualified, it does not appear. As the case is presented, the plaintiff was entitled to a judgment for that part of the land claimed by the defendant Hale; he not showing that he acquired title from Robert Hale, since the former judgment was rendered, at such time and under such circumstances as to make it superior to that acquired by the plaintiff from Robert Hale.

The judgment will be reversed, and the cause remanded.

WEBS v. DEVLIN.

(Supreme Court of Texas. March 18, 1887.)

CONTRACT—PERFORMANCE—DESTRUCTION OF SUBJECT-MATTER.

Where a builder contracts to do certain repairs on a house for an agreed sum, without stipulating as to when the money shall be payable, and when the repairs have been only partially completed the house is destroyed by fire, the builder is

entitled to recover compensation *pro rata* upon the contract price for the repairs then completed. That he had the right, for his own protection, to insure the repairs so far as completed, and failed to do so, is immaterial.

Appeal from Galveston county.

Davis & Davidson, for appellant. *Geo. P. Finlay*, for appellee.

STAYTON, J. It appears that some time prior to September 1, 1885, the appellant desired to have alterations and repairs made on his dining-room, which did not involve the entire reconstruction of that part of the house on which he desired work done. He caused specifications and general design of the work desired to be done to be drawn by an architect, and designated as "Design for remodeling of dining-room in residence of Albert Weis, Esq." Through the architect he sought bids from the builders and mechanics of this city for the work; plans and specifications being given. The appellee made two propositions to do the work, and furnish the material, which were as follows:

"GALVESTON, September 1, 1885.

"*Mr. N. J. Clayton, Architect*: The undersigned will agree and contract to remodel house for Mr. Weis, as per plans and specifications and details [meaning those referred to in said Exhibit A] made by you, at the under-mentioned figures, to-wit: For all work and material except that contained in painter's specifications, using openings as they are at present, \$793; or with all new openings in the dining-room to correspond with details, I to take old openings, grates, and mantels, for \$850.

"Respectfully,

[Signed]

"HARRY DEVLIN."

The proposition to furnish the material and do the labor for \$850 was accepted, and the greater part of the material necessary and labor to be done went into the building before the thirteenth of November, 1885, at which time the entire building, without fault of either party, was destroyed by the great fire which then occurred. There was no agreement as to the time when the payment for the material and labor should be made.

This action was brought to recover for the material furnished and the labor done, and the court instructed the jury as follows: "If you believe from the evidence that the agreement between plaintiff and defendant was that the plaintiff was, for the sum of \$850, to do the work and furnish the materials, all at his own expense, and repair the L of defendant's building according to the plan and specifications in evidence, and that the plaintiff, in accordance with the contract, had done a part of the work, and had attached a part of the materials to the building, but that, before the completion of the contract, the building and all the materials on hand were destroyed by the great fire of November 13, 1885, without the fault of either party, then your verdict should be for the plaintiff for such a *pro rata* part of the contract price as the work and materials wrought into the building bears to the entire work and materials contracted for," etc. There was a verdict and judgment in favor of the appellee for \$500, and interest on that sum from November 13, 1885.

The defendant denied his liability under the facts, and, as a further defense, urged that it was the duty of the plaintiff to have taken out insurance, and that his failure to do so was such negligence as would defeat his right to recover. The court excluded evidence tending to show that it was usual for builders to take out what are termed "builders' risks," and it is urged that this was error. We are of the opinion that there was no error in this ruling. That the builder, for his own protection, might have taken insurance, in no way affects his right to recover; nor could the fact that the builder may have had such a right in any way prevent the owner from taking such insurance on

his own property as he might deem necessary for his own protection. If a builder be willing to trust to the solvency of the person for whom he does work and furnishes material, the latter has no right to thrust upon him the burden of insuring property on which he does work. It is well settled that if one undertakes to furnish the material and build a house or other structure for another, the same to be paid for when the work is completed, that the builder cannot recover for the partial construction in case the structure be destroyed without fault of either party. And this rule applies when the structure is such as to make it, from day to day as erected, a part of the land to which it is intended to be permanently attached, as well as to a structure chattel in its nature. This rule has its foundation in the fact that it remains possible for the builder to complete the structure, though in an unfinished state it be partially or wholly destroyed, and he is therefore left under the full obligation of his contract. In such a case, though the structure may have been so attached to the land as to become a part of it, and therefore the property of the owner of the land, the maxim, *res perit domino*, has not been given effect.

In the case before us the appellee undertook to furnish material and to perform labor to complete an entire job. The thing to be done, however, consisted in making alterations in an existing thing, which in the nature of things was impossible after the thing to be altered was destroyed, unless its owner saw proper to restore the house to the condition in which it was before the alteration began, or at the time of its destruction. This he did not elect to do, and it was not the duty of the plaintiff to do so. Had this been done, it may be that the plaintiff ought not to recover until he completed the work he undertook, and that the maxim would not apply.

It is said that "it is very clear at the common law that, if the thing of the employer on which work is done, and for which material is furnished, is by accident, and without any fault of the workman, destroyed or lost before the work is completed, or the thing is delivered back, the loss must be borne by the employer, and he must pay the workman a full compensation for the work and labor already done, and material found, although he has derived no benefit therefrom." Story, Bailm. 426a, citing *Menetone v. Atharoes*, 3 Burrows, 1592, and *Gillett v. Mauman*, 1 Taunt. 187. It is difficult to tell from an examination of these cases whether the labor and material embraced an entire job which a contract had been made to complete. The author intimates an opinion, however, that one contracting to do work and furnish material on a thing, by the job for a stipulated price, would not be entitled to recover compensation *pro tanto* for his labor, and material applied to it, if the thing be destroyed before completion; and cites the case of *Appleby v. Myers*, L. R. 2 C. P. 651, and *Brumby v. Smith*, 8 Ala. 123. These cases support the rule; but, notwithstanding the high character of the courts by which they were decided, we are not, under the former decisions made in this state, prepared to follow them.

On this question there has been great difference of opinion. In *Hollis v. Chapman*, 36 Tex. 1, it appeared that a carpenter had contracted to furnish the material and do the wood-work on the defendant's brick buildings, then in course of construction, for a specified sum; but before the buildings were completed the houses were destroyed by fire without fault of either party. In an action by the carpenter to recover for material furnished and labor done by him, it was held that he was entitled to recover. In *Cleary v. Sohier*, 120 Mass. 210, it appeared that a person contracted to lath and plaster a building at a named price per square yard, and that he had done the greater part of the work when the building was destroyed by fire without fault of either party. In disposing of the case, the court said: "The building having been destroyed by fire without fault of the plaintiff, so that he could not complete his contract, he may recover under a count for work done and material

furnished. *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 514, 517." The contract in that case made no provision as to the time when the work should be paid for, and it was no less entire in its nature than would it have been had the agreement been to furnish the material and do the work for a gross sum.

In the case before us the completion of the work agreed to be done had become impossible from the destruction of the house to be altered and repaired; and the work and material furnished were represented by the alterations and improvements so far as made, which had become the property of the defendant; and it would seem that the case is one in which the maxim, *res perit domino*, may find just application.

The cases which hold that a recovery cannot be had in such cases are made to rest largely on the entirety of the contract, and the holding in the particular jurisdiction that apportionment cannot be made. The tendency of the recent decisions has been to ameliorate that rule, and in this state it has long ceased to be recognized. As we said in *Carroll v. Welch*, 26 Tex. 149, which arose on a contract to do the entire wood-work on a building: "According to the modern decisions of this court, the rule appears to be that, if the employe abandons his contract, the employer shall be charged with only the reasonable worth or the amount of benefit he has received on the whole transaction, and, in estimating the amount, the contract price cannot be exceeded. The former is allowed to recover for his part performance its reasonable worth, not to exceed the contract price, and the latter to recoup or reconvene his damages for the breach of contract by the former. When the employe is discharged without cause, or is prevented by the employer from completing the performance, he is entitled to recover for the part performed, and the damages he has sustained by breach of contract by the employer. If both parties have broken the contract, or there has been a mutual abandonment of it by both parties, the employe is entitled to recover the reasonable worth of the services he has rendered the employer." If such be the rule even in case of violation of contract, the employe certainly cannot be denied a recovery when by inevitable accident he has been prevented from performing the contract. By the case of *Gonzales College v. McHugh*, 21 Tex. 257, which was a case of builder's contract, the rule in force in this state is further illustrated. *Hillyard v. Crabtree*, 11 Tex. 264, was a case arising on a builder's contract, entire in its nature, which the employe was prevented from completing by his sickness, and the same rule was enforced. "If a contract which is entire, after part performance, is rescinded by the mutual consent and act of the parties as to the residue, or the further performance is prevented by law or the act of God, without fault of either party, the contractor may recover on a *quantum meruit* for what he has done. In such case, neither party is in fault, and therefore is not responsible to the other for failing to fulfill the entire contract. In a recovery on a *quantum meruit* there is an apportionment of so much of the agreed compensation to the contractor as he has earned in what he has done; he recovers such part of the entire compensation as is equal to the part he has performed of the entire contract." 2 Suth. Dam. 507. This was the rule of the civil law. 1 Dom. Civil Law, 533.

The measure of damages given by the charge was in accordance with what we understand to be the recognized rule. *Gonzales College v. McHugh*, 21 Tex. 257; *Hollis v. Chapman*, 36 Tex. 3; 2 Suth. Dam. 504; Field, Dam. 382-388.

The last assignment of error is: "The court erred in refusing to give the several charges asked by the defendant, numbered, respectively, 1, 2, 3, and 4, set out in the record." The assignment points out no specific matter of error, and cannot be considered.

There is no error in the judgment, and it will be affirmed.

COLLINS v. McCARTY and others.

(Supreme Court of Texas. March 18, 1887.)

LIMITATIONS—DISABILITY—TRUSTS.

Where the full legal title to property is vested in a trustee to be held for the sole use and benefit of another, and subject to no other condition than that it shall be conveyed to such other person upon demand, if the right of action of the trustee to recover the property is barred by limitation, the *cestui que trust* is also barred, although the latter may have been under disability at the time the cause of action accrued.

Appeal from Hood county.

Cooper & Estes, for appellant. *A. W. De Berry*, for appellees.

WILLIE, C. J. This cause is submitted upon an agreed case. It is an action of trespass to try title brought by the appellant, Mrs. Collins, against several defendants, to recover two-thirds of 1,280 acres of land originally granted to Wiley V. Collins, as assignee of Stephen Wingate. The pleas relied on by the defendants were the statutes of limitations of three and five years. Judgment upon these pleas was rendered in favor of all the defendants but one, and from that judgment the plaintiff appeals. The agreed case admits that the successful defendants fully established everything necessary to entitle them to recover under the five-years plea, providing the statute could run during that time so as to bar a suit by Mrs. Collins for the land in controversy. The appellant contends, however, that she was not barred, because at the time the possession of the defendants, under which they prescribe, commenced, she was under the disability of coverture. The appellee replies that she was barred, notwithstanding her coverture, because, at the time the cause of action accrued, the legal title to the land was held by a trustee for the benefit of Mrs. Collins; that the statute commenced to run against him, and completed its bar during his trusteeship, and, limitations having run against him, it barred also all right of action on the part of his *cestui que trust*. This issue between the parties presents the only question in the case. The facts are that on the twenty-seventh day of April, 1858, Wiley V. Collins, the patentee of the land, and then and still the husband of the appellant, made a conveyance of it to Albert N. Mills in trust for the benefit of the appellant. The deed recited that the grantor had used property of his wife to the value of \$2,500 in payment of his individual debts, and that he wished to vest in her the land described as a compensation for the sum thus used, believing it to be worth about \$2,500; and, "as a husband [could] cannot convey directly to his wife," therefore he conveyed to said Mills the said land to hold in trust for the sole use and purpose of conveying the same to his said wife whenever she should request the same. The conveyance was made by the trustee to Mrs. Collins, March 2, 1885, which was some months after the commencement of this suit. That this conveyance vested the legal title in Mills for the sole use and benefit of Mrs. Collins cannot be doubted; and it is also apparent from the agreement that everything necessary to complete the bar of the statute, as against a person not under disability, occurred during the time the legal title remained in him.

The question for decision in this cause is for the first time before this court, though it has been passed upon by the courts of many of our sister states, and their reports show great uniformity of decision upon the subject. It is almost universally held that, when suit by the trustee is barred, the right of the *cestui que trust* to sue is also gone, though he may have been under disability at the time the cause of action arose. *Wingfield v. Virgin*, 51 Ga. 139; *Wilmerding v. Russ*, 33 Conn. 67; *Williams v. Otey*, 8 Humph. 568; *Molton v. Henderson*, 62 Ala. 426; *Smilie v. Biffle*, 2 Pa. St. 52; *Long v. Cason*, 4 Rich. Eq. 60; *Crook v. Glenn*, 30 Md. 55; *Wood*, Lim. § 205. In *Missis-*

issippi a contrary doctrine was announced in *Bacon v. Gray*, 23 Miss. 140, by a divided court, and has been adhered to ever since in that state. But one authority is cited in support of the views of the majority of the court in that case, viz., *Allen v. Sayer*, 2 Vern. 368, and that decision seems in conflict with the views of the same court in the subsequent case of *The Earl v. The Countess of Huntingdon*, found referred to in a note to the case of *Wyoh v. East India Co.*, 3 P. Wms. 309. Whether the two cases can be reconciled or not upon the ground that they arose upon different facts, as has been attempted by some law writers, is not important, as the doctrine sought to be deduced from the case of *Allen v. Sayer*, *supra*, by the Mississippi court, has not met with the sanction of any other American court, so far as we can discover. In some states, however, it is held that the suit of an heir or a ward will not be barred, though the administrator or guardian could not maintain the action by reason of the lapse of time. In others, these parties are placed upon a footing with trustees appointed by deed, and their failure to sue in proper time bars the right of action in those whose property they are managing, though these be under disability. In reference to this it is sufficient to say that in our own state it is held that the heir or ward under disability is not deprived of his action by any neglect on the part of the administrator or guardian to bring suit within due time. *Lacy v. Williams*, 8 Tex. 182; *Hanks v. Crosby*, 64 Tex. 488.

However much the courts of other states may differ upon this point, they have almost universally agreed that the position of a trustee under deed is different from that of a guardian or administrator, the trustee holding the legal, while the *cestui que trust* holds the equitable, title; whereas the heir or ward holds the legal title, subject only to the right of the administrator or guardian to control the estate for the benefit of all parties interested in it or its administration. *Wingfield v. Virgin*, *supra*; *Ladd v. Jackson*, 43 Ga. 288. This distinction is recognized by this court in the case of *Hanks v. Crosby*, *supra*, though its sequence, that the *cestui que trust* is barred when the trustee is barred, though an heir or ward would not be prejudiced by the laches of the administrator or guardian, is not authoritatively announced. This would seem, however, to be a natural deduction; for to debar the owner of the equitable title from a right of action the legal title must be fully barred. This cannot be effected except through the laches of the one in whom that title is fully vested. The neglect of an administrator or guardian to bring suit in proper time cannot, therefore, prejudice the title of the ward or heir who is under disability, and against whom, therefore, the statute of limitations cannot run. But when the full legal title is vested in a trustee, to be held for the sole use and benefit of another, and subject to no other condition except that it shall be conveyed to such other person on demand, when suit by the grantee is barred the full legal title is barred, and, according to well-established principles, the legal estate being barred, the equitable estate is also. Whether these may not be sound reasons for an opposite doctrine we shall not pause to consider. The principle seems thoroughly imbedded in the jurisprudence of this country; and, being supported by reasoning which is persuasive of its correctness, we feel disposed to give it our sanction, and keep within the line of the authorities.

But it cannot be extended beyond the case made, and those to which the principles announced are precisely applicable. It does not, of course, apply to causes where a claim is set up through the trustee, as against the *cestui que trust*, or those claiming under the latter. It cannot affect the rights of a person laboring under disabilities when the cause of action arose, if, at that time, the legal title existed in him, though the control of the property was intrusted to another; nor to a case where the cause of action arose from any breach of trust on the part of the trustee other than the mere failure to sue within the period of limitation. Other exceptions might be named, but it

will be time enough to pass upon them when demanded by some case under decision. Even as thus guarded, the doctrine may operate harshly upon parties peculiarly within the protection of courts of equity; but it is not the only case in which such parties are made to suffer from the neglect or misconduct of the trustee to whom their interests have been confided by persons seeking to provide for their welfare. But, as was said in the case of *Herndon v. Pratt*, 6 Jones, Eq. 334: "If, by reason of neglect on the part of trustees, *cestuis que trust* lose the trust fund, their remedy is against the trustees; and, if they are irresponsible, it is the misfortune of the *cestuis que trust*, growing out of the want of forethought on the part of the maker of the trust under whom they claim."

We think the appellant's suit was, at the time it was begun, barred as to the parties in whose favor judgment was rendered below, and the judgment is affirmed.

WILLIS and another v. STROUD.

(Supreme Court of Texas. March 18, 1887.)

JUDGMENT—REVIVAL—LIMITATIONS.

Rev. St. Tex. art. 3210, providing that "a judgment in any court of record within this state, where execution has not issued within twelve months after the rendition of the judgment, may be revived by *scire facias*, or action of debt brought thereon, within ten years after the date of such judgment, and not after," applies to an action to revive a judgment upon which execution has already issued, and requires that such action shall be brought in 10 years from the issuance of the last execution.

Appeal from Galveston county.

Geo. E. Mann, for appellants. F. C. Hume, for appellee.

WILLIE, C. J. The petition filed September 3, 1885, alleges the recovery by Willis & Bro. of a judgment against Stroud in June, 1875, in the district court of Galveston county, and the issuance of an execution thereon during the same month, and that no execution had since been sued out upon said judgment. By special demurrer the defendant set up the lapse of 10 years between the issuance of the execution and the commencement of the suit, and that it was barred by limitation. This demurrer was sustained, and, the plaintiffs declining to amend, the suit was dismissed. From the judgment dismissing the suit the plaintiffs have appealed to this court.

Our Revised Statutes provide that "a judgment in any court of record within this state, where execution has not issued within twelve months after the rendition of the judgment, may be revived by *scire facias*, or action of debt brought thereon, within 10 years after the date of such judgment, and not after." Article 3210. This article is in the same language as that used in the statute of February 5, 1841, in force at the time this judgment was rendered. That act, like the present law, made no express provision as to limitation upon a judgment where execution had duly issued; but, under the decisions of this court made during its existence, such a judgment was held barred at the expiration of 10 years from the date when the last execution issued thereon. *Fessenden v. Barrett*, 9 Tex. 475.

If this rule is to govern the present case, the action is of course barred, it having been commenced more than 10 years after the issuance of an execution upon the judgment. It is, however, urged by the appellants that since the passage of the third section of the act of November 9, 1866, found in *Paschal's Digest*, (article 7007,) in force when the judgment was obtained, the foregoing rule does not prevail, and a judgment could not be barred under that act until 10 years had elapsed from the time it became dormant. The foregoing section reads: "No judgment of a court of record shall become dormant unless 10 years shall have elapsed between the issuance of execution

thereon." The plaintiffs' claim is that this law, having postponed the time at which a judgment became dormant to a date later than that fixed by the former law, necessarily postponed the date from which limitation would commence to run against a revival of the judgment. There would be much force in this idea if limitation upon a judgment necessarily commenced to run from the date when it became dormant. But this is not the rule either by statute or the decisions of this court. For instance, although a judgment upon which an execution has not issued does not become dormant till the end of one year after it was obtained, yet limitation is made by statute to commence running from the date when it was obtained. Again, a judgment upon which execution has issued did not, under former laws, become dormant until one year had expired from the day when the last execution issued, yet our decisions made limitation to run from the date of the issuance of the last execution, and not from one year thereafter. *De Witt v. Jones*, 17 Tex. 620; *Fessenden v. Barrett, supra*; *Spann v. Crummerford*, 20 Tex. 216.

It is apparent from these citations that the period of dormancy is not taken into consideration in fixing the date when the statute begins to run. There may be reasons why it should be, but these cannot prevail against the plain provisions of the statute, and the equally clear adjudications of the supreme court, which have sufficient reasons to support them. The brief of appellants points us to no decision where it has even been intimated that limitation commenced to run from the time a judgment becomes dormant. The case of *Black v. Epperson*, 40 Tex. 162, does not so hold. The decision is as to the time when a judgment became dormant, and not as to when limitation would bar it; and so as to other cases cited by counsel. *De Witt v. Jones, supra*, also fixes the date of dormancy under the old law at the end of one year from issuance of the last execution, but does not say that limitation commences to run from that time. On the contrary, the decisions upon the question of limitation then prevailing, and never questioned, made it to commence running from the issuance of the last execution, notwithstanding the judgment did not become dormant for some time thereafter. We think the same rule should hold in this case, and that, more than 10 years having expired between the issuance of the last execution and the filing of the petition, the suit was barred.

The court below rendered the proper judgment in the case, and it is affirmed.

ISLAND CITY SAV. BANK v. SACHTLEBEN.

(Supreme Court of Texas. February 25, 1887.)

BANK—CHANGE OF ORGANIZATION—LIABILITY FOR DEBTS OF ORIGINAL ORGANIZATION.

Where an insolvent banking corporation, which has agreed with most of its creditors to accept a composition of 74 per cent., transfers all its assets of every character, including its name and franchise, to a new association, and obligates itself to pay back to such new association whatever the latter might be compelled to pay in excess of the 74 per cent. composition, which composition the new association binds itself to pay, and such new association assumes the name of and carries on a banking business in the office theretofore occupied by the old association, and claims its franchise and uses its seal, there is a mere change of membership, and not a new corporation; and the new organization is liable to creditors who did not accept the composition offered by the original organization, with interest from the date of demand.

Appeal from Galveston county.

Action to recover on bank deposit, brought by August Sachtleben, appellee, against Island City Savings Bank.

McLemore & Campbell, for appellant. *Burnett & Hanscom*, for appellee.

GAINES, J. This suit was brought by appellee against appellant to recover the balance of a bank deposit. Appellant denied that appellee had ever made

any deposit with it, and alleged in its answer that the transactions upon which appellant had brought this suit took place before it (the defendant company) was organized. The nature of this defense appears more distinctly from the facts as found by the court below, which we here copy in full:

"(1) The Island City Savings Bank was incorporated with banking privileges *by special law of the legislature of June 20, 1870*, and its charter amended December 1, 1871, and again amended on June 3, 1873, which see without herein transcribing. The *said bank organized* under its charter very shortly thereafter, and opened its banking-house, and procured seal, and continued its business without intermission until January 25, 1885, on which day it failed, and closed its doors, and was insolvent, and all of its assets, according to the best estimates, would not pay seventy-four per cent. of its debts to the depositors; and immediately after the closing of its doors a great many attachments and garnishments were sued out by various depositors. In a few days after the failure of the bank public meetings of the depositors were held and committees appointed to investigate the affairs of the bank, and it was reported that the bank's assets would not pay seventy-four per cent. of its debts due depositors and others; and thereupon several citizens, by subscription, contributed about \$20,000, which, added to the assets of the bank, would enable the bank to pay seventy-four per cent. to the depositors; and thereupon the bank proposed to the depositors that it should pay them seventy-four per cent. of their claims, one-fourth of which per cent. was to be paid immediately, in cash, and the balance in three equal quarterly installments; and nearly all the depositors, including those who had attached and garnished, accepted the proposition of the bank; and thereupon the attachments and garnishments were dismissed, and the depositors received their cash installments, and the notes of the bank for the three quarterly installments. But the plaintiff in this suit, Sachtleben, refused to accept said proffered compromise, *and was the only one of the depositors who refused to accept the compromise offered by the bank as aforesaid.*

"(2) Some time in February, 1885, or early in March, 1885, several persons whose names are not shown by the evidence associated themselves together, and called themselves the 'Island City Savings Bank,' but the manner of the organization is not shown by the evidence; and to this organization the insolvent Island City Savings Bank transferred all of its assets of every character, including its name and franchise, and obligated itself to pay back to this new association whatever amounts this new association might ever be compelled to pay in excess of the seventy-four per cent. compromise aforesaid; this new association agreeing to pay for the old association the said seventy-four per cent. This new association organized itself in February, 1885, or early in March, 1885, styling itself the 'Island City Savings Bank,' and carried on from that time a banking business in the same office theretofore occupied by the old organization, and claimed the franchise of the old association, and have continued ever since to use the seal of the old corporation, and its assets and franchises, in carrying on the banking business of the new organization, under the name of the Island City Savings Bank; having a teller, cashier, and president, the teller being the same person that occupied the position in the old association, but the cashier of the old corporation died before the organization of the new organization, and hence the new organization has a different cashier; and the evidence does not show who are the other officers of the new organization, or in what respect they differ from the former or old organization.

"(3) The plaintiff in this suit, Sachtleben, did not agree to take seventy-four per cent. of his deposit; and on April 9, 1885, he demanded of the new organization, styling itself the 'Island City Savings Bank,' the full amount of his deposit with the old Island City Savings Bank; which deposit, at the time of the failure of the old Island City Savings Bank, amounted to the sum

of four thousand one hundred and fifty-two dollars and fifteen cents, after deducting credits, which sum of \$4,152.15, so deposited with the old Island City Savings Bank, the said old Island City Savings Bank promised to pay to plaintiff on demand, and the same has never been paid, the defendant being unwilling to pay more than seventy-four per cent. of the same, and interest, which the plaintiff, Sachtleben, refused to receive in full satisfaction of his deposit."

Now, it is contended on behalf of appellees that the reorganization, which took place in February or March, 1885, resulted in the formation of a new and distinct company, and was not the continuation of the original corporation. We do not doubt that, when the bank became unable to pay its debts, it was competent to transfer its assets to a new organization, who might continue a similar business without incurring any liability for the debts of the insolvent corporation; and it would make no difference in this respect if the new company consisted in part of the stockholders of the original corporation, and transacted its business through one or more of its officers. Such, however, are not the facts of this case. As we construe the findings, upon the failure of the bank, the shareholders at that time agreed with a new set of shareholders that the latter should become substituted to the rights of the former in the corporate property and franchises, in consideration of their agreeing to pay its creditors to the extent of 74 cents on the dollar. This is shown by the facts that the business was resumed in the original name of the corporation, and that the original seal was used in the authentication of its transactions. The use of the seal conclusively establishes that the operations of the concern were carried on under the franchises of the original charter and its amendments; for, since the adoption of the present constitution, no new charter could have been obtained for the purpose of doing a banking business.

It is uniformly held that a corporation is not dissolved by the mere fact that it becomes insolvent. It is so decided in New York, where they have a statute which provides that inability to pay its debts and a suspension of business shall be deemed a surrender of its franchises. The court there say that a surrender will not be presumed as long as it has power to continue or resume its business. *Bradt v. Benedict*, 17 N. Y. 98. In *Brinckerhoff v. Brown*, 7 Johns. Ch. 217, Chancellor KENT says: "It does not follow that a corporation is dissolved by the sale of its visible and tangible property for the payment of its debts, and by a temporary suspension of its business, so long as it has its moral and legal capacity to increase its subscriptions, call in more capital, and resume its business." See, also, *Mickles v. Rochester City Bank*, 11 Paige, 118.

The bank in this case was insolvent; but there is no rule of law to prevent the stockholders of the insolvent corporation from transferring their interest to others who were willing and able to put it upon a solvent footing, and to enable it to carry on the business for which it was originally organized. That this was done in fact, we think the findings of the court sufficiently show. There being a mere change of membership, and not a change of the corporation itself, it follows that the obligations existing against the original organization before continued to exist against it when reorganized. In *Longley v. Longley Stage Co.*, 23 Me. 89, the defendant corporation had organized on the twenty-eighth March, and in June following the stockholders agreed to consider the first organization illegal, and to reorganize, which was accordingly done. The plaintiffs were creditors and stockholders of the old organization, and also became parties to the new by taking stock in it. They were held entitled to recover their debt of the corporation as newly organized. The principle is that the artificial person (the body corporate) remains the same, and cannot divest itself of its liabilities by a change of membership, or a reorganization.

We conclude that the court below did not err in holding appellant liable upon the debt.

There are no other errors assigned, but the cause has been submitted with a suggestion of delay; and we think essentially the same question of interest is presented by the record which was raised in the case of *Heidenheimer v. Ellis*, ante, 666, this day decided. The court below allowed interest from the date of demand. Under the ruling in that case, we hold that this was correct.

We find no error in the proceedings of the court below, and affirm the judgment, but without damages.

ROBINSON v. STATE.¹

(Court of Appeals of Texas. January 22, 1887.)

1. LARCENY—POSSESSION OF PROPERTY.

Possession of recently stolen property, when alone relied upon as evidence of theft, is subject to the following rule: "To warrant an inference or presumption of guilt from the circumstance alone of possession, such possession must be personal, must be recent, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant." The rule is otherwise stated in general terms as follows: "If a party in whose exclusive possession goods recently stolen are found, fails reasonably to account for his possession when called upon to explain, or when the facts are such as to require an explanation of him, the presumption of guilt arising from recent loss and possession will warrant a conviction without the necessity of further proof."²

2. SAME—EVIDENCE.

See the statement of the case for evidence held insufficient to support a conviction for larceny, because, relying solely upon recent possession, the state failed to establish "exclusive possession," and "a distinct and conscious assertion of property" by the defendant.

Appeal from county court of Houston.

The conviction in this case was for the theft of four hogs, of the value of three dollars each, and the penalty imposed was a fine of \$40, and confinement in the county jail for 10 days.

Plummer, the owner of the alleged stolen property, was the one witness for the state. He testified, in substance, that returning to his home from a neighboring county on the day stated in the indictment, and when near his home, he met the defendant and G. and S. Robinson riding two horses, and going towards their homes, defendant and S. Robinson each having a pig belonging to witness in possession. Witness said nothing about the animals at that time, but on the morrow went to the house of G. and S. Robinson, and ascertained that they had killed four of his pigs. G. and S. Robinson satisfied him about the matter. Defendant lived beyond G. and S. Robinson. None of the pork was found in his house. He never claimed an interest either in the live pig witness saw him have, nor in the pork witness found at G. and S. Robinson's house. Defendant was not related to G. and S. Robinson. The defendant's single witness testified to substantially the same facts.

Cooper & Moore, for appellant, assailed the sufficiency of the evidence to support the verdict.

Asst. Atty. Gen. Burts, for the State.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

² As to the presumption of guilt arising from the possession of recently stolen property, see *State v. Griffin*, (Iowa,) 32 N. W. Rep. 447, *Johnson v. Miller*, (Iowa,) 29 N. W. Rep. 743, and note, and 19 N. W. Rep. 810, and 17 N. W. Rep. 84; *Van Vickle v. State*, (Tex.) 2 S. W. Rep. 642; *State v. Buella*, (Mo.) 1 S. W. Rep. 764; *Brothers v. State*, post, 737, *Hart v. State*, post, 741, *Clark v. State*, post, 744.

WHITE, P. J. We do not believe the testimony as exhibited in this record is sufficient to sustain the conviction of the appellant. With regard to the other two parties implicated in the theft of the hogs, the evidence may be sufficient, amply sufficient, to establish the charge. But as to this appellant the case as made is simply one of recent possession, and nothing more. What is the rule with regard to recent possession alone as evidence of theft? It is fully laid down in *Lehman v. State*, 18 Tex. App. 174, as follows: "But, to warrant an inference or presumption of guilt from the circumstance alone of possession, such possession must be personal, must be recent, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant." Again: "We think the rule may be stated in general terms thus: 'If a party in whose exclusive possession goods recently stolen are found, falls reasonably to account for his possession when called upon to explain, or when the facts are such as to require an explanation of him, the presumption of guilt arising from recent loss and possession will warrant a conviction without the necessity of further proof,'" citing *Belote v. State*, 36 Miss. 97; *Unger v. State*, 42 Miss. 642; *Smith v. People*, 103 Ill. 82; *Knickerbocker v. People*, 43 N. Y. 177; *State v. Turner*, 65 N. C. 592; to which we add *Taliaferro v. Com.*, 77 Va. 411.

Two essential requisites are wanting in this case, to-wit, the "exclusive possession," and "a distinct and conscious assertion of property by the defendant." We will not repeat the facts, as they will be reported.

Because the evidence is wholly insufficient, the judgment is reversed, and the cause remanded.

BROTHERS v. STATE.¹

(Court of Appeals of Texas. November 27, 1886.)

1. RECEIVING STOLEN PROPERTY—INDICTMENT.

To charge the receiving of stolen property knowing it to be stolen, the indictment need not allege the facts going to constitute theft against the original taker, from whom it has been received. See the opinion on the question.²

2. CRIMINAL PRACTICE.

Plea of *autrefois acquit*, showing upon its face that there was no identity of the former case, and that on trial it was properly held bad on demurrer.

3. RECENTLY STOLEN PROPERTY—EXCULPATORY EXPLANATION—BURDEN OF PROOF.

When a party in possession of recently stolen property gives an exculpatory explanation of his possession which is reasonable or probable, then the burden devolves upon the state to prove its falsity; otherwise the accused is entitled to an acquittal.³

4. SAME—EVIDENCE.

See the statement of the case for evidence held insufficient to support a conviction for receiving stolen property knowing it to be stolen, because insufficient to establish the essential element of guilty knowledge beyond a reasonable doubt.

Appeal from district court, Falls county.

The conviction in this case was for receiving stolen property knowing the same to be stolen. The penalty assessed against the appellant was a term of two years in the penitentiary.

The testimony disclosed that the animal described in the indictment was stolen by somebody on the day alleged. Subsequently the owner and two others found it in the possession of the defendant. When his possession was

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

² See *Robinson v. State*, ante, 736, and note; *Hart v. State*, post, 741; *Clark v. State*, post, 744.

³ To sustain a plea of former jeopardy, the defendant must show that he has been tried for the same offense. *Hilands v. Coorn*, (Pa.) 6 Atl. Rep. 267, and note; *Phillips v. State*, (Tenn.) 3 S. W. Rep. 454; *Curtis v. State*, (Tex.) ante, 86; *State v. Blanut*, (Ark.) 2 S. W. Rep. 190.

discovered and challenged, the defendant asserted his claim to the animal, and said that he bought it from one Mat Roberts. He refused to surrender the animal to the owner without proof of ownership, until the owner agreed to produce witnesses, and his responsibility was vouched for by the parties with him, who were known to defendant. For the defense it was testified that the defendant purchased the animal described in the indictment from one Mat Roberts some time before the same was found in the possession of defendant, and that, prior to that purchase, the said Roberts purchased it from a man named Webb. In rebuttal to this, the state proved that shortly before the animal disappeared from the owner's pasture, Roberts and another saw it, and Roberts remarked that there was an animal easily captured. His companion told him (Roberts) who owned the animal. The evidence showed that two animals were taken from the possession of Osborne at the same time, and were found together at the same time in the possession of defendant. The one involved in this prosecution was alleged to be the property of Osborne. The other was alleged to be held by him for one Waters, the general owner. The plea of *autrefois acquit* set up the defendant's trial under the indictment, involving the receiving, etc., of the latter animal.

J. H. Wharton and Martin & Dickinson, for appellant, maintaining that the trial court erred in sustaining the state's demurrer to the defendant's special plea of *autrefois acquit*.

Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. Two counts were contained in the indictment, one for theft, and one for receiving stolen property knowing it to have been stolen; the allegation as to description of the animal and possession being that it was "one certain yearling," taken from the possession of one Osborne, who was holding possession thereof for one J. W. Waters. Appellant was found guilty, upon the second count, for receiving the stolen property knowing it to have been stolen, and his punishment was assessed at two years in the penitentiary. A motion was made to quash the second count in the indictment, and the one upon which defendant has been convicted, because said count does not specifically charge a theft of the animal by Mat Roberts, from whom defendant is alleged to have received it knowing it to have been stolen, but simply charges, in general terms, that Mat Roberts had stolen said animal from Osborne, and that defendant received and fraudulently took the same into his possession from Mat Roberts, the same having been acquired by Mat Roberts in such manner as that the acquisition came within the meaning of the term "theft." The objection is that the allegations were conclusions, rather than statements of facts essential to charge the crime of theft by Mat Roberts.

Is it essential to the validity of a charge for receiving stolen property that the count shall contain a direct, distinct, and affirmative allegation of all the facts going to constitute theft against the original taker, from whom it has been received? The pleader, it will be noted, has followed substantially form No. 512, prescribed for receiving stolen property, in Willson's Criminal Forms, p. 220. Under the great weight of authority, the form is unquestionably sufficient. See 1 Whart. Prec. & Indict. (4th Ed.) No. 450; 2 Archb. Crim. Pr. & Pl. (8th Ed.) top p. 1425, side p. 474.

Speaking of the offense of receiving stolen property, Mr. Bishop says of the indictment: "As in larceny, so in receiving, the transaction is identified by the description of the stolen things, and their ownership. The thing stolen must be described in the same manner as in larceny. The name of the thief is not identifying matter, and hence it need not be alleged. The owner's name is essential to identification; hence it must be stated if known. Commonly in England, and in numbers of our states, the indictment does not aver from whom the stolen goods were received. Some of our American cases require it." 2 Bish. Crim. Pr. (8d Ed.) §§ 982, 983. And to the same effect see

1 Whart. Crim. Law, (8th Ed.) § 997. In Texas it has been the rule that an indictment for receiving stolen property must allege the name of the owner of the property, if known, and the name of the person from whom received. *State v. Perkins*, 45 Tex. 10. Judge Willson's form is sustained by all *standard* authorities, and the count here complained of is in compliance with said form. It was not error to overrule the motion to quash. *Nourse v. State*, 2 Tex. App. 304.

After his motion to quash was overruled, defendant interposed a special plea of *autrefois acquit*, alleging that he had formerly been tried and acquitted of this same offense, and as exhibits to and parts of his plea he set out the former indictment and former judgment of acquittal. A demurrer to this plea by the district attorney was rightly sustained by the court, the plea showing upon its face that there was not an identity of offenses in the two cases charged. *Wright v. State*, 17 Tex. App. 152; *Alexander v. State*, 21 Tex. App. 406; *Shubert v. State*, Id. 551.

Defendant's third bill of exceptions was to a paragraph of the court's charge wherein the jury were instructed: "If you find defendant was in possession of said animal, and you find he made an explanation of such possession, you will inquire first to determine if the same was reasonable, natural, or probable; and if you find it so, then, in order to convict the defendant on either count, you must find such explanation to have been false; and, unless you so find beyond a reasonable doubt, you will find the defendant not guilty." The correct rule is that, where a party in possession of property recently stolen gives an exculpatory explanation of his possession which is reasonable or probable, then the burden devolves upon the state to prove its falsity; otherwise he is entitled to be acquitted. *Johnson v. State*, 12 Tex. App. 385; *Sitterlee v. State*, 13 Tex. App. 587; *Irvine v. State*, Id. 499; *Ross v. State*, 16 Tex. App. 554; *Miller v. State*, 18 Tex. App. 34; *Loving v. State*, Id. 459; *Windham v. State*, 19 Tex. App. 413.

We have given the statement of facts in this record our very careful consideration, and we do not believe the evidence as here shown sufficiently establishes defendant's knowledge of the fact that the animals he purchased from Roberts had been stolen by Roberts, so as to warrant a conviction for receiving stolen property knowing it to have been stolen. An hypothesis that he did not know that fact, is, under the evidence as shown us, by no means unreasonable or improbable.

The judgment is reversed, and the cause remanded.

HODGES v. STATE.¹

(Court of Appeals of Texas. November 27, 1886.)

1. EMBEZZLEMENT.

Embezzlement is *eo nomine* an offense against the laws of this state, and is fully defined in article 786 *et seq.* of chapter 16 of the Penal Code.

2. SAME—RECEIVING EMBEZZLED PROPERTY KNOWING IT TO HAVE BEEN EMBEZZLED.

The act of March 16, 1883, (Gen. Laws Eighteenth Leg. p. 24.) defining the offense of receiving embezzled property, knowing it to be embezzled, reads as follows: "If any person shall fraudulently receive or conceal any property which has been acquired by another in such manner as that the acquisition comes within the meaning of embezzlement, knowing the same to have been so acquired, he shall be punished in the same manner as the person embezzling the same would be liable to be punished." *Held* that, notwithstanding the use by the legislature, in the act, of the terms "acquired" and "acquisition," instead of the proper terms "converted" and "conversion," the intent of the legislature was to create and punish as an offense the receiving or concealing of embezzled property, and full force and effect must be given to that legislative intent. Objection, therefore, that the act of March 16, 1883, is inoperative and void, was not well taken, and was properly overruled.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

3. SAME—INDICTMENT.

It is no valid objection to an indictment which charges, in the language of the act, the receiving and concealing of embezzled property, knowing it to be embezzled, that it fails to allege the facts constituting the embezzlement. The indictment in this case charges, in substance, that the defendant did fraudulently receive from J. G., and did fraudulently conceal, certain property, to-wit, a horse, the same being the property of B. H., and the same being of the value of \$100, which said property had been acquired by said J. G. in such manner as that the acquisition comes within the meaning of embezzlement, and that the said defendant received and concealed said horse knowing the same to have been so acquired. Held sufficient to charge the offense of receiving and concealing embezzled property knowing it to be embezzled. See the opinion *in extenso* on the question.¹

4. SAME.

Charge of the court is to be considered as a whole, and every portion of it is to be construed with reference to every other portion. If, as so considered and construed, it is found to be correct, it is sufficient.

HURT, J., dissents.

Appeal from district court, Wise county.

The conviction in the case was for receiving and concealing embezzled property, knowing it to be embezzled, the charging part of the indictment appearing, in substance, in the opinion of the court. The penalty assessed by the verdict was a term of five years in the penitentiary. The transcript brings up no statement of the facts.

Bullock & Trenchard, for appellant, maintaining that the indictment was insufficient to charge the offense. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. In this case the indictment was drawn, and the conviction had, under the act of March 16, 1883, (Gen. Laws Eighteenth Leg. p. 24,) which reads as follows: "If any person shall fraudulently receive or conceal any property which has been acquired by another in such manner as that the acquisition comes within the meaning of embezzlement, knowing the same to have been so acquired, he shall be punished in the same manner as the person embezzling the same would be liable to be punished." It is insisted by appellant's counsel that the above quoted act is inoperative and void, because "embezzlement" is not an offense under our laws, *eo nomine*, and is not defined in the Penal Code, and hence a conviction for embezzlement, or receiving, etc., embezzled property, cannot be sustained. We must confess that we are doubtful about our understanding of the objection made to the act by the counsel in their brief, as they have not made their views upon this subject very clear to our minds. We have stated their objections to the law as we understand them. We are unable to see any force in the objections. "Embezzlement" is an offense *eo nomine*, and is fully defined in the Penal Code. Pen. Code, c. 16 art. 786 *et seq.* The only defect in said act that we can perceive is that it uses the words "acquired" and "acquisition" where the words "converted" and "conversion" should have been used. There can be no question but that the legislative intent was to create and punish as an offense the receiving or concealing of embezzled property the same as the receiving or concealing of stolen property. Pen. Code, art. 743. This intent being plain from the act itself, we must give such intent effect, although the language used therein is not as critically correct as it might have been made. The act is not so indefinitely framed, or of such doubtful construction, in our opinion, that it cannot be understood, and hence it cannot be held inoperative because it uses some words not as appropriate to express the legislative intent as would be some other words.

¹ An indictment which charges an offense in the language employed by the statute is sufficient. *U. S. v. Britton*, 2 Sup. Ct. Rep. 512; *Eastman v. State*, (Ind.) 10 N. E. Rep. 97, and note; *Graeter v. State*, (Ind.) 4 N. E. Rep. 461; *State v. Ah Sam*, (Or.) 13 Pac. Rep. 303, and note; *Scoles v. State*, (Ark.) 1 S. W. Rep. 769; *Fortenbury v. State*, Id. 68.

An objection to the indictment is urged. The objection is that said indictment does not allege the facts which constituted the *embezzlement*. The indictment alleges substantially that the defendant did fraudulently receive from Jim Gilbreth, and did fraudulently conceal, certain property, to-wit, a horse, the same being the property of Boon Halford, and the same being of the value of \$100, which said property had been acquired by said Gilbreth in such manner as that the acquisition comes within the meaning of *embezzlement*, and that the said defendant received and concealed said horse, knowing the same to have been so acquired. It will be seen that the indictment follows the language of the statute creating this offense. It is not the offense of *embezzlement* that is sought to be charged, but the offense of *receiving or concealing embezzled property, knowing the same to have been embezzled*. We think the indictment sufficiently charges the last-named offense, and that it is no valid objection to it that it does not allege the facts constituting the *embezzlement*. It is not like the case of indictment for burglary, in which it is essential to not only aver the elements of burglary, but also those of the felony or theft committed, or intended to be committed. Burglary is a compound offense, to constitute which there must not only be the breaking of and entry into a house, but there must be an intent on the part of the offender, co-existent with the acts of breaking and entry, to commit felony or theft. The offense is dependent upon the *intent* to commit some felony, or to commit theft, and the felony or theft intended is therefore a necessary element of the offense of burglary, and must be alleged.

The offense we are considering is a substantive one, and it is not essential to its existence or description that the facts constituting the *embezzlement* should be specifically averred. If the property is *embezzled property*, no matter when, where, by whom, or under what circumstances it was *embezzled*, it is an offense to receive or conceal it, knowing that it is *embezzled property*. The offense is analogous to that of receiving stolen property, knowing the same to be stolen; and this court, in *Brothers v. State*, *ante*, 737, holds that it is not necessary, in an indictment for receiving stolen property, to specifically allege the elements of the *theft* of such property, but that it is sufficient to follow the language of the statute. See that decision for a full discussion of the subject, and the citation of the authorities bearing upon it. We are of the opinion that the indictment in this case is a good one, and that the court did not err in overruling the exceptions to it, nor in overruling the motion in arrest of judgment.

Considering the charge of the court as a whole, it is correct and sufficient; and, while the exception to one paragraph of said charge is well taken, the error in said paragraph is fully cured by another portion of the charge. A charge must be treated as a whole, and every portion be construed with reference to every other portion. *Thrasher v. State*, 3 Tex. App. 281; *Brownlee v. State*, 13 Tex. App. 255; *Logan v. State*, 17 Tex. App. 50; *Davis v. State*, 19 Tex. App. 201.

There is no error in the judgment, and it is affirmed.

HURT, J., dissents, and holds that the act creating this offense is so indefinite as to be inoperative. He concurs in the opinion as to the sufficiency of the indictment, provided the act is valid and operative.

HART v. STATE.¹

(Court of Appeals of Texas. December 11, 1886.)

1. CRIMINAL PRACTICE—EVIDENCE—FLIGHT OF ACCUSED.

Flight of the accused after his indictment and release on bail is a fact which may be proved by the state in cases either of positive or circumstantial evidence.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

2. LARCENY—INSTRUCTIONS—POSSESSION OF PROPERTY.

See the opinion *in extenso* for instructions of the court in a theft case held correct, both in the abstract and in their applicability to evidence of a purchase by the defendant, and of his explanation of his possession of the stolen property.¹

3. SAME—EVIDENCE.

See the statement of the case for evidence held sufficient to support a conviction for theft.

Appeal from district court, Hopkins county.

The conviction was for the theft of a mare and colt, the property of V. T. Cummings, in Hopkins county, Texas, on the eighteenth day of August, 1885. A term of five years in the penitentiary was the penalty assessed by the verdict.

The state proved the disappearance of the mare and colt from their range, traced the possession of the same to the defendant, and proved their sale by him to one Jones. It was further proved that, while he was gathering horses to sell Jones, the defendant was asked about this particular mare and colt. He replied that he knew them, and that possibly they were among those he had penned, and promised, if so, to turn them out. After he delivered the horses he sold to Jones, he was asked about the mare and colt, and said that he knew nothing about them. Subsequent to the recovery of the animals from Jones, defendant claimed that he bought them from one Clark. Defendant introduced in evidence a bill of sale signed by one J. P. Clark, conveying, among several animals, a mare and colt of the description of the Cummings mare and colt.

E. B. Perkins and *Leach & Templeton*, for appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. This is an appeal from a conviction for the theft of a mare and colt alleged to be the property of V. T. Cummings. The state, over the objections of defendant, proved that defendant forfeited his bail-bond. Appellant contends that proof of flight is admissible only in cases in which the state relies upon circumstantial evidence for a conviction; citing *Williams v. State*, 43 Tex. 182. This court holds to the contrary; that is, that flight by a defendant is admissible in all cases, whether the evidence be circumstantial or direct. *Blake v. State*, 3 Tex. App. 581. The court charged the jury that the taking of property under an honest claim of right cannot constitute theft, though the party may be mistaken in his claim, and the intent with which an accused acted, whether an honest intent or a fraudulent intent, is a question of fact for the jury to determine from all the facts and circumstances established by the evidence. To this charge defendant objects, because it instructs the jury to consider only such facts and circumstances as are established by the evidence, and not all the facts and circumstances in proof. We can see no practical difference between the two propositions. If facts and circumstances are *in proof*, certainly they are established by the evidence. Proof is the result of evidence. A fact established by the evidence is in proof, and such fact is the result from the evidence established by it.

The court charged the jury if some other person stole the mare and colt, and took them into actual possession, and that defendant did not assist in such actual taking, but afterwards purchased said mare and colt, and received possession of them from the person who stole them, the defendant would not be guilty of theft, although he may have known that his vendor had stolen them. To this charge it is objected that there was no evidence tending to show that any person had stolen the horses, or had ever had actual possession of the same. We will discuss this part of the charge in connection with another proposition urged by appellant, to-wit: "In case of theft, where the de-

¹See *Brothers v. State*, ante, 737; *Robinson v. State*, ante, 736, and note; *Clark v. State*, post, 744.

fendant claims the property under claim of purchase, it is immaterial whether he purchased the property in good or bad faith." This proposition may or may not be correct, depending upon other facts. If defendant obtained possession of the property from some other person with or without purchase, in good or bad faith, with or without knowledge that it was stolen, he cannot be convicted of theft. But suppose defendant took the property from the possession of the owner, and, to justify the trespass,—the taking,—he relies upon a purchase from some other person. In such a case it is of the first importance whether defendant acted in bad faith; for, if he knew the person from whom he purchased had no right to sell, and that the sale was a fraud upon the rights of the owner, a taking under such circumstances, though he had purchased the property, would be fraudulent, as much so as if there had been no purchase.

By reference to the statement of facts it will be found that the charge complained of was demanded by the evidence, and hence there was no error in the charge. The court charged the jury the rule applicable to a case of recent possession, with reasonable explanation. There is no objection urged to the rule as stated by the court, but it is insisted that the court should have made a direct application to the facts bearing upon this matter; and in support of this position we are cited to *Windham's Case*, 19 Tex. App. 422; *Müller's Case*, 18 Tex. App. 34; *York's Case*, 17 Tex. App. 441; *Richardson's Case*, 7 Tex. App. 489; and *Francois' Case*, *Id.* 514. We have examined each of these cases, and find none of them support the position of appellant. When the rule is stated clearly and correctly upon the question of recent possession, we have found no case in which it is held that there must be a direct application of the rule to the facts. That part of the charge in which the rule is stated is very clear and simple, and there can be no doubt but that its application to the facts bearing upon this subject was thoroughly understood by the jury.

The charge is as follows: "When a person found in possession of property recently stolen, when first found in possession of it, or when his title thereto is first called in question, gives a reasonable and probable explanation consistent with his innocence, such explanation rebuts the presumption of guilt arising from such recent possession, and it devolves upon the prosecution to show that such explanation is false." It would be a dangerous doctrine to require the court to conclude this charge with instructions to the jury to acquit if the state failed to show the explanation of defendant to be false, because it is a rare case in which there are no other criminative facts except recent possession with reasonable explanation; and, while it may be true that other criminative facts would tend to disprove the apparently reasonable explanations made by defendant, yet the jury might conclude that the state should, by direct evidence, refute the explanations, and, failing in this, the defendant would be entitled to an acquittal. If, however, the inculpatory facts consisted alone of recent possession with reasonable explanation, it would be proper to so charge the jury.

We have read with interest the close and very plausible argument of counsel for appellant in support of the proposition that the evidence is not sufficient to support the verdict. But, after a careful examination of the statement of facts, we do not think we would be warranted in reversing the judgment upon this ground.

We have found no such error in the judgment as will require a reversal thereof, and the same is affirmed.

CLARK v. STATE.¹

(Court of Appeals of Texas. December 17, 1886.)

LARCENY—OF HORSE—EVIDENCE.

See the opinion *in extenso* and the statement of the case for evidence held insufficient to support a conviction for horse-theft, because the defendant's explanation of his possession of the stolen animal, being reasonable, natural, and probable, the state relying solely upon such possession, rebutted the presumption of guilt, and devolved upon the state the burden of proving the falsity of the explanation, which the state failing to do entitled the defendant to an acquittal.²

Appeal from district court, Erath county.

The conviction in this case was for the theft of a horse, the property of J. A. Fry and Ira Millican, in Erath county, Texas, on the first day of April, 1884. A term of five years in the penitentiary was the penalty assessed against the appellant.

The fact of recent possession was alone relied upon by the state in this case. The disappearance of the horse from its accustomed range, and that defendant sold the animal to a man in a neighboring county, were facts fully proved by the state. Defendant, however, when his possession was first challenged, claimed that he bought the animal from one Haynes, upon which statement the state brought no contradictory evidence to bear.

No appearance for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. Possession of the alleged stolen horse recently after the theft thereof is the only inculpatory circumstance of defendant's guilt of the theft, of any substantial weight. This circumstance he explained before even being called upon to do so, and on more than one occasion. His explanation of his possession of the horse was that he had got it from a man named Haynes, and had traded Haynes a mare and colt for it. While the defendant did not prove by direct evidence the truth of this explanation of his possession of the horse, he proved it circumstantially, and almost conclusively, if his witnesses testified truly. There is no evidence in the case which disproves the truth of such explanation. He told one witness, in a casual conversation, that he had owned the horse two years, but this statement was made by him in a jocular manner, and in relation to the foolish disposition of the horse. Considering the circumstances under which this statement was made, and the manner in which it was made, and also viewing it in connection with his more deliberate and detailed accounts of when, where, and how he acquired possession of the horse, we think such statement entitled to but little, if any, consideration as evidence disproving the truth of his explanation. He said he got the horse from a man named Haynes, who lived on Armstrong creek, in Erath county. It was proved circumstantially by the state that but one man of that name lived on said creek, and this man was produced as a witness, and testified that the defendant did not get the horse from him. But defendant, when first called upon by the owner of the horse to tell who he got him from, said he got him from a man named Haynes, but not from the Haynes who afterwards testified in the case. He never at any time claimed that the witness Haynes was the man from whom he got the horse, but, on the contrary, stated that it was another Haynes, whose Christian name he did not know. He proved that a man named Haynes had, about the time he claimed to have traded for the horse, been in his neighborhood inquiring for and claiming the horse in question, and that about said time defendant owned a mare and colt, and that said mare and colt were not seen in his possession, or in their ac-

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

² See *Hart v. State*, ante, 741; *Brothers v. State*, ante, 737; *Robinson v. State*, ante, 736, and note.

customed range, after the time he claimed to have traded them to Haynes for the horse.

While defendant had the horse, he used him openly, claimed him as his own, and at no time and in no manner concealed or attempted to conceal such possession and claim, or to account for the same in any other way than that he had acquired the animal from Haynes, by swapping therefor a mare and colt. That the man Haynes from whom he claimed to have got the horse did not live on Armstrong creek, while tending to prove the falsity of defendant's explanation, perhaps, is certainly of small weight when we consider that, if defendant's explanation is true, Haynes must have been the person who stole the horse, and, being guilty of the theft, it is not likely that he would have told the defendant or any one else the truth as to his residence. On the contrary, he would have sought to mislead the defendant and others, not only as to his residence, but as to his name. In fact, one witness testified that this man who called himself Haynes told him that he lived in Mason county.

We are of the opinion that the defendant's explanation of the possession of the horse is a reasonable, natural, and probable one, and rebutted and destroyed the inculpatory force of the circumstance of his possession of the stolen horse, and it devolved upon the state to show the falsity of such explanation. Otherwise the defendant should have been acquitted. *Garcia v. State*, 26 Tex. 209; *Johnson v. State*, 12 Tex. App. 385; *Irvine v. State*, 13 Tex. App. 499; *Sittlerlee v. State*, Id. 587; *Loving v. State*, 18 Tex. App. 459; *Windham v. State*, 19 Tex. App. 413. And we are further of the opinion that the evidence does not show the falsity of the defendant's said explanation, and that, therefore, the conviction is unsupported by the evidence; wherefore the judgment is reversed, and the cause is remanded.

PAGE 7. STATE.¹

(Court of Appeals of Texas. December 8, 1886.)

JURY—COMPETENCY—SECOND COUSIN OF ACCUSED.

A cause for challenge to a juror is that he is related to the injured party within the third degree of consanguinity or affinity. Second cousins are relatives within the third degree. A juror in this case, though he denied it upon his *voir dire*, is shown to have been the second cousin of the injured party. *Held*, that a new trial should have been awarded.

Appeal from district court, Madison county.

The conviction in this case was for theft, and the penalty assessed was a term of three years in the penitentiary.

The state amply proved the disappearance of the cow alleged to be stolen from one Allphin, and the fact that a cow of such description was killed by the defendant. The defense, on the other hand, by a large number of witnesses, proved that defendant killed his own cow,—an animal which bore a marked resemblance to the Allphin cow.

Abercrombie & Randolph, for appellant, holding that a new trial should have been awarded because of the disqualification of a juror and the insufficiency of the evidence.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. On a motion for a new trial, it was made to appear that one of the jurors who tried the cause was the husband of the second cousin of the alleged injured party. It further appears that said juror, before being accepted by the defendant, was interrogated upon his *voir dire*, and was asked the question if he was related to said alleged injured party by consanguinity

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

or affinity, and he answered in the negative. Defendant asserts in his motion, which is verified by his affidavit, that at the time of accepting said juror as one of his triers he was utterly ignorant of any relationship existing between said juror and said alleged injured party, and relied upon the truth of said juror's statement, made under oath, that no such relationship existed.

One of the grounds of challenge for cause to a juror is that he is related to the person injured by the commission of the offense within the third degree of consanguinity or affinity. Code Crim. Proc. art. 636, subd. 10. Second cousins are related to each other within the third degree. W. & W. Con. Rep. 267; *Reed v. State*, 11 Tex. App. 587; 1 Bouv. Law Dict. 299, 300. It was the defendant's right, therefore, to have the juror in question stood aside, and he alleges that he would have exercised this right if he had known of the existence of said relationship.

An effort was made on the part of the prosecution to show that defendant knew, or might have known by the use of reasonable diligence, of said relationship; but we do not think the evidence shows such knowledge on the part of defendant, nor that it shows any want of diligence on his part to obtain such knowledge. Of course, if defendant accepted said juror with a knowledge of such relationship, or if he accepted him without inquiring in regard thereto, he could no be heard to complain; but, as presented to us, the facts appear to be that he was entirely ignorant of the existence of this cause of challenge to the juror, and that such ignorance was not attributable to neglect on his part. Such being the case, the defendant, without his fault, has been tried by a jury which the law does not regard as impartial, and has therefore been deprived of a right guarantied by the constitution to every one charged with crime. Bill of Rights, § 10. We are of the opinion that upon this ground of the motion the new trial should have been granted.

We are further of the opinion that the court should have granted a new trial because of the insufficiency of the evidence. As presented to us in the statement of facts, the evidence is unsatisfactory, and fails to prove beyond a reasonable doubt the guilt of the defendant. We find no material error in the charge of the court. It is a full, fair, and correct exposition of the law of the case.

Because, for the reasons stated, the court erred in not granting the defendant a new trial, the judgment is reversed, and the cause is remanded.

VAN VALKENBERG and others v. RUBY and others.

(*Supreme Court of Texas. February 15, 1887.*)

1. TRESPASS—TO TRY TITLE—VERDICT—JUDGMENT.

In an action of trespass to try title to land in Texas, where the jury in the body of the verdict say nothing about ground-rent against one of the defendants, but find ground-rent against another defendant, and in the recapitulation charge the amount so found to the former, and charge a different amount to the latter, such verdict is so inconsistent and uncertain that it will not support a judgment, and, the error being apparent on the face of the record, a judgment entered thereon will be reversed.

2. SAME—IMPROVEMENTS—RENT—DAMAGES.

The Texas statute allowing a party who is ejected from land the value of his improvements, when he is shown to have been a possessor in good faith, and deferring the owner's right of possession until he pays such party the excess of the value of such improvements over the rents, is valid, but such statute cannot be extended beyond its letter, and a judgment awarding damages against the owner cannot be sustained.

Appeal from Harris county.

Brady & Ring and *Jones & Garnett*, for appellants. *E. P. Hamblen*, for Thacker, appellee.

GAINES, J. This is an action of trespass to try title, and was brought by appellant Van Valkenberg to recover of appellees and others a certain block of lots in the city of Houston. He sued out a writ of sequestration, by virtue of which the property was taken into possession by the sheriff, who it seems still held the same at the time of the trial in the court below. The other appellants were sureties on the sequestration bond. Appellees in their answer claimed title, and also set up improvements in good faith. They also pleaded in reconviction, claiming damages against plaintiff and the sureties on his sequestration bond on the ground that the writ was wrongfully and maliciously sued out. The case was submitted to a jury, who found a verdict for plaintiff for the property claimed; but also found that appellees were possessors in good faith, and had made valuable improvements upon the lots. The verdict reads as follows:

"We, the jury in the above entitled case, find that the title to the land in Block No. 200 is vested in plaintiff Van Valkenberg, and value the same at \$125 per lot. Upon the question of three years' limitation, we also find for plaintiff; also upon question of five (5) years' limitation; also upon the question of exemplary damages in suing out the writ of sequestration; also as against defendant Thacker for ground-rent, \$216. We find for defendant Thacker for his improvements made in good faith upon lot No. 10, \$256; for rent for 12 months on the same, \$100; and for improvements on lots Nos. 8 and 9, \$384; and for rents on same, \$100.

"RECAPITULATION.

Improvements on lot No. 10,	-	-	-	-	-	\$256
Rents,	-	-	-	-	-	100
Improvements on lots 8 and 9,	-	-	-	-	-	384
Rents,	-	-	-	-	-	100
						<hr/>
						\$840
Less ground-rents,	-	-	-	-	-	90
						<hr/>
						\$750
We also find for defendant Ruby on improvements made on lots						
Nos. 1, 2, 3, 4, 5, 6, 7, 11, and 12,	-	-	-	-	-	\$1,616
And for rents on same,	-	-	-	-	-	600

"RECAPITULATION RUBY.

Improvements,	-	-	-	-	-	\$1,616
Rents,	-	-	-	-	-	600
						<hr/>
						\$2,216
Less ground-rents	-	-	-	-	-	216
						<hr/>

\$2,000 total."

Upon this verdict a judgment was entered in favor of plaintiff against the defendants for the premises in controversy; but in favor of defendants Ruby and Thacker respectively for the value of their improvements, less the ground-rents set forth in the recapitulation in the verdict; that is to say, in favor of Ruby for \$1,400, and in favor of Thacker for \$550. It was also ordered that the sheriff restore the property to these defendants; and that plaintiff should have his writ of possession, provided he paid the value of the improvements within 12 months; and that, if he failed to do so, said defendants, or either of them, could acquire title by paying the value as assessed by the jury,—the value of the lots respectively claimed by them. It is also adjudged that Ruby and Thacker should recover of plaintiff and the other appellants, as sureties

on his sequestration bond, \$600 and \$200 respectively, as damages for the wrongful suing out of the writ of sequestration. The jury do not find, in so many words, that the writ was wrongfully sued out; but the court seems to have considered that proposition as a necessary deduction from the finding that appellees were possessors in good faith and had made valuable improvements; and also that the value of the rent of the property from the time the sheriff took possession under the writ up to the date of the trial was the proper measure of damages for the supposed wrong. It will be perceived that there is an inconsistency in the verdict, caused, as it is to be presumed, by some clerical error on part of the jury. In the body of the verdict, they say nothing about ground-rent against Ruby, but find ground-rent against Thacker to the amount of \$216. In the recapitulation the latter amount is charged against Ruby as ground-rents, and the sum of \$90 charged against Thacker. The inconsistency is apparent.

It is impossible to determine from these irreconcilable statements, with any degree of certainty, what the jury really meant by these findings. However informal a verdict may be, if it respond to all the issues, and its meaning be clear, it will be held good; but, if its construction be doubtful, no judgment can be rendered upon it. This was in effect so held by this court in the case of *Moore v. Moore*, 3 S. W. Rep. 284, decided at the present term. This is an error of law apparent on the face of the record, and necessarily works a reversal of the judgment. Rules Sup. Court No. 23, (47 Tex. 601.)

We think the court also erred in rendering judgment against appellants, in favor of appellees, for damages for the wrongful suing out of the writ of sequestration. The jury found that appellant Van Valkenberg was the owner of the land; and, for aught we may know from the verdict, the rents assessed by the jury upon the property in favor of appellees may have controlled the rent of the lots as well as that of the improvements. If so, we have the remarkable case of trespassers upon real estate recovering of the owner, in action of damages, rent upon his own property. However this may be, we are of opinion that there is nothing in this case to warrant this judgment for damages against the plaintiff and the sureties on his sequestration bond. When he established his title to the premises in controversy, we think the question of damages for the wrongful suing out of the writ of sequestration was settled in his favor. If he had taken possession of his property without suit, could these defendants, who, though possessors and improvers in good faith, are mere trespassers, at last have maintained an action against him as for a wrong? We think not. Having the title to the property, and no privity with the possessors, his title carried with it the right to the possession, which it is believed even the legislature could not abridge or take away. We do not mean to say that our statutes in reference to possessors in good faith are in violation of the constitution. The constitutionality of similar enactments in other states has generally been upheld.

In *Scott v. Mather*, 14 Tex. 235, and in *Saunders v. Wilson*, 19 Tex. 194, the act of February 5, 1840, which is substantially re-enacted by the Revised Statutes, was decided to be valid. We neither question the correctness of that ruling, nor the grounds upon which it is maintained. The decisions in these cases are in accord with the great weight of authority, and are supported by sound reasoning. But the ruling in *Hearn v. Camp*, 18 Tex. 546, in which the second section of the act of February, 1844, was held unconstitutional, shows, we think, that the court considered that the legislature had gone to the verge of its authority in the first section of that law, and in the previous enactments upon this subject. By these statutes the right of the owner to the possession of his land is not denied. It is merely provided that, after it is adjudicated that the defendant is a possessor in good faith, and the excess of the value of his improvements over the rents is ascertained, the owner's immediate right to his writ of possession is withheld until he performs the equitable obligation

of paying for that excess. By complying with this reasonable condition, he is not delayed in his remedy. If he does not pay, he must ultimately have his land, or its equivalent in value. It is upon these grounds that the constitutionality of these statutes has been upheld. Attempts on part of legislatures to go further than these statutes in favoring the claims of possessors in good faith have generally been held unconstitutional by the courts. *Hearn v. Camp, supra*; *McCoy v. Grandy*, 3 Ohio St. 463; *Childs v. Shower*, 18 Iowa, 261; *Billings v. Hall*, 7 Cal. 1.

It follows from what we have said that, in our opinion, the operation of the statutes in question cannot be extended beyond their letter, and that so much of the judgment of the court below as awarded damages to the defendants was not authorized by law. We have considered the foregoing as questions of law apparent upon the face of the record, and we think the errors pointed out fundamental in character, and require a reversal of the judgment, although they are not complained of in the assignments.

The assignments of error are directed mainly to the question of the sufficiency of the evidence to support the verdict on the issue of possession in good faith, and need not be considered.

The judgment is reversed, and the cause remanded.

COOK v. STATE.¹

(Court of Appeals of Texas. June 23, 1886.)

1. MURDER—EVIDENCE—RES GESTE—HUSBAND AND WIFE—PRINCIPAL AND ACCESSORY.

It was proved by the state on a trial for murder that, immediately before the shooting, the defendant's wife called to him to get his pistol, and when he did so, and returned to the place where his wife and the deceased were disputing, the woman several times ordered the defendant to shoot, which he presently did, inflicting the fatal wound. It was objected by the defense that the evidence recited the acts and declarations of the defendant's wife, which, as such, could not be used in evidence against him. *Held*, that the objection was not well taken. The declarations being verbal acts during the progress of the offense, they were admissible as a part of the *res gestæ*. Moreover, the evidence disclosed the wife to be a principal with defendant in the commission of the offense, and her declarations were admissible under the uniform rule that the declarations of one of the parties principal, made at the time, during the progress and in furtherance of the common design, are competent evidence against any or all of the co-conspirators. See the opinion *in extenso* on the question, and for the reason of the rule.

2. SAME—DYING DECLARATIONS—PREDICATE.

See the opinion *in extenso* for evidence held sufficient to establish the necessary predicate for the admission of the dying declarations of the deceased.

3. SAME—BAWDY-HOUSE—REPUTATION.

Proof of general reputation is sufficient to show the character of the house as a disorderly house; that it was kept for the purpose of public prostitution; and that the occupants thereof were prostitutes.

4. CRIMINAL PRACTICE—APPEAL—EFFECT OF CHARGE ON JURY—EXCEPTIONS.

It is not within the discretion of this court to consider the effect of an erroneous charge upon the jury if exception to it was reserved at the proper time; but this court will revise an erroneous charge, in the absence of a proper exception, when it is made to appear that the error was calculated to injure the defendant's rights.

5. SAME—CHARGE ON SELF-DEFENSE—NO EVIDENCE.

Omission in a trial for murder to charge the law of self-defense, in the absence of any evidence tending to raise that issue, is not error.

Appeal from district court, Bexar county.

The indictment in this case charged the appellant with the murder of William M. Russell, in Bexar county, Texas, on the twentieth day of December,

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

1885. His trial resulted in his conviction of murder in the first degree, and his punishment was assessed at a life term in the penitentiary.

On this trial the state proved that the deceased and one Jones went to the house of prostitution in San Antonio, Texas, kept by one Lilly Gibson, the wife of the defendant. The deceased ordered a bottle of beer, which was drunk by deceased, Jones, and two of the inmates. Deceased paid for the bottle of beer, the price being one dollar. He then ordered, and the same parties drank, another bottle of beer. For that bottle he paid the waiter 45 cents. A dispute then arose between Lilly Gibson and deceased about the balance due on the beer. Jones paid 50 cents, and he and deceased started off, Jones some distance in advance. When deceased reached a point midway between the door of the house and the yard-gate, Lilly Gibson called to defendant, who was then in the room adjoining the gallery on which she was standing, to bring his pistol, and kill the ——. Defendant stepped to the gallery with his pistol, when Lilly Gibson called to him to shoot the deceased. Defendant fired three shots at deceased as he passed out of the gate, one of which took effect, producing death next day. This was the substance of the testimony of the witnesses for the state, and of the dying declarations of the deceased. The defense relied upon evidence introduced to impeach the state witnesses, and the testimony of one witness, who was discredited, that deceased held a pistol presented towards Lilly Gibson when the defendant fired. The predicate laid by the state to qualify the dying declarations was that deceased was rational when he made them, protested that his death was inevitable, and made the statements voluntarily, and not in response to questions asked.

M. G. Anderson, A. J. Evans, and Walton, Hill & Walton, for appellant.

Lilly Gibson was proved to be the lawful wife of the defendant, and was of course incompetent to testify against him. It was therefore error to admit proof of her declarations just before the shooting.

The predicate laid was not sufficient to admit the dying declarations of the deceased.

Asst. Atty. Gen. Burt, for the State.

WHITE, P. J. The appellant was convicted in the court below of murder in the first degree, with a life-term penalty assessed in the penitentiary. The party killed was one William M. Russell, and the record shows that the fatal shooting took place on the night of December 21, 1885, after midnight, between 12 and 1 o'clock. The shooting took place at a brothel kept by one Lilly Gibson, or just after the deceased had started to leave, and was leaving, said house of prostitution. Lilly Gibson, the keeper of the bagnio, was the wife of this appellant, and appellant had rooms and lived at and slept in said house. Appellant was in his room in said house when an altercation occurred between the deceased and Lilly Gibson about the payment by deceased for a bottle of beer. Deceased was intoxicated, and his friend attempted to settle the altercation between him and the woman Gibson, and had succeeded so far as to get him started away from the house to his own place of abode, and they had gotten outside of the gate of the premises, when the woman Gibson called to her husband, the defendant, "to get his pistol and bring it there;" and, as he emerged upon the porch where she was standing, she told him several times "to fire." He immediately fired three shots, one of which took effect, and produced the death of the deceased. It is claimed that, during the wordy altercation between the parties above mentioned, deceased had used insulting language towards the woman Gibson, the wife of appellant, and that he had called her "a damned old whore."

This is a brief, succinct statement of the material facts shown by the record. There are no independent bills of exception in the record, but several were reserved during the trial, and are shown in the statement of facts, to the

admission of the testimony of the witnesses, as follows: (1) Objection was made by defendant to testimony as to acts and declarations of Lilly Gibson, upon the ground that she was the wife of defendant, and therefore her acts and declarations could not be used against him. (2) Objection was made by defendant to admitted testimony of the reputation of the house kept by Lilly Gibson as a house of prostitution, and that the inmates thereof were prostitutes. (3) Objection was made to the admission of the dying declarations of the deceased, Russell.

With regard to the declarations of the wife, made during the progress of the difficulty, just preceding and subsequent to the shooting of Russell, they were admissible as verbal acts, and were clearly parts of the *res gesta*, and consequently did not come within the rule announced in article 735, Code Crim. Proc., which prohibits a husband and wife from testifying against each other in a criminal prosecution. Again, the evidence, as developed in this case, shows that the husband and wife acted together in the commission of the offense, and are both principals, and the rule is uniform that the declarations of one of the parties principal, made at the time, during the progress and in furtherance of the common design, are admissible in evidence, and binding upon the other co-conspirators. *Cox v. State*, 8 Tex. App. 256; *Loggins v. State*, Id. 434.

Mr. Wharton, in his work on Evidence, (section 252,) says: "It is, in any view, clear that declarations which are the immediate accompaniments of an act, are admissible as part of the *res gesta*." Again, in section 263, he says that "the wife's declarations, forming a part of the *res gesta*, are admissible against the husband." This doctrine is maintained in civil cases at common law. *Johnson v. Sherwin*, 3 Gray, 374; *Walton v. Green*, 1 Car. & P. 621; *Gilchrist v. Bale*, 8 Watts, 355; *Aveson v. Lord Kinnair*, 6 East, 188; *Thompson v. Trevanton*, 1 Skin. 402. At common law, the rule which in civil cases excluded the husband and wife from testifying against each other was the same as that which is announced by our statutes with regard to criminal cases. There is no law of this state which governs or regulates the admission of declarations of the wife affecting the husband, when they constitute a part of the *res gesta*; and, there being no specific rules prescribed by statute, other rules of the Code relegate us to the common law for the rules which are to govern. Code Crim. Proc. arts. 27, 725.

We shall therefore adhere to the common-law rule as expressed in the authorities above cited, and hold the declarations of the wife admissible against the husband as a part of the *res gesta*; for it is indispensable to a correct understanding of every transaction that every act attending it, verbal as well as physical, by whomsoever it may be committed, be placed before the court for its enlightenment. This rule as to *res gesta* overrides all other rules known to the law governing the admissibility of testimony. The court below, then, did not err in so admitting the declarations of Lilly Gibson as complained about in this case.

We are also of opinion that the objection of appellant to the admission of the dying declarations of the deceased, Russell, as made to Owen I. Cook and Jesse Bennett, are equally untenable. The evidence clearly shows that the deceased was conscious of approaching death when he made the declarations, and the only objection urged to them is upon this ground. The deceased said he was going to die, and wanted a priest. He said this continually, according to Bennett's testimony. To Owen I. Cook he stated that it was no use, he was going to die; thus showing clearly that the predominant idea in his mind—the all-absorbing topic with him—was approaching dissolution. This was sufficient proof to establish the predicate for their admission, and the court did not err in so admitting them. *Huntt v. State*, 18 Tex. App. 493, and 20 Tex. App. 632; *Temple v. State*, 15 Tex. App. 304.

As to the third exception, as stated in the bill, the language is: "The de-

fendant excepted to the statement of witness that the house kept by Lilly Gibson was a house of prostitution, and that the occupants thereof are prostitutes." The rule is well established that the fact of the character of a house as a disorderly house, and that it was kept for the purpose of prostitution, and the character of the occupants thereof, may be proved by general reputation. *Morris v. State*, 38 Tex. 603; *Sylvester v. State*, 42 Tex. 496; *Allen v. State*, 15 Tex. App. 320; and *Burton v. State*, 16 Tex. App. 156. The evidence objected to was admissible, and the ruling complained of was not erroneous.

The charge of the court is very seriously objected to, and it is urgently insisted that the same was erroneous in several particulars mentioned in the motion for new trial and in the assignment of errors, and ably discussed in the brief of counsel for appellant; but there was no bill of exceptions reserved at the trial to the charge, or any portion of the same, nor to the refusal of the court to give such of the special requested instructions as the court declined to give, or refused because substantially given in the general charge. Had certain portions of the charge been excepted to at the time the charge was given, then there might have been a very serious question as to whether some of the errors pointed out would not have necessitated a reversal of the judgment. *Niland v. State*, 19 Tex. App. 167, and authorities cited; Code Crim. Proc. arts. 685, 686.

It is not within the discretion of this court to consider the effect upon the jury of an erroneous charge of the court if the same was promptly excepted to at the time the same was given. In such a case the conviction must be set aside, however immaterial the error may have been. *Clanton v. State*, 20 Tex. App. 616; *Bravo v. State*, Id. 188. Where a charge is not excepted to at the trial, but the same is objected to for the first time on the motion for a new trial, or in this court on appeal, then the question is whether or not such charge was calculated to injure the rights of defendant, and, unless such is made to appear, this court will not revise the error. Code Crim. Proc. art. 777; *Bishop v. State*, 43 Tex. 390; *Mace v. State*, 9 Tex. App. 110; *Henry v. State*, Id. 359; *Gardner v. State*, 11 Tex. App. 265; *Elam v. State*, 16 Tex. App. 34; *Mendiola v. State*, 18 Tex. App. 463; *Lewis v. State*, Id. 401.

In addition to the general charge, which embraced murder in the first and second degrees, and manslaughter, six special requested instructions for defendant were also given in charge to the jury.

A portion of paragraph 6 of the general charge is specially complained of in the able brief of counsel for appellant. The words specially objected to are embraced in the following extract. Speaking of the *indicia* of express malice, the learned judge said: "These external circumstances indicating the design may transpire at the very moment of the killing, as well as before that time; for, although the killing may have been upon an unexpected meeting, it may have been attended with such absence of passion, and such a wanton, cruel, calculating method, *as will afford ample evidence to establish* in your minds the conviction that the killing was the result of a sedate, deliberate, and well-formed design then and there to take the life of the deceased. The length of time that intervenes between the design so formed and its execution is immaterial, for the reason that an apparently instantaneous act may be accompanied with such circumstances and such want of provocation as to leave no doubt of its being the result of premeditation." There can be no question but that the charge announced a sound abstract proposition of law. *McCoy v. State*, 25 Tex. 33. Two objections, however, are claimed against it, to-wit: *First*, that it trenches upon the rule which forbids the court to charge upon the weight of evidence; and, *secondly*, because there was no evidence to call for, justify, or warrant such a charge. Had exception been taken to the charge at the time it was given, it might have presented a nice question for decision. But, even if we should concede that it was erroneous, there

being no exception, we cannot see, when viewed in the light of the evidence, that it was calculated seriously to affect and injure the rights of the defendant.

The same may be said with reference to other portions of the charge complained of, to-wit, the charge upon manslaughter, in so far as it was based upon insulting words and conduct of deceased towards the wife of defendant; the objection thereto being that it was not sufficiently full and explicit, as required by the Code, and presented a phase of the law not applicable to the facts in the case. *Niland's Case*, 19 Tex. App. 166. There is not a particle of testimony affirmatively appearing in the record which shows that defendant either heard or was informed of the insulting words which had been used by deceased towards his wife. But, even if such had been the case, we cannot say, under the peculiar circumstances developed in the record, that the charge would have been such error as must necessarily have injured the rights of the defendant.

Again, it is said that the court failed to charge, as part of the law of self-defense, that it was not necessary for the defendant to retreat before killing the assailant. In our opinion, the record utterly fails to show the slightest shadow or pretense of self-defense. The deceased was leaving the house, being taken off by his friend, was drunk,—almost helplessly drunk,—had gotten outside of the premises of the defendant and his wife, when defendant, instigated by his wife, fired upon and inflicted the fatal shot which killed him.

As to the sufficiency of the evidence, after most mature and repeated consideration of the record, we have been unable to arrive at any other conclusion than that the verdict and judgment are fully warranted and supported by the facts.

Having found no reversible error, the judgment is in all things affirmed.

TAYLOR v. STATE.¹

(Court of Appeals of Texas. December 4, 1886.)

1. WITNESS—APPRECIATION OF OATH—INSTRUCTION BY PROSECUTING ATTORNEY.

A state's witness having disqualified herself upon her *voir dire* with regard to her knowledge of the nature and obligation of an oath, the state was permitted to take her to a private office, and instruct her thereupon. She was thereupon returned into court, and, replying that she then understood the test, was held competent as a witness. *Held*, that the proceeding was erroneous.

2. CRIMINAL PRACTICE—EVIDENCE—PROOF OF MOTIVE—OTHER OFFENSES.

When motive is the issue sought to be established, it is permissible for a state's witness to testify to previous criminal acts of a like nature as that on trial, perpetrated by defendant; but the failure of the charge to confine such evidence to the purpose of proving motive only, is fatal error.

3. WITNESS—LEADING QUESTIONS.

Under the practice in this state, leading questions are permissible when the witness shows clearly an unwillingness to testify.

4. ASSAULT TO RAPE—THREATS WITHOUT FORCE.

Note the concluding paragraph of the opinion to the effect that *threats*, unaccompanied by *force*, as a means resorted to to obtain sexual intercourse with a female, will not support a conviction for assault to rape, and will authorize only a conviction for attempt to rape.

Appeal from district court, Clay county.

The indictment in this case charged the appellant with the rape of Jane Taylor, who is shown by the evidence to be his own daughter, in Clay county, Texas, on the twenty-seventh day of December, 1885. His trial resulted in

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

his conviction of assault with intent to rape, and he was awarded a term of seven years in the penitentiary.

The statement of facts in this case is voluminous. Its substance, however, can be sufficiently stated in a few words. This conviction rests almost solely upon the testimony of Jane Taylor, the alleged victim of the outrage. She is shown throughout to have been a most reluctant and unwilling witness. In the first place, it is shown that, after having filed the complaint against her father, she sought legal advice as to whether she could be compelled to testify. Advised that she could decline to testify to any facts which would tend to involve her in a criminal charge, she declined to testify on the examining trial, and did not do so until she had been committed to and confined in jail for 48 hours. The evidence strongly intimates attempts on her part to get transportation out of the country, to avoid testifying on this trial. The substance of her testimony, elicited by close questioning, was to the effect that her father came to her room on the night alleged in the indictment, having a pistol in his hand. He first threatened to kill her if she made outcry or other noise. He then struck her with the pistol, forced her to assume an unnatural attitude on the bed, and then gratified his passion upon her person,—all of which he did against her will and consent. The witness then testified that defendant had subjected her person to his carnal passion as often, at least, as six times before the act charged in the indictment. She stated that she always complied through fear. With reference to one particular act, she stated that just before she retired, and while her mother and brothers were yet in an adjoining room, her father came to her room, and directed her to meet him at a later hour behind a haystack, which she did, going to him in her night clothes. The defense proved that Jane Taylor, on the examining trial, denied that the defendant ever had carnal knowledge of her person. The reputation of Jane Taylor for truth and veracity was shown by several witnesses to be bad, and the general reputation of the defendant, except that he gambled occasionally, to be good.

Plemons, Hazlewood & Templeton and *E. J. Hamner*, for appellant, insisted that the trial court erred in permitting the state's attorneys to instruct the witness, Jane Taylor, as to the nature and obligation of an oath, after she had disqualified herself on her *voir dire*, and in then holding her competent, and that the court erred in permitting the said witness to testify to other acts of outrage than that charged in the indictment.

Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. This appeal is from a judgment of conviction for assault with intent to commit rape, the punishment being seven years in the penitentiary. The injured party was the daughter of appellant, and the conviction rests almost exclusively upon her uncorroborated testimony. According to her statements as a witness, appellant had ravished her first some five years prior to the date of the crime for which he was being tried, and she deposed that his crime had been repeatedly perpetrated upon her in the interval between the first and last offense. After the testimony at the trial was closed, the defense demanded that the prosecution be required to elect the precise and specific offense for which a conviction would be claimed, and the prosecution announced that they would claim a conviction only upon the offense as laid in the indictment, to-wit, the one committed on or about the twenty-seventh of December, 1885.

Before her examination as a witness, defendant requested the court to have the prosecutrix tested upon her *voir dire* as to her competency with regard to the nature and obligations of an oath. This was granted, the witness examined in open court, and pronounced incompetent by the judge. Thereupon, at the request of the prosecuting attorneys, and over objection of defendant, the said prosecuting attorneys were permitted to take said witness

from the court-room to the private law office of one of said attorneys, that they might there instruct her properly, in the presence of the sheriff, with regard to the nature of an oath, and read and explain to her the statutes with regard to the crime of perjury, and its punishment; after which the witness was again brought back into court, re-examined as to her competency, and pronounced competent by the judge, and she then testified in the case,—all of which was excepted to by defendant.

Our statutes, while they declare that no person shall be disqualified from giving evidence on account of his religious opinions, or for want of any religious belief, (Bill of Rights, § 5; Code Crim. Proc. art. 12,) do hold as incompetent "children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligations of an oath." Code Crim. Proc. art. 730, subd. 2. The method of testing the competency of such witnesses is confided to the discretion of the trial judge, and his determination of the question will not ordinarily be disturbed on appeal, unless an abuse of that discretion is apparent. *Brown v. State*, 2 Tex. App. 115; *Ake v. State*, 6 Tex. App. 398; *Brown v. State*, id. 286; *Williams v. State*, 12 Tex. App. 127; *Burk v. State*, 8 Tex. App. 336.

Was the mode adopted in this instance an abuse of discretion? Mr. Wharton says: "When a child is incompetent simply for want of instruction as to the nature of an oath, the practice has been to postpone the case, so that the child might in the meanwhile be properly instructed." Whart. Crim. Ev. (8th Ed.) § 368; citing *Rev v. White*, 1 Leach, 430. This was the English practice. As far as known, it has never been adopted in this country. On the contrary, as Judge LEWIS says in *State v. Scanlan*, 58 Mo. 206, such "practice has been criticised as like preparing or getting up a witness for a particular purpose." S. C. 1 Amer. Crim. Rep. (Hawley,) 185. In Indiana, where the witness on a trial for rape was a child only six years old at the time of the trial, and was testifying sixteen months after the alleged offense, the competency of the witness having been challenged, the court examined her, and, not being satisfied, appointed two gentlemen, who retired with the child to a private room, and, after some time, returned and reported to the court that, in their opinion, her testimony ought to be heard, but received with great allowance, whereupon she was allowed to testify, over defendant's objections. It was held that for this action of the court the defendant was entitled to a new trial. *Simpson v. State*, 31 Ind. 90. In Alabama, where the question was "whether the circuit court was authorized to arrive at a conclusion respecting the admission or rejection of an infant witness from a *private examination*, after a *public examination in court* had resulted in the exclusion of the witness in consequence of an apparent defect of knowledge with respect to the obligations of an oath," it was held that it is the court, and not the judge as an individual, which is to determine the competency of a witness; and therefore the examination of the competency of the witness must be made at the trial, and in the presence of the prisoner and his counsel. To admit such a witness upon a private examination by the judge is erroneous. Judge GOLDTHWAITE says: "It may be objected it is scarcely possible that an infant of such tender years can be capable of satisfactorily answering questions amid the bustle and confusion of a court-house; but certainly the consequences would be alarming if the admission of such a witness might be effected through the medium of a private examination, and more so when one made in public had proved to be unsatisfactory." *State v. Morea*, 2 Ala. (N. S.) 275. And so in *People v. Welsh*, 68 Cal. 167, it is said "that a defendant in a criminal case is entitled to have the question of the competency of a presumably incompetent witness heard and determined in his presence, and on his trial before the court and jury." We are clearly of opinion that the procedure here complained of was error.

During the examination of the prosecutrix as a witness, objection was made and exception reserved by defendant whenever the witness was permitted to testify as to other criminal acts of a like character by the defendant to the one charged by the indictment to have been committed on or about the twenty-seventh of December, 1885. Wherever and whenever motive and intent become important questions in the trial of a case, evidence of similar acts or conduct in other instances is admissible. "It is the *animus* with which an act is done which constitutes its criminality. There must be a joint union of act and intention in every crime, and the intention, like the act, may be proved by direct or indirect evidence of the circumstances connected with the crime. Hence the conduct of a party before and after the principal fact in issue is admissible, not as part of the *res gesta*, but as a circumstance connected with the act indicating the guilty intent." *People v. Welsh*, 63 Cal. 167. It is permissible where motive is the important question to prove other transactions of a similar character. *Street v. State*, 7 Tex. App. 5; *Heard v. State*, 9 Tex. App. 1; *Cameron v. State*, Id. 332; *Williamson v. State*, 13 Tex. App. 514; *Jones v. State*, 14 Tex. App. 85; *Holmes v. State*, 20 Tex. App. 509.

But where, however, this is permissible, it is always important that the charge of the court should properly limit and restrict the jury, in their consideration of such testimony, exclusively to the purposes of its admission, lest they should give it unwarranted weight as evidence proving the main fact. *Kelley v. State*, 18 Tex. App. 262; *Holmes v. State*, 20 Tex. App. 509; *Alexander v. State*, 21 Tex. App. 407. In the otherwise unexceptionable charge of the court, we find that this important matter was entirely overlooked. It was, however, not excepted to on that ground, but the error is scarcely cured by the fact that in its application of the law to the facts the jury were restricted in their findings by the charge expressly and specifically to a rape committed on or about the twenty-seventh day of December, because, under express provision of the Code, a prosecution for rape must be commenced within one year, and not afterwards. Code Crim. Proc. art. 197. In view of this fact, it was most important—in fact, imperative—that the evidence of acts barred by limitation should be strictly confined to the legitimate purposes for which it was alone admissible and entitled to be considered. A failure to so restrict it is radical error of omission in the charge. See *Davidson v. State*, ante, 662.

It is a general rule that, in the direct examination of a witness, he shall not be asked leading questions, or, in other words, questions formed in such a manner as to suggest to the witness the answers desired of him. To this rule, however, there are a few exceptions. "Exceptions are recognized where the witnesses are unwilling, where they are of weak memory, and where such a mode of questioning is logically consistent with a fair and honest development of the case." Whart. Crim. Ev. (8th Ed.) § 454a. In *Mann v. State*, 44 Tex. 642, it was held that it is in the discretion of the district court to allow direct questions to a witness who shows an unwillingness to testify. In this case it is shown that the witness, on the examining trial, had positively refused to testify, and had to be confined in jail before she would consent to testify. In view of that fact, and the further fact that the witness does not appear to be at all bright, we can not say that the court erred in permitting the prosecution, on direct examination, to ask leading questions.

As charged in the indictment, the rape is alleged to have been committed by *force and threats*. It is, to our minds, left very uncertain from the evidence whether any "force" was used. The prosecutrix testifies that she was struck over the head with a pistol by defendant, but whether during the transaction, or before, on the same night, or at some other time, is not made manifest. It would rather seem that at the particular time whatever offense defendant committed was committed through means of threats, unaccompa-

nied by force, or attempted force, constituting an assault. Appellant was found guilty of assault with intent to commit rape: which offense can only be established by proof of force, or attempted force. Proof of threats, as a means resorted to in order to accomplish sexual intercourse with a female against her will, will not, when unaccompanied by force, authorize a conviction for assault with intent to rape, but would only authorize a conviction for an attempt to rape. *Burney v. State*, 21 Tex. App. 565. We call attention to this matter in view of another trial, where the defendant, having been acquitted of the higher offense of rape, is only liable to be tried for a lesser degree.

For the errors we have discussed, the judgment is reversed, and the cause remanded.

HOLST v. STATE.¹

(Court of Appeals of Texas. January 26, 1887.)

1. RAPE—COMPLAINT AS EVIDENCE.

The common-law rule obtains in this state that in rape cases neither the particulars of the injured female's complaint, nor the name of the person she mentioned as the offender, can be proved as original evidence, though they may be brought out by the defendant, if he chooses, upon cross-examination. See this case in illustration.

2. WITNESS—APPRECIATION OF OATH.

See the opinion *in extenso* for circumstances under which it is held that the prosecuting witness was incompetent to testify, because, even if intelligent enough to relate the transaction, she was not sufficiently intelligent to understand the obligation of an oath.

Appeal from district court, Jefferson county.

The opinion states the case. The state's testimony clearly established a rape by force. The defendant's testimony as clearly established an *alibi*. The jury gave credence to the state's witnesses to the extent of finding defendant guilty of an attempt to rape, and awarded him a term of two years in the penitentiary.

Huck, Jr., & Greer, for appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. Appellant was convicted below of assault with intent to rape, and presents his case here on appeal. The indictment charges the offense to have been committed upon Cordelia Holst, a female under the age of 10 years. Over objection, the state was permitted to make proof that Cordelia complained of the assault, and exhibited marks of violence. To this extent it was proper, in an ordinary case, that the testimony should go. The prosecution was further permitted to put in evidence the particulars of the complaint, and the name of the person she gave as her assailant. This also being objected to, its admission in evidence was erroneous. Upon this subject Mr. Bishop has well said: "Neither the particulars of the complaint, nor the name of the person whom she mentioned as offender, can by the English and more common American practice, thus be given. They may be brought out by the defendant, if he chooses, on cross-examination." 2 Bish. Crim. Proc. § 963.

In some of the states, however, it is held that the prosecution may call for these particulars, to an extent varying in the different states, in the first instance. In this state the holding on this question is with the common-law rule. In *Pefferling v. State*, 40 Tex. 487, the court says: "It is, we think, well established, by reason as well as by the great weight of authority, that proof of the particulars, and the detailed statement of the alleged facts and

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

circumstances connected with it, as was permitted in the court below, cannot be admitted as original evidence to prove the truth of the statements testified to by the injured party, or to establish the charge against the prisoner." And: "If the girl is too young or too little instructed in the nature of an oath to testify in the usual way, she cannot give the evidence otherwise; nor will proof of her declarations be admitted, and so the evidence is lost." 2 Bish. Crim. Proc. § 961. We conclude that there was error in admitting as original testimony evidence of the particulars of the girl Cordelia's complaint, and more especially the giving of the offender's name.

The child was in her sixth year at the time of the alleged assault, and had barely attained the age of seven when offered as a witness. When placed upon the stand, as preliminary to her examination, she was tested as to her competency as follows: "I do not know what the gentleman did [presumably referring to the administration of the oath] when I held up my hand. I do not know how old I am. I have never been to school. I know my A, B, C's. I do know where I live. I live in here Beaumont now. Last summer I lived down on the bayou." "When you were on the bayou, did you know how to go around to the neighbors' houses by yourself?" "Yes, sir; I would walk. I would go by myself, and come back by myself." "Do you know what would be done with you if you were to tell a story in the court-house?" "No, sir." "Have you been talked to about where you would go to if you were to tell a story and be a bad girl and then die?" "I don't know, sir." "Do you see anybody else in the court-house that you know?" "I see Cousin Slep; he is standing by that post out yonder. I do not see anybody else I know." *The Judge*: "If you were to tell a story while in the court-house, it would be very bad; very wrong. If you were to tell a story in the court-house, after being sworn, you might be sent to the penitentiary; or, if you were to die after telling a story, you might go to the bad man." *Examination Resumed by Counsel*. "I do know Edward; there he sits." *The Judge*: "Cordelia, that is Mr. Leonard. We will be as good to you as we can be. You shan't be hurt. We are good to little girls here. When Mr. Leonard asks you a question, tell him as near as you can answer the question. Answer it just as you remember it; and, if you do not know, just tell him you do not know. This is Mr. Greer here. When he asks you a question, answer that, too."

Our law upon this subject provides that "children or other persons who, after being examined by the court, appear not to possess sufficient intelligence to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath, are incompetent witnesses." Code Crim. Proc. art. 730. By reference to the examination above quoted from the record, taken in connection with the child's manner of testifying in her after-examination, it is doubtful if she came up to the standard of intelligence demanded by the statute with respect to her ability to relate the transaction. But, if this qualification for competency be admitted, she unquestionably fell short in the other qualification, viz., that of being sufficiently advanced in intelligence to "understand the obligation of an oath." This fact was impressed upon the mind of the trial judge, as is evidenced by his effort to instruct the witness upon this subject. The evidence quoted shows that she did not know the fact that she had been sworn at all. Her answer was that she did not know what the gentleman did when she held up her hand, nor, it may be added, was she subsequently informed.

Was the instruction given by the court at the time this witness was placed upon the stand sufficient to bring to her mind a realizing sense of the obligation of an oath? Upon this subject Mr. Russell says: "The effect of the oath upon the conscience of the child should arise from religious [with us, moral] feelings of a permanent nature, and not from instructions confined to the nature of an oath, recently communicated to it for the purpose of a trial." When the child does not appear to adequately comprehend the nature and ob-

ligation of an oath, courts have often thought it necessary, for the purposes of justice, to continue the case, directing that the child should in the meantime be properly instructed. It is in the discretion of the court to continue for such a purpose. And, in a case for the want of this qualification, the incapacity arising from no neglect, but from being but six years old, and too young to be taught this obligation, POLLOCK, C. B., refused to postpone the trial; since he doubted whether the loss in part of memory would not more than countervail the gain in part of religious [moral] education." "Application to postpone in such a case should be made before the child is examined by a grand jury, or, at all events, before the trial is begun; since, if the postponement is after the jury are sworn, and the prisoner put upon trial, the judge cannot discharge the jury, but should direct an acquittal, if this be all the evidence; and, when the child is incompetent to be sworn, the account of the matter which she has given to others is inadmissible." 8 Russ. Crimes, 612. "But if the witness be an adult, and still does not possess sufficient intelligence to understand the obligation of an oath, it is not proper to postpone the trial in order that the witness may have an opportunity of being instructed upon the subject before the next term, as may be done in the case of a child." Id. 617. As also bearing upon this subject, *vide Taylor v. State, ante, 758.*

Cordelia Holst being incompetent to testify because not possessing sufficient intelligence to understand the obligation of an oath, the objections of the defendant to the admission of her testimony should have been sustained.

For this error of the court below, and for that considered in the opening of this opinion, the judgment is reversed, and the cause remanded.

ROLLINS v. STATE.¹

(Court of Appeals of Texas. December 8, 1886.)

FORGERY—INDICTMENT—VALIDITY OF FORGED INSTRUMENT.

It is an established rule that a written instrument, to be the subject of an indictment for forgery, must be such as would be valid, if genuine, for the purpose intended. If void or invalid upon its face, and it cannot be made good by averment, the crime of forgery cannot be predicated upon it. In other words, if the instrument is absolutely void upon its face, it cannot be made the subject of forgery; but, if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery. The indictment describes the instrument involved in this case as follows: "July 3, 1885. *Appollas* [meaning Appollas] & [meaning "and"] *Halsal*: Please let Mr. G. B. Rollins [meaning Mr. G. B. Rollins] Have \$400d. [meaning four dollars] in goods, and oblige. Charge to me. JOEL ELLER, [meaning JOEL ELLER]." Held sufficient, under the rule announced above, to support the assignment of forgery; wherefore the motion to quash the indictment was properly overruled.

Appeal from district court, Collin county.

The conviction was for forgery, and the penalty assessed was a term of two years in the penitentiary. J. S. B. Appollas, the senior member of the firm of Appollas & Halsal, merchants at Weston, Collin county, Texas, testified, for the state, that the defendant presented the order described in the indictment, and asked for goods on the same. Explaining the said order to witness, he said that the order called for four dollars in goods, and that the same was written by Mr. Joel Eller in person, in his presence and view. He said that he could not explain why Mr. Eller placed the dollar mark between the two noughts and the figure four. Upon the faith of the order and the statements of defendant, witness delivered to him four dollars worth of goods. On that same evening Mr. Joel Eller came to the store, and pronounced the order a forgery. Joel Eller testified for the state that the order in evidence, purport-

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas Court of appeals.

ing to have been executed by him, was a forgery. He never executed the said order.

Johnson & Jenkins, for the appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. The appellant was convicted for forging the following order, addressed to Appollas & Halsal, and purporting to have been drawn by Joel Eller.

"JULY 3, 1885.

"*Apolas & Halsal*: Please let Mr. G. B. Rollins Have 4\$00d. in goods, and oblige. Charge to me. JOEL E3LER."

Appellant relies upon three propositions for a reversal of the judgment: (1) The indictment should have been quashed, because it did not set out an instrument upon which forgery could be assigned. (2) The court erred in permitting a witness to explain or construe the instrument alleged to have been forged; that the instrument, as it was written, and without explanation or construction, must be such as would, if true and genuine, have created, increased, or diminished some pecuniary obligation of Joel Eller; that a witness should not be permitted to come into court and translate marks by stating what appellant said they meant; if so, appellant would be tried and convicted of forgery for what he said certain marks meant, and not on the written instrument. (3) A new trial should have been granted because the indictment alleged that the order was forged on Joel Eller, and the instrument bears a different signature.

We are impressed with the belief that a correct solution of the first proposition will dispose of the necessity of considering the others. We have copied above the original instrument, and the question presented is, can forgery be predicated or assigned upon said instrument? We will state what we understand to be the rules relative to this question. (1) "When the law to which an instrument is subject makes it absolutely and everywhere inoperative without certain formalities, then, falsely to make it without such formalities is not forgery. Thus, if certain witnesses are necessary to make a deed or will, falsely making a deed or will without such witnesses is not forgery." Whart. Crim. Law, § 697. "But to further illustrate, if the law forbids the circulation of notes below a certain denomination, this does not release a person from forgery. For the banker may be made liable on such notes, the prohibition going only to a circulation, and there is also a possibility of defrauding third persons." Whart. Crim. Law, § 699. (2) "If the instrument is *prima facie* capable of legal use, it is forgery." Id. 695. "That the instrument, in order to make it *prima facie* proof, must appear upon the face of it to have been made to resemble a true instrument, so as to be capable of deceiving persons using ordinary observation, although those not scientifically acquainted with such instruments may not be deceived." Id. 700. "Whether a particular writing is sufficient on its face may be a question of difficulty. If a writing is so far incomplete in form as to have an apparent uncertainty in law whether it is valid or not, it does not follow that it may not be the subject of forgery. In such a case the indictment must allege such extrinsic facts as will enable the court to see that, if it were genuine, it would be valid." 2 Bish. Crim. Law, § 545. Hence we may conclude that, if the instrument appears upon its face to be absolutely void, it cannot be the subject of forgery. But if the legality be doubtful, and by proper allegations its legality is capable of being shown to the court, it is a subject of forgery.

In *People v. Harrison*, 8 Barb. 560, Mr. Justice HUBBARD states the rule thus: "The rule seems, therefore, firmly established that a written instrument, to be the subject of an indictment for forgery, must be valid, if genuine, for the purpose intended. If void or invalid on its face, and cannot be

made good by averment, the crime of forgery cannot be predicated upon it."

Now, it will not be contended in this case that the order in this case is absolutely void because of the want of formalities required by law. Hence, if obscure or of doubtful interpretation, by all the authorities it may be made the predicate of forgery by proper allegation of extrinsic matters, or, as in this case, by allegations explanatory of words, figures, and writing contained in the instrument; which are very admirably drawn in the indictment in this case. Now, we are not to be understood as holding that all instruments, though not absolutely void, can be made the predicate for forgery simply by allegations in the indictment. The instrument, by an inspection of it alone, independent of extrinsic matters or explanatory pleading, must, by its very terms, words, figures, and marks, appear to be that which by proper allegations *it is made to be*. Now, how does this instrument impress us? Though vague, uncertain, and without form or comeliness, still we are certain that it was intended for an order on Appollas & Halsal for four dollars in goods. And while we might not understand from the instrument itself whose signature was to the order, under the rules above stated this was made plain, and, as explained, is in harmony with the name to the order.

We are of the opinion that the order in question can be and was properly made the predicate for forgery. We are also of the opinion that the court did not err in permitting the state to prove the explanatory allegations in the indictment; this question depending upon the first. Nor did the court err in refusing to quash the indictment.

There being no error in the record, the judgment is affirmed.

PHIPPS v. STATE.¹

(Court of Appeals of Texas. December 11, 1886.)

LARCENY—OF A HORSE—EVIDENCE.

See the statement of the case for evidence in a theft case held not only insufficient to support the conviction, but contrary thereto.

Appeal from district court, Bosque county.

The conviction in this case was for the theft of a horse, the property of Billy Richards, in Bosque county, Texas, on the first day of October, 1885. A term of five years in the penitentiary was the penalty assessed by the jury.

William Richards was the first witness for the state. He testified, in substance, that he lived in Bosque county, Texas, between the towns of Clifton and Valley Mills. The horse described in the indictment, and others, all of which belonged to the witness, disappeared from their accustomed range, between the Bosque river and Childress creek, in September, 1885. A month later the witness heard of them at Wortham's Bend, 10 or 12 miles west from where he lived. He sent Jim McFadden to the Bend, and recovered all of his animals except the horse described in the indictment. The witness consented for no one to take his horse. The horse involved in this proceeding, a black mare, a gray mare, and a two year old horse mule, all save the mule branded plainly with the witness' brand, (the figure "6,") disappeared at the same time. The mule was unbranded. The range from which the horses were taken was in Bosque county, Texas.

Jim McFadden testified, for the state, in substance, that he lived about a mile from the witness William Richards, commonly known as Billy Richards, and had known the Richards horse for many years. In October, 1885, witness went to the house of the defendant, at Wortham's Bend, in Bosque

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county, saw the defendant, and described to him the Richards horses, for which he was then looking. Defendant replied that he had driven up some animals believing them to be the property of his brother Newt, but that, from witness' description of the animals, they must be the Richards stock. Defendant went off, brought the animals up, and turned them over to the witness. Witness, before this, met a man in Valley Mills who told him where the horses could be found, and witness told Richards, and Richards sent him to the Bend after the horses. After defendant turned the horses over to him, witness advised defendant to go with him to Valley Mills, and see Mr. Richards, and defendant did so. An affidavit was subsequently filed against the defendant, and witness, who was a deputy-sheriff, arrested him. Witness recovered the two mares and the mule for Richards, but did not recover the bay gelding,—the animal described in the indictment. Witness' information was that that animal's neck was broken in an effort to tame him to work.

Mr. Martin testified, for the state, that, in 1885, he lived in McLennan county, Texas, about six miles distant from Wortham's Bend, which was in Bosque county. Witness knew the defendant and his brother Newt. Before the latter left the country, he told witness he would pay him five dollars per head for all the horses in the figure "6" brand that witness would find and deliver to him. Some time afterwards the witness and Mr. Tom Wortham found the horses in the "6" brand, referred to by previous witnesses, on the Isenhow branch, in Bosque county. They went to the defendant, and asked him if his brother Newt owned such horses. He replied in the affirmative. Witness and Wortham then told him that, if he would pay them, they would conduct him to the said horses. Defendant paid them, and went with them, and the three (witness, Wortham, and defendant) penned the horses at Wortham's, and defendant afterwards turned them into Sam Cogdale's pasture. Witness had never seen any other horses in the figure "6" brand, and knew nothing about Newt Phipps owning any such horses. When the horses described were turned over to the defendant, he said that the figure "6" brand of his brother Newt was recorded in both McLennan and Bosque counties, and agreed to go to Meridian to see if anybody else gave the "6" brand. Defendant went to Meridian on the next day, and on his return said that he found the brand all right, and that it was given by no other person in Bosque county but his brother Newt. All this occurred in Bosque county, between the first and tenth days of September, 1885. Tom Wortham's testimony was substantially the same as Martin's.

George Davis testified, for the state, that he was a brother-in-law of Newt Phipps. Newt Phipps left Wortham's Bend nearly a year previous to this trial, since when the witness had not seen him. Some six or seven years prior to this trial the witness saw several horses branded "6" on the left hip, in Newt's possession, but had seen no such horses in his possession since.

F. B. Williams testified for the state that he lived in McLennan county, Texas, and for five or six years had owned the "McCowan estate" stock of horses. McCowan's brand was the letter "J" on the left hip. Newt Phipps bought that brand of horses before witness did, but, failing to pay for them, they were taken back by the vendor, and sold to witness. The original branding-iron got lost, and the blacksmith, in making a new iron, curled the letter the wrong way, and made a "6" instead of a "J." Six or eight colts were branded with that reversed "J" or "6" brand, high up on the hip. While Newt Phipps owned the McCowan stock he branded five or six colts "6," high up on the hip. Newt Phipps told witness, after witness bought the horses, that he had no claim on them.

T. B. Williams testified, for the state, that he was familiar with the McCowan stock of horses. McCowan's brand was the letter "J" on the left hip. He knew of no horses branded "6" running in that neighborhood. Newt

Phipps once bought the McCowan horses, but got into trouble about them, and returned them to McCowan, who died soon afterwards. The state closed.

George Jacobs testified, for the defense, that he made a crop on the place of the defendant's mother in 1885. Newt Phipps moved away from Bosque county in the summer of 1885. A week or two before he left Newt told witness and defendant that, if they would find and take up for him all horses branded "6" on the left shoulder, he would pay them five dollars a head, or give them half of the horses. Witness did not gather his crop in time to assist defendant in hunting such horses, a fact over which he now rejoiced. Newt Phipps left the country in a wagon drawn by a mule and a jennet, with a jackass tied behind.

No appearance for appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. The judgment of conviction for theft rendered in this case in the court is wholly by, and is contrary to, the evidence, as sent up to us in the record.

The judgment is reversed, and the cause remanded.

RUMMEL v. STATE.¹

(Court of Appeals of Texas. December 11, 1886.)

1. CRIMINAL PRACTICE—EXCLUDING WITNESSES FROM ROOM.

Note the opinion for circumstances under which the operation of the "rule" was correctly enforced against a defense witness.

2. SAME—PRAYER COVERED BY CHARGE.

However correct a special instruction may be, it is properly refused if its substance was given in the general charge.

3. LARCENY—OF A CALF—EVIDENCE.

See the statement of the case for evidence held sufficient to support a conviction for cattle theft.

Appeal from district court, Frio county.

The indictment charged the appellant and Manuel Ingle, jointly, with the theft of a calf, the property of one L. J. W. Edwards, in Frio county, Texas, on the twenty-ninth day of April, 1885. A severance being awarded, the appellant was placed upon his trial, was convicted, and awarded a term of two years in the penitentiary. It was affirmatively proved by the state that appellant and Ingle took possession of the Edwards animal near the residence of one Austin, separating it from its mother and other animals, and driving it off. The defense set up was that the animal was taken as the animal of one House, the employer of Ingle; but it was claimed to have been taken at a point many miles distant from the Austin place.

Price & Merriwether and *J. T. Biceps*, for appellant, controverting the rulings announced in the opinion. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. Appellant and Manuel Ingle were jointly indicted for the theft of a calf, the property of L. J. W. Edwards, and upon severance appellant was placed upon trial and convicted. Both parties called for the "rule," and the witnesses were sworn and placed thereunder. One Nuckols, who was in attendance on the court as a juror, was present at the trial, heard the testimony of Mrs. Rummel, a witness for defendant, and informed counsel for defendant, while she was testifying, or just after she had finished, that he knew some material facts in connection with her testimony. Counsel for appellant then offered Nuckols as a witness. The state objected because he had been present, hearing the testimony of the witnesses, and had not been under the

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

rule, and counsel for appellant stated that neither he nor his client was ever advised that Nuckols knew any facts, and especially the facts proposed to be proved by him. The learned judge rejected the witness, and the court took a recess for the space of two hours, awaiting the arrival of another witness. At the expiration of the two hours the court met, and the trial proceeded with the examination of the witnesses. After one witness had been examined for defendant, Nuckols was again offered, and the state again objected, also upon the ground that after hearing that Nuckols was a material witness for defendant, and his counsel had neglected to have him placed under the rule, but permitted him to remain in the court-room and hear the testimony of other witnesses to testify besides Mrs. Rummel. The court sustained the objection. In this there was no error. This disposes of the first and second assignments of error.

The third assignment of errors is: "The court erred in not giving the special charge asked by defendant." The charge reads: "The court instructs the jury that, if they believe from the evidence, that the defendant, Charlie Rummel, was aiding and assisting Manuel Ingle in gathering and driving the cattle of John House, and that they took a calf, the property of Edwards, and that the said Rummel at the time honestly thought that the calf was the property of John House, and took it in accordance with such belief, he is not guilty of theft, although Manuel Ingle may have known that the calf was not the property of John House. And if the jury have a reasonable doubt on this point, arising out of the evidence, the defendant, Charles Rummel, is entitled to the benefit of the same, if in fact they have a reasonable doubt as to the guilty intention of the defendant." This charge was very clearly required by the facts of this case, and, if not given elsewhere in the charge, this judgment must be reversed. The learned judge, however, refused this charge, because, he says, it is embraced in the general charge, and by referring to the latter clause of the fifth paragraph of the charge it will be seen that the principle contained in the special charge is clearly, affirmatively, and pertinently given to the jury; hence there was no error in refusing to give the special charge.

The last error assigned is that the court erred in overruling the motion for new trial, because the verdict is not supported by the evidence. We do not believe this ground well taken, and this court would not be warranted in reversing the judgment in this case for want of sufficient evidence to support the verdict.

The judgment is affirmed.

HILL v. STATE.¹

(Court of Appeals of Texas. December 15, 1886.)

1. PERJURY—EVIDENCE—JUDGMENT.

The appellant in this case being on trial for perjury, he introduced in evidence the judgment rendered in the civil suit between himself and the prosecuting witness. The judgment was properly excluded, because the parties to that suit are not the parties to this proceeding; because the civil suit was not a case *in rem*, nor the judgment in that case of a public nature; and because the civil judgment was not sought to be used by way of inducement, or to establish a collateral fact.

2. CRIMINAL PRACTICE—INSTRUCTIONS—EXCEPTIONS.

An erroneous charge of the court, in the absence of an exception, will not be revised, unless it appears that the same was calculated to injure the rights of the defendant.

Appeal from district court, Bell county.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

The conviction was for perjury, the false statements assigned as such appearing, in substance, in the statement of the case, and the penalty assessed against the appellant being a term of five years in the penitentiary.

It was proved by the state that, at a prior term of the court, one W. A. Hunt was tried upon an indictment charging him with illegally marking and branding the animal of the defendant, W. D. Hill. On that trial, defendant, as the prosecuting witness, testified that he *owned the animal marked and branded, and that he never sold the same to Hunt*. It was affirmatively proved that Hunt was acquitted, and that, prior to the prosecution of him, (Hunt,) the defendant sold him the animal, delivered the same to him, and received pay for the same. The defense proved that upon his acquittal of the charge of illegally marking and branding defendant's animal, Hunt remarked: "Well, if I did steal Hill's calf, I am clear now, and will keep out of such trouble in future."

Harris, Saunders & McDowell, for appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. This is an appeal from a conviction for perjury. W. H. Hunt, Jr., was indicted and tried for illegally marking and branding a certain calf alleged to be the property of the appellant. Upon this trial, appellant was a witness, and his testimony then given is assigned as perjury. Hunt was tried on April 20, 1884, and it appears from a bill of exceptions that Hunt sued Hill for the calf before a justice of the peace, in which suit Hill recovered a judgment for costs. This suit was instituted October 22, 1882. The indictment was presented against Hunt, October 11, 1883.

Appellant offered in evidence the record of trial and judgment in the case of *Hunt v. Hill*, relating to the title to the calf. The state objected upon the ground of irrelevancy, and the court sustained the objection and appellant excepted. In this there was no error. The parties to the first suit were not the same as in this prosecution. 3 Greenl. § 522. The suit between Hunt and Hill was not a case *in rem*, nor was the judgment in that case of a public nature. Id. § 526. Nor was this judgment sought to be used by way of inducement, or to establish a collateral fact, as is permitted in such instances as are treated of in section 527 of Greenleaf on Evidence.

The state, over the appellant's objections, introduced in evidence conversations between appellant and J. R. Graves, H. C. Pedigo, C. N. Porter, and one Hilliard, occurring at different times, in regard to trades of yearlings and other stock with W. H. Hunt, Jr. Appellant objected, because these conversations were had anterior to October, 1882, and because the matters established by these conversations were immaterial and irrelevant. By referring to the testimony of these witnesses it is found that the evidence elicited from them is quite pertinent, and very conclusive in its character; hence there was no error in its admission upon the grounds of irrelevancy. Nor can we see how the fact that these conversations occurred prior to October, 1882, could affect the question of competency.

The charge of the court is complained of because it does not define the word "willful." No objection was taken to the charge when given, nor were any special instructions requested, the correctness of the charge being called in question for the first time in the motion for a new trial. We are cited to several cases holding that it is necessary to define "willful." These decisions are correct when considered with reference to the offenses discussed, and the peculiar facts of the cases cited. When, however, considered with reference to this offense, and when the charge is taken as a whole, we do not think the omission contributed in the least to injure the appellant. Perjury is a false statement *deliberately* and *willfully* made. A false statement made through inadvertence, or under agitation, or by mistake, is not perjury. The court in its charge gave to the jury the above definition and restrictions in a very clear

manner. We cannot see how a party can deliberately, without agitation, coolly, without mistake or inadvertence, make a statement without such statement be "willfully" made. The omission, if error, not being objected to at the time, we must look to the entire record to ascertain if it was prejudicial to defendant, and, thus viewing the record, we perceive no injury.

It is urged that "the court erred in each and all of its charges to the jury, except the fourth, seventh, and eighth, because they are not law, and, if law, they are not warranted by the facts in evidence, in this: *First*. The charge of the court alleges that defendant is charged with perjury in the indictment, when in truth and in fact said indictment will not sustain a conviction for the offense of perjury." If the indictment be defective, why not move to quash, or in arrest of judgment? Why question the charge because it simply states that "defendant is charged with perjury in the indictment?" "*Second*. In the second charge the allegation of the indictment was not correctly stated." The false statements made by the allegations of the indictment are very clearly stated, and each of the false statements assigned for perjury is very distinctly presented to the jury with such instructions as to properly form an issue upon each statement.

In the fifth charge the court instructed the jury that they must find from the evidence, beyond a reasonable doubt, that the statements were false. Appellant does not object to this, but does object because the jury were not instructed that they must believe that defendant knew their falsity beyond a *reasonable doubt*. By referring to the charge it will be seen that the reasonable doubt is applied as well to the knowledge of defendant as to the truth of the statements. We have critically examined the charge with and without reference to the objections urged to it, but fail to find such error as demands a reversal of the judgment for error therein.

Counsel urge the insufficiency of the evidence to support the verdict. We have read the statement of facts several times, and must say we believe the verdict fully sustained by the evidence. The judgment is affirmed.

PATILLO v. STATE.¹

(Court of Appeals of Texas. December 15, 1886.)

MURDER—SELF-DEFENSE—INSTRUCTIONS.

See the opinion *in extenso* for a charge of the court on the subject of self-defense held erroneous; and the same for a special charge on the same question, which, being correct, should have been given.

Appeal from district court, Bosque county.

This conviction was in the second degree, for the murder of Daniel Bibbes, a term of 10 years in the penitentiary being the penalty assessed.

The shooting and killing of the deceased by the appellant were affirmatively established by the state. It was further proved that no weapon of any kind was found on the deceased's person immediately after his death. In his dying declaration, the deceased charged that appellant shot him about a girl, making no other statement. Two witnesses testified that shortly before the shooting, which occurred at night, defendant said that he intended to "paint the town red" that night, and that "somebody would have to eat dirt before morning."

The defense established a number of previous difficulties between defendant and deceased, all of which were provoked by deceased, and as well frequent threats uttered by deceased to kill defendant. From this point the evidence for the defense proceeds as follows:

Ramsey Cox, the railroad station master at Walnut Springs, testified for the defense that he saw the defendant and the deceased together on the depot

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

platform about 6 o'clock on the fatal evening. Deceased was not then drunk, but appeared to be drinking. The two were quarreling and cursing. After a short time, deceased produced a flask of whisky and took a drink. He then passed it to defendant, who took a drink, and returned it. Deceased put the flask back into his pocket, and said to defendant: "What I have said is so, and I don't take it back." Deceased then put his hand in his overcoat pocket, and defendant asked: "What does that mean?" Deceased replied: "That is none of your d—d business." Defendant said to him: "Dan, this is the third fuss you have raised with me, and if you do it again you had better look out." The deceased replied: "I will raise a fuss with you as often as I d—d please." Witness then stepped forward and said: "There is no use in you two quarreling; come on, Patillo, let's go to supper." Witness and defendant, who boarded at the same place, then went to supper, passing Ferguson's saloon, which was on their direct route. Witness went calling after supper, and returned to the depot about 35 minutes past 9 o'clock, being a few minutes tardy. Just as the witness got his key inserted into the lock of the depot door, three or four shots were fired. Witness went to the east end of the depot, some 15 or 20 feet distant, looked up the street, and saw nothing. Two parties went to the end of the depot with the witness. One of those parties remarked that shooting in that town was common, and indicated nothing, and witness went back into the depot. In going from the depot door to the corner, and thence into the depot, he occupied about a minute of time. He occupied another half minute at the telegraph instrument, reporting the train. He then wrote a short letter, occupying perhaps three minutes. He then spoke a few words to some boys present, and closed the depot and started home. When he reached a point on the platform about 25 steps from his door, the defendant appeared and said: "Hold on, Cox, I want to tell you something." Not less than five nor more than fifteen minutes had then elapsed since the shooting. Defendant said: "I have shot Dan Bibles." Witness replied: "The h—ll you have!" Defendant said: "Yes, but I don't know whether I killed him or not." Witness then asked defendant how the shooting occurred. He said: "I was on the depot platform immediately after the train came in. Dan Bibles passed me, looked in my face, and then turned back and passed me again. I waited until I thought Dan had time to get home. Then I started, and, after passing Ferguson's saloon, Dan Bibles called to me to hold on. I was on the sidewalk a few yards past the saloon. Dan came up, cursing me, and asked why I didn't drink with him this evening, and I told him that I would not drink with any man that would talk about a girl as he had. Then Dan advanced on me, and threw his hand behind him. I told him to stop, and he kept on advancing, and I shot him." Witness advised defendant to leave, and said to him: "You know where my horse is, and I have three hundred dollars which is at your service." Defendant said: "No; I shot Bibles in self-defense, and I won't leave." About 30 minutes later, witness and defendant went to the house of Deputy-sheriff Shider, and defendant surrendered.

Lockett & Lockett, J. A. Martin, and Flint, Anderson & Anderson, for appellant. Asst. Atty. Gen. Burts, for the State.

WHITE, P. J. Appellant's conviction in the lower court was for murder in the second degree, with punishment assessed at 10 years in the penitentiary. It is made to appear by the evidence that, some two or three weeks prior to the homicide, appellant and deceased, Dan Bibles, had a difficulty in a billiard saloon, in which the deceased attempted to strike defendant with a billiard cue, but was prevented. After defendant left, the deceased said: "If ever I have another fuss with Will Patillo, I'll cut his G—d d—d heart out, and kick it around like a foot-ball." Then, as if talking to himself, he said: "I'll cut his G—d d—d heart out." Defendant was told of this

threat the next day by the witness Ferguson. It was in evidence that the deceased was peaceable when sober, but quarrelsome, violent, and dangerous when drinking. The homicide occurred at about 9:35 o'clock in the evening. About 6 o'clock that evening, the parties, deceased and defendant, were seen on the depot platform; quarrelling and cursing each other. Deceased was drinking.

There was no eye-witness to the shooting, but defendant's statement as to how it occurred, made to the witness Cox within between five and fifteen minutes after it had taken place, was as follows: "I was on the depot platform immediately after the train came in. Dan Bibles passed me, looked in my face, and then turned back and passed me again. I waited until I thought Dan had time to get home. Then I started, and, after passing Ferguson's saloon,—I was on the sidewalk, and a little past the saloon,—a few yards,—Dan Bibles called to me to hold on. Dan came up, cursing me, and asked me why I did not drink with him this evening, and I told him I would not drink with any man that would talk about a girl like he had. Then Dan advanced on me, and threw his hand behind him. I told him to stop, and he kept advancing, and I shot him." Deceased was wounded four times, two of them—one of which was in the back—being mortal. After the shooting, and when deceased had reached his father's house and was undressed, his clothing was searched for weapons, and nothing was found in them except a pocket-knife in his pants pocket, and it was unopened.

Numerous exceptions were taken to the charge of the court to the jury; and, while that portion relative to murder of the first degree is seriously objectionable in some respects, we do not deem it necessary to discuss it, since defendant was acquitted of that degree of murder. As to murder of the second degree, we see nothing very seriously or radically defective in said charge.

We propose mainly to notice the instructions upon self-defense. As given in the general charge, the law upon this branch of the case is thus stated, viz.: "When a person is attacked by another person, it is not necessary that he should retreat in order to avoid the necessity of defending himself from the assault of his assailant, but he may stand his ground, and repel such assault; and if there is danger, or apparent danger, of losing his life, or of suffering serious bodily harm, at the hands of his assailant, he may, in such case, take the life of his assailant, for the purpose of protecting himself from such danger, or apparent danger." This charge was specially excepted to because it failed to instruct the jury that they were to consider the apparent danger as it appeared to defendant.

The objection is well taken. Without explanation, the jury would naturally consider appearances of danger as they appeared to them from the evidence, and not as they appeared to the defendant at the time he acted in the premises. The jury could see from the evidence before them that deceased, though he threw his hand behind him, did in fact have no pistol, and might conclude from that fact that there was no apparent danger. But the question was not how it appeared to them in view of the evidence, but how did the matter appear to defendant? "It is a rule, not only statutory, but of almost universal acceptance, that a party may act upon reasonable appearances of danger, and that whether the danger is apparent or not is always to be determined from defendant's stand-point." *Brumley v. State*, 21 Tex. App. 223, and authorities there collated; *Bell v. State*, 20 Tex. App. 445; *Horbach v. State*, 43 Tex. 242.

Defendant's counsel attempted to correct this defect in the charge by a requested instruction which the court refused, and which was as follows, viz.: "If the jury believe from all the facts before them that deceased, Daniel Bibles, made an assault upon defendant, W. L. Patillo, and that the assault was made in such manner as to reasonably cause defendant to apprehend that

his life was in danger, or that he was in danger of serious bodily injury, from the assault, then defendant would be permitted by the law to defend himself by any means in his power; and, if he commenced to shoot as a means of defense, he would be justified in continuing to shoot until he had reason to believe that he was out of danger."

We are of opinion the court did not err in refusing the second special requested instruction, with regard to threats. As therein announced, the legal proposition would be correct if the threats were uncommunicated, as was held in the celebrated *Case of Stokes*, (for the killing of Fisk,) 53 N. Y. 164; Whart. Hom. (3d Ed.) § 694; Hor. & T. Cas. 927. But this is not the rule with regard to communicated threats. In such case the presumption is as great, to say the least of it, that the threatened party would commence the attack as that it would be commenced by the party making the threats. We are of opinion the charge of the court, as given, presented correctly the law of threats as laid down in article 608, Pen. Code, and as applicable to the facts of the case. But, for the error of the charge as above pointed out, and for error in refusing defendant's special instruction, *supra*, the judgment is reversed, and the cause remanded.

HURT, J., has doubts about the distinction made between the rule as to communicated and uncommunicated threats.

WATTS v. STATE.¹

(Court of Appeals of Texas. December 15, 1886.)

1. CRIMINAL PRACTICE—VENUE—DE FACTO COUNTY-SITE.

To this prosecution, which was being had at the town of Marfa, the appellant set up by special plea that Fort Davis, and not Marfa, was the county-site *de jure* of Presidio county, and that although the town of Marfa was clothed with all the *indicia* of the county-site, and was, as shown by the facts set up in said plea, the *de facto* county-site, still the court had no authority to sit and try causes at Marfa; the said Marfa being merely the *de facto* and not the *de jure* county-site of Presidio county. Held, that the trial court properly overruled and struck out the special plea, and excluded evidence in support of it, inasmuch as the jurisdiction of the court was amply supported by the *de facto* character of Marfa as the county-site. The authority of the court to try the case at the *de facto* county-site cannot be assailed in a collateral proceeding; nor is the validity of a judgment rendered by the court holding its session at the *de facto* county-site affected by a subsequent adjudication, by competent jurisdiction, in a direct proceeding in favor of another point as the *de jure* county-seat. See the opinion *in extenso* on the question.

2. INDICTMENT—DISCHARGE OF ONE GRAND JUROR.

Neither the validity of the indictment, nor of the proceedings on the trial, is affected by the discharge by the grand jury of one of their number before the presentment of the indictment. The power to discharge one of its members is not vested in the grand jury, wherefore such a discharge is a nullity and is absolutely void. Moreover, nine members of the grand jury constitute a quorum of that body for the transaction of business.

3. DISORDERLY HOUSE—EVIDENCE.

See the statement of the case for evidence held sufficient to support a conviction for keeping a disorderly house.

Appeal from county court, Presidio county.

The conviction in this case was for keeping a disorderly house, and the penalty imposed by the verdict was a fine of \$200.

It was incontestibly proved, on the part of the state, that the defendant was the proprietor of a saloon situated in the town of Fort Davis, Texas, and that a dance-hall and certain attached buildings and an unattached building, occupied by notorious prostitutes, were under his proprietorship, he receiving

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

money from the said prostitutes in payment of rent for the rooms in the said buildings so occupied by them.

A. V. D. Old, for appellant, insisting that the trial court erred in striking out his special plea, and refusing to admit evidence to support it.

Asst. Atty. Gen. Burts, for the State.

WILLSON, J. This conviction is for keeping a disorderly house. The defendant, by a special plea, challenged the right of the court to try the cause at the town of Marfa, alleging that said town was not the county-site of Presidio county, but that Fort Davis was the county-site of said county. This plea set forth at length the facts relating to the county-site question in said county, and by those facts it is shown that, at the time of the trial of this cause, it was claimed by the county judge and other officials of said county that the said town of Marfa was the legal county-site of said county, made so by an election held for that purpose, and said county officials had moved the public records of said county to said town of Marfa, and transacted the public business of the county at said place, and recognized said place as the county-site of said county. In other words, the facts recited in said plea show that, at the time of said trial, the town of Marfa was the *de facto*, if not the *de jure*, county-site of said county. Said plea was stricken out by the court, and the court refused to hear proof in support thereof. In this action of the court there was no error.

The jurisdiction of the court to try this case at Marfa did not depend upon the question whether or not Marfa was the county-site *de jure* of Presidio county. It being *de facto* the county-site was sufficient to give the court jurisdiction; Marfa was being occupied and recognized as the county-site under color of authority of law,—under color of its having been selected and established as such county-site in the mode provided by law. The plea sought to inquire into and determine whether it was the county-site *de jure*. This question could not be raised collaterally. If Marfa was not rightfully and legally the county-site, being such *de facto* its legality as a county-site could only be inquired into and determined by some direct proceeding had for that purpose. Such direct proceeding has been taken, and our supreme court, since this conviction was had, in such proceeding decided that Fort Davis and not Marfa was the county-site *de jure* of Presidio county. *Caruthers v. State*, 2 S. W. Rep. 91. But, as before stated, Marfa, at the time the trial and conviction in this case were had, was the county-site *de facto*, and, being so, it matters not in this case that it was not the county-site *de jure*. This question is analogous to a collateral attack made upon the authority of an officer *de facto*. The authority of a *de facto* officer cannot be questioned collaterally. His official acts, until ejected from office, are valid. *Aulanter v. The Governor*, 1 Tex. 653; *McKinney v. O'Connor*, 26 Tex. 5; *Ex parte Call*, 2 Tex. App. 497. We are of the opinion that the trial of the case at Marfa was legal and valid, notwithstanding said town was not the legal county-site of Presidio county at the time.

That the grand jury which presented the indictment had, before such presentment, excused one of its members for the term, leaving only 11 members of said jury, presents no good ground for a reversal of the conviction, nor does the fact in any manner affect the validity of the indictment. *Smith v. State*, 19 Tex. App. 95.

We find that the evidence amply supports the conviction, and that the charge of the court is applicable to the evidence, and, when considered as a whole, is correct. The judgment is affirmed.

STEAGALD v. STATE.¹

(Court of Appeals of Texas. December 1, 1886.)

1. MURDER—SENTENCE—FINAL JUDGMENT.

Since the adoption of the Texas Revised Statutes, it is no longer necessary that the final judgment in a capital conviction for murder shall recite the mode of execution.

2. CRIMINAL PRACTICE—APPEAL—JURY—SPECIAL VENIRE.

The record on appeal in a capital case should show affirmatively that a *special venire* was ordered.

3. SAME—ARRAIGNMENT—PLEA.

The failure of the record on appeal to show an arraignment of the accused and his plea will require the reversal of a conviction. But if the record shows the plea of not guilty, and is silent as to arraignment, the presumption that the accused was properly arraigned will obtain.

4. JURY—OPINION OF JUROR.

A proposed juror admitted that he had formed an opinion respecting the defendant's guilt or innocence, and that it would require evidence to remove it. He stated, further, that the opinion was formed upon hearsay, which he valued little, and that he could render an impartial verdict upon the law and the evidence. *Held*, that the juror was qualified, and not subject to challenge for cause.

5. EVIDENCE—PRIVILEGED COMMUNICATIONS.

Declarations made by the defendant to or in the hearing of a physician in professional attendance upon him do not, under the statutes of this state, come within the class of privileged communications. See the statement of the case for evidence of this character held both pertinent and admissible.

6. SAME—PREDICATE.

As a predicate for the introduction of the written testimony of certain witnesses taken before an examining court, the state introduced the affidavit of one M., which, in conformity with the statute, recited the fact that the said witnesses were beyond the limits of this state, having removed to the state of Tennessee. The defense disputed the truth of this recital of the affidavit, and requested the trial court to place the affiant, M., who was present in the court-room, upon the stand, so that he might be tested as to his means of knowledge of the allegations made in his affidavit. The trial court sustained the predicate as laid, and refused to allow the examination of M. as to his means of knowledge. *Held*, that in the latter ruling the court erred. See opinion *in extenso* on the question.

7. MURDER—CHARGE OF THE COURT.

The indictment in this case charged a murder by personal violence, and with malice aforethought. The trial court charged, as a part of the law of murder of the first degree, that "all murder committed by poison, starving, torture, or with express malice, or committed in the perpetration, or in an attempt at the perpetration, of arson, rape, robbery, or burglary, is murder in the first degree." *Held* error, but immaterial error in view of the fact that the same was cured by subsequent portions of the charge; the rule being that, in testing the sufficiency of a charge of the court, it must be considered as a whole.

8. SAME.

The general charge of the court should always include the instruction that, if the jury do not believe the defendant guilty, they should acquit. The omission of such instruction has the tendency to impress the jury with the belief that, in the opinion of the court, the defendant was, under no circumstances, entitled to an acquittal, even if they believed him not guilty.

9. SAME.

See the statement of the case for instructions of the court, given in response to questions by the jury, held not to be obnoxious to the objection that they were not responsive to the issues in the case.

10. SAME—CHANGE OF VENUE—NEW TRIAL.

See the opinion *in extenso* for circumstances under which the trial court, in a murder case, having in the first instance erroneously declined to change the venue of its own motion, should have awarded the defendant a new trial, and note the comments of this court upon the proceedings in the lower court upon the trial of this case.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

Appeal from district court, Clay county.

The death penalty was assessed against the appellant upon his conviction in the first degree for the murder of the infant child of his unmarried daughter. That the infant was the result of his own incestuous intercourse with the mother was one of the motives imputed to him by the state.

The statement of facts covers about 50 pages of the record. A critical analysis of it, however, is not essential to this report. Briefly, it discloses the following facts:

On the morning of Friday, January 15, 1886, the appellant applied to Dr. Bittick to attend his wife, in child-bed, representing her as being then in labor. Before reaching appellant's house, appellant told the doctor that the patient he was about to serve was not in fact his wife, but an unfortunate young lady then visiting his house. In this connection he asked the doctor to preserve the fact of the birth of the child a secret, insisting that it was the doctor's professional duty to do so under the circumstances. He claimed that no one knew of the young lady's condition but himself and an old woman who could be relied on to keep the matter secret. The doctor urged the impossibility of the birth being kept secret, as the child would be evidence of its own birth. Appellant replied that he expected it to be a still-born child. The doctor refused to take charge of the case unless the appellant procured the attendance of witnesses, which appellant declined to do. Finally it was agreed that the doctor should return to town, and get Dr. Galloway. When the two doctors reached appellant's house, they found a young woman in the rear room of defendant's house in labor, the labor progressing slowly. Dr. Galloway remained but a few minutes. Dr. Bittick remained until the child was born, on the evening of the succeeding day, Saturday. While the child was being dressed in the front room by Mrs. Steagald, appellant's wife, the approach of two ladies was observed, when Mrs. Steagald fled with the child into the rear room, closing the door. Appellant met the ladies at the door, who asked him how his daughter was. Appellant replied that she was too ill to see company, and this was the first intimation the witness had that the young mother was appellant's daughter. There was one old woman about the house besides Mrs. Steagald, the appellant's son, 17 years of age, and his two younger daughters, aged, respectively, 13 and 11. The young woman's condition, when witness first reached her, was critical. Her bowels were active, a condition not usual in pregnancy. She had contracted a cold, and her womb was out of order. Drastic purgatives would produce the disorder of bowels, and were capable of producing abortion. Witness could not say that any medicines had been administered to the patient prior to his arrival. On the night before the child's birth, the appellant, in a conversation with witness, expressed wonder that certain medicines could be administered to women in pregnancy which would destroy the fetus without danger or harm to the woman. Witness disputed that such medicine was known. On Sunday night, witness was again called to see the defendant's daughter, and pronounced her beyond hope of recovery. Not seeing the child, he asked for it, and appellant said that he had given it to an old couple in the country to raise. On Monday evening the young mother died. On Tuesday night, Dr. Ferris brought the dead body of an infant to witness' house, which witness identified as the child born to defendant's daughter on Saturday evening. Witness did not handle the body, but saw its head manipulated by Dr. Ferris, and became satisfied that its neck was broken. He was unable to say whether its neck was broken before or after death, or whether it died or was killed.

It was proved by the state that, after the inquest on the body of the mother closed, on Tuesday, search was made for the body of a child, the *post-mortem* examination disclosing a recent birth, which resulted in the finding of the body of the child packed in a small box, and stowed away in the garret. The head was crushed in; the neck and one arm broken. None of the medical

witnesses were able to testify when the child died, but it had not yet been washed and dressed. None of them could swear that the wounds on the body were inflicted *before* death, but all concurred in the opinion that, *if* the head was crushed and the neck broken *before* death, those injuries were the immediate cause of death. Discoloration about the fracture on the arm induced one of the medical witnesses to believe that *that* fracture was made before death, but he would not positively swear to that fact.

The written testimony of John, Emma, and Fannie Steagald, son and daughters of defendant, taken on the examining trial, was to the effect that on Sunday morning the defendant forbade them mounting into the garret to play, as had been their custom. It was further proved for the state that the mother of the child had no male associates or intimates, and was always attended in public by her father, the defendant; that, for a year prior to the death of the former, she went daily to the Presbyterian church, often accompanied by defendant and nobody else, to practice on the organ; that the two would remain alone in the church sometimes for hours at a time, the church door being closed and locked, the organ playing, and silence pervading the church alternately.

The opinion sets out that part of the motion for new trial considered in the opinion.

W. G. Eustis, A. M. Jackson, Jr., and N. P. Jackson, for appellant.

We rely on the following assigned errors: (1) The record should show that a *special venire* was ordered, summoned, and drawn according to law. Code Crim. Proc. arts. 606-610; *Handline v. State*, 6 Tex. App. 847, 21 Tex. App. 277. (2) Except by formal recital in the judgment, the record fails to show the arraignment or plea of defendant. *Brown v. State*, 3 Tex. App. 303. (3) The predicate upon which the written testimony of the Steagald children was admitted in evidence was insufficient. The said predicate is disclosed in the opinion. The affidavit used as predicate is no part of the statement of facts "signed" by the trial judge, but appears at the close of the record. *Wade's Case*, 2 S. W. Rep. 594; *Sullivan v. State*, 6 Tex. App. 819-343; *Cooper v. State*, 7 Tex. App. 194; *Ruston v. State*, 4 Tex. App. 433; *Preston v. State*, Id. 186; *Haynie v. State*, 2 Tex. App. 169; *McWilliams v. State*, 44 Tex. 116. (4) There was no charge given on the presumption of innocence and the reasonable doubt.

We submit to this court that the evidence is wholly insufficient to support the conviction, and that it wholly fails to establish the *corpus delicti*, proving only the one element, viz., that the child is dead. *Pogue v. State*, 12 Tex. App. 291; *Rainey v. State*, 20 Tex. App. 455. Not a single witness pretends to avow the manner of the child's death, and not one undertakes to swear positively that the wounds found on the body were inflicted before death, or that death ensued from violence. Admitting, for the argument, that the *corpus delicti* was proved,—that the child was absolutely murdered,—there is no more evidence inculcating the defendant than there is inculcating the counsel addressing this court, or his honor who tried the case; and it is no more calculated to throw suspicion upon the defendant as the perpetrator of so horrible and revolting a butchery than it is calculated to enmesh in suspicion the strange woman who was present at the birth, but not at the burial, or the wife, or the son, or the surviving daughters of the defendant.

We submit, in conclusion, that the trial judge, vigilant as we know him to be to preserve the balance equally between the state and unfortunates tried before him, was derelict in his duty in failing and refusing to change the venue of his own motion. It is true that no statutory application for such change was filed,—an omission on the defendant's part explained by the fact that Judge Lynch proclaimed from the house-tops that if the venue was changed he would preside himself over the new forum, and would suffer the defendant to plead only from the end of a halter. We do not propose to review the

grounds upon which the new trial was applied for. The motion is pregnant with gross, but doubtless unconscious, outrage upon the judicial discretion, and speaks for itself. We do not deny that the trial judge, in ordinary cases, if he discovers no good reason why he should change the venue of his own motion, should refuse to entertain a request to do it unless it is predicated upon a proper affidavit; but we insist that when, under circumstances such as are disclosed by the motion for new trial in this case, it is made to appear to him that the mob surging around the court-house, having hanged the defendant once, was proclaiming under the very eaves of the court-house, that, unless tried and convicted then and there, they would hang him again from the very windows of the court-house, the trial judge should have changed the venue, instead of forcing the defendant to accept and to seek his own conviction, in order to escape the fury of the enraged populace.

Asst. Atty. Gen. Burt, for the State.

WHITE, P. J. A motion is made by the assistant attorney general to dismiss the appeal in this case, because "there is no such final judgment in the record as will support an appeal." Appellant was found guilty of murder of the first degree, his punishment being assessed at death. As set forth in the record, the judgment rendered by the court is in the following words, viz.:

"The State of Texas v. A. A. Steagald.

"TUESDAY, the thirtieth day of March, 1886.

"This day this cause was called for trial, and the state appeared by her district attorney, and the defendant, A. A. Steagald, appeared in person in open court, his counsel also being present; and the said defendant, A. A. Steagald, having been duly arraigned, and having pleaded not guilty to the indictment herein, both parties announced ready for trial, and thereupon a jury, to-wit, M. E. Ivie and eleven others, were duly selected, impaneled, and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer to consider of their verdict, and afterwards were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the court, and is here now entered upon the minutes of the court, to-wit: 'We, the jury, find the defendant, A. A. Steagald, guilty of murder in the first degree, and assess his punishment at death. M. E. IVIE, Foreman.' It is therefore considered and adjudged by the court that the defendant, A. A. Steagald, is guilty of murder in the first degree, as found by the jury, and that he be punished as has been determined by the jury,—that is, with death,—and that he be remanded to jail to await the further order of this court herein."

The objection to the sufficiency of this judgment is that it does not declare the mode and manner in and by which defendant shall be put to death; that is, that he shall "be hanged by the neck until he is dead." Before the adoption of our present Revised Penal Code and Code of Criminal Procedure, in 1879, it was essential to the validity of a final judgment inflicting the death penalty in a murder case that it should adjudge that the defendant should be condemned to be hanged by the neck until he is dead. *Shultz v. State*, 18 Tex. 401; *Burrell v. State*, 16 Tex. 147; *Calvin v. State*, 23 Tex. 578; *Trimble v. State*, 2 Tex. App. 303. Article 791 of the Revised Code of Criminal Procedure defines a final judgment, and sets forth what it must contain. When we apply its provisions to the judgment in this case we find the judgment conforms strictly to said provisions, and is, moreover, in literal compliance with the approved form set out in Willson's Criminal Forms, (No. 748,

pp. 356, 357.) The declaration of the mode and manner of executing the death penalty, under our present statutes, properly belongs to and should be embraced in the sentence of the court. "A sentence is the order of the court, made in presence of the defendant, and entered of record, pronouncing the judgment, and ordering the same to be carried into execution in the manner prescribed by law." Code Crim. Proc. art. 792. And article 827 of the Code of Criminal Procedure declares that "the sentence of death shall be executed by hanging the convict by the neck until he is dead." See, also, Pen. Code, arts. 70, 71.

We are of opinion that the judgment here presented is a valid and sufficient final judgment for murder of the first degree, inflicting the death penalty, and that the motion of the assistant attorney general to dismiss the appeal is not maintainable under our present statutes. Wherefore the motion is overruled.

Motion to dismiss the appeal overruled.

[NOTE.—The foregoing opinion on the state's motion to dismiss the appeal was rendered on the fifth day of June, 1886, at the Austin term of the court. Subsequently the case was submitted on its merits, by both parties, was taken under advisement by the court, and transferred to the Tyler branch, and there decided the opinion on the merits following.]

WHITE, P. J. This appeal is from a conviction for murder of the first degree, with death penalty, and the deceased is alleged to have been appellant's own child, and the illegitimate offspring of incestuous intercourse with his own daughter.

1. It is objected to the record sent up on this appeal that it does not affirmatively show that any *special venire* had ever been ordered, drawn, and summoned as required by law, before the trial in the lower court. Code Crim. Proc. arts. 606-610. "It is the duty of the clerk of a court from which an appeal is taken to prepare, as soon as practicable, a transcript in every case in which an appeal has been taken, which transcript shall contain *all the proceedings* had in the case," etc. Code Crim. Proc. art. 860. A *special venire* is one of the important and peculiar features pertaining to the selection of a jury for the trial of a capital case, and the record on appeal should show the proceedings with regard thereto. From other portions of the record we infer a *special venire* was ordered in the case. But such matters should not be left to inference; and where the statute makes it the duty of the clerk to send up all the proceedings, he should do so or be able to show a reason for not doing so,—as that the incorporation of the same into the record was waived by the appellant. Where mere irregularities occur in a transcript, this court may overlook or presume that that was done which should have been done, (*Smith v. State*, 21 Tex. App. 277; *Handline v. State*, 6 Tex. App. 347;) but such presumption cannot and will not be indulged where the proceeding goes to the very gist of one of a defendant's most important rights, given him by law when about to be tried upon a matter involving his life. No objection, however, appears to have been taken *in limine* to any matter pertaining to the *special venire*, and doubtless the provisions of the law were fully complied with. The transcript not showing this matter, if we had concluded to affirm the judgment otherwise, we would not do so until we had first ascertained, by means of a *certiorari* to perfect the record, that the proceedings not shown had been taken in conformity with the statute.

2. It is complained that the record does not show that defendant was ever arraigned under the indictment, and required to plead thereto, except by the formal recitals in the judgment, which, it is claimed, is insufficient. This question was sufficiently discussed, and the authorities cited in *Wilson's Case*, 17 Tex. App. 526. While the practice contemplated by the statute (Code Crim. Proc. arts. 508, 509) would seem to indicate the procedure as a separate

1 one preliminary to the trial proper, (*Smith v. State*, 1 Tex. App. 408,) yet the more common practice is, we believe, to arraign the defendant when he is called to plead to the indictment at the trial; and that is certainly sufficient under the comprehensive rule, now well settled, that, "if the record shows that the accused pleaded 'not guilty,' but is silent respecting the arraignment, this court, presuming that an arraignment was waived, will not reverse the judgment of conviction for want of an arraignment; but, if the record shows neither an arraignment nor a plea, the judgment would be set aside." *Plasters v. State*, 1 Tex. App. 673; *Wilson's Case*, *supra*.

3. Appellant's first bill of exceptions was as to the ruling of the court in holding the juror Sanders competent on the examination on his *voir dire*. Sanders did not show himself incompetent or disqualified. *Thompson v. State*, 19 Tex. App. 594; *Kennedy v. State*, Id. 619; *Johnson v. State*, 21 Tex. App. 368. Moreover, it is not shown by the bill that defendant had exhausted his peremptory challenges, and, unless that is shown, he has no right to complain. *Loggins v. State*, 12 Tex. App. 65; *Bean v. State*, 17 Tex. App. 60; *Heskew v. State*, Id. 161.

4. Appellant's second bill of exceptions was as to the admissibility of Dr. Bitlick's testimony of a conversation which he overheard between the defendant and his wife, while the witness was attending the mother of the child as physician, during her confinement. "A medical attendant is ordinarily without privilege even as to communications confidentially made to him by his patient. In the United States, however, statutes in several jurisdictions have been passed conferring this immunity, which statutes virtually prohibited physicians from disclosing information they derive professionally from their relations to their patient." Whart. Crim. Ev. (8th Ed.) § 516. We have no such statute in this state. That the testimony was relevant and pertinent there can be no doubt, because it went to establish a design and intent on the part of the accused, and to show his anxiety and determination to dispose of the child by sending it and its mother away, and thus keep secret the disgrace which had befallen his family.

5. A most serious question is raised by appellant's third bill of exceptions. It appears that, on the day on which the examining trial was had, John, Fannie, and Emma Steagald, minors, and children of defendant, were summoned to testify, and did testify at said trial, to certain facts of a damaging character against defendant. As a predicate for the introduction upon the trial below in this case of the written testimony of said witnesses, taken as aforesaid at the examining trial, one E. B. Mundy made an affidavit relating the circumstances of their testifying at the examining trial; and he deposed furthermore in said affidavit that the said witnesses, John, Emma, and Fannie Steagald, since the taking of said testimony, have removed from the state of Texas and from the jurisdiction of this court, and taken up their permanent residence in the state of Tennessee; and the said E. B. Mundy, in another and second affidavit, states that said parties are material witnesses for the state in this cause, and that they reside out of the jurisdiction of the court and in the state of Tennessee. Upon this predicate, the prosecution proposed to introduce in evidence the written testimony of the witnesses taken at the examining trial. Defendant's counsel objected, and asked the court to have the affiant, Mundy, who was there present in the court-room, sworn and tested under direction of the court as to his knowledge and means of knowledge of the fact stated by him, to-wit, that the said witnesses had removed from the state of Texas to the state of Tennessee, and were beyond the jurisdiction of the court; defendant at the time stating that said witnesses were not beyond the court's jurisdiction, and that affiant, Mundy, did not know the facts as stated by him in his affidavit. The court refused to have affiant, Mundy, called, sworn, and tested as to his means of knowledge, overruled defendant's objections to the evidence, and permitted the introduction of the

same before the jury. There is no question but that the affidavits in their allegations were in conformity with the requirements of the statute, (Code Crim. Proc. arts. 772, 773,) and established a sufficient predicate for the introduction of the testimony, provided the affiant, Mundy, was a "credible person," and knew the facts deposed to. Article 773 declares that, when such testimony is proposed to be used by the state, *the oath* prescribed may be made by the district or county attorney, "or any other credible person." No provision is made by law for controverting this oath; but we see no reason why it cannot be controverted, and, especially if in writing, by counter-affidavit made at the time when it was sought to be used as a predicate upon which to introduce the testimony of the absent witnesses. This seems to be the practice followed in the lower courts. *Ballinger v. State*, 11 Tex. App. 323; *Kerry v. State*, 17 Tex. App. 179. But "the oath" required by the statute is not required to be in the form of an affidavit, or even in writing. Code Crim. Proc. art. 772; *Post v. State*, 10 Tex. App. 579; *Pinkney v. State*, 12 Tex. App. 352; *Parker v. State*, 18 Tex. App. 72. It is an oath made by a credible person, presumably a statement in person under the sanctity of an oath, just as any other fact is testified to by witnesses at a trial; and we can see no reason why it cannot and should not be liable to be controverted and impeached in the same manner as any other testimony, both as to the credibility of the witness, his means of knowledge, and as to the truth of his statement. A credible person may swear to a fact, and yet it may be shown that his means of knowledge was so limited that he was mistaken as to the fact. An affidavit to a fact does not *per se* mean that the affiant had personal knowledge of the fact. *U. S. v. Moore*, 2 Low. 232, 4 Crim. Def. 398. The admission of this character of testimony rests solely upon necessity, and the rule as to its admission is an innovation upon the constitutional guaranty that in all criminal cases the accused shall have the right to be confronted with the witnesses against him. *Johnson v. State*, 1 Tex. App. 338. Such being the case, it is important that the facts which authorize its use be established by proof. *Menges v. State*, 21 Tex. App. 418. We are of opinion the defendant was entitled to have the affiant, Mundy, called, sworn, and tested as to the facts stated by him in his affidavits, and that it was error to refuse his request to that effect. It is true he filed no counter-affidavit controverting Mundy's affidavit; but this was not necessary, since Mundy's "affidavit" was not in conformity to, or rather not required by, the law,—the statute requiring an oath, and not an affidavit.

6. Appellant's fifth and sixth bills of exception relate to errors in the charge of the court. The sixth is a special exception to the third paragraph, which is in these words, viz.: "All murder committed by poison, starving, torture, or with express malice, or committed in the perpetration, or in the attempt at the perpetration, of arson, rape, robbery, or burglary, is murder in the first degree." As charged in the indictment, the crime was a murder committed by personal injuries, and with malice aforethought. There was no averment of any kind about either poison, starving, or torture, nor concerning the perpetration, or attempt at the perpetration, of arson, rape, robbery, or burglary, and there is not a *scintilla* of proof relating to any of these matters. It is true that, in distinguishing the two degrees of murder, the Code declares that either of those means, when used in its commission, constitutes murder in the first degree *per se*, (Pen. Code, art. 606;) but this article is no part of the definition of murder, (*Neyland v. State*, 18 Tex. App. 536,) and is never essential to be given in the language of the statute. On the contrary, it is worse than nonsense and folly to give any more of it than is exactly and precisely applicable to the case as laid in the indictment and made by the evidence. To illustrate: A shoots B. in a public street, with a shot-gun, of his express malice, nothing more, nothing less. Now, in the name of reason and common sense, what has arson, poison, robbery, starving, torture, or rape

to do with such a case? Not one particle more than a game of pin-pool, or the violation of the local option law, and perhaps not half as much. And yet all these matters are submitted to the jury only to confuse and confound instead of enlightening them distinctly in "the law applicable to the case." Code Crim. Proc. art. 677. See on this point the pertinent comments of Judge HURT in *Hackett v. State*, 13 Tex. App. 406. A charge "applicable to the case" means applicable to the case as averred in the indictment and made by the evidence. *Kouns v. State*, 3 Tex. App. 13; *Lister v. State*, Id. 17; Clark, Crim. Laws Tex. 515 *et seq.*, and note, 204.

The instruction quoted above was excepted to, and a bill of exceptions reserved. But for the fact that the patent error was cured in subsequent portions of the charge, where it was sought to apply the law to the facts, the error would have been fatal, and have necessitated a reversal. That a charge, however, is to be considered as a whole, and not by isolated paragraphs, in determining its validity and sufficiency, is the well-established rule of practice in this state, and if, as a whole, it is sufficient, the demands of the law are met. *Hart v. State*, 21 Tex. App. 163. Where an instruction is erroneous, and not afterwards cured in the charge, it will, if excepted to, be ground for reversible error, without inquiry as to the probability of injury done by it. *Niland v. State*, 19 Tex. App. 166; *Clanton v. State*, 20 Tex. App. 615; *Paulin v. State*, 21 Tex. App. 436. There is a striking omission in the general charge. The jury are nowhere told that, if they do not believe the defendant guilty, they should find him not guilty or acquit him. A failure to so instruct might have a tendency to impress the jury with the belief that, in the opinion of the court, the defendant, was, under no circumstances, entitled to be acquitted, even if they believed him not guilty.

Several requested instructions were asked by defendant and refused. We do not believe any error was committed in this respect, the instructions not being correct in law.

After their retirement, and after they had been considering the case for some time, the jury returned into court, and propounded several questions upon which they desired additional instructions from the court. These instructions the court gave in writing, and we believe that in the main they are substantially correct, and not obnoxious to the objections urged against them that they are not responsive to the questions asked or applicable to the facts in evidence.

We come now to the consideration of the motion for a new trial. Without going over or discussing any of the other grounds, we will, at the risk of prolixity, and because it is a most terrible arraignment of the fairness, justice, and impartiality of the trial and proceedings in the lower court, copy in full the thirteenth ground of said motion, as we find it in the record, as follows, viz.:

"(13) Because defendant did not get a fair and impartial trial, and such as is guarantied him by the constitution and the laws of the state of Texas, for the following reasons, to-wit: From the very day that defendant was first arrested, charged with the murder of said infant, the prejudice in Clay county has been so very great, continually up to this time, against defendant, that he has been wholly unable to obtain a fair and impartial trial; that a short time after his arrest, he was taken from the jail of Clay county by a mob of citizens of Clay county, and hung in the jail yard, and that the sheriff of Clay county, by force cut down said defendant just before life was extinct; that at another time, during the examining trial of defendant before BEN F. TURNER, justice of the peace, in the court-house of Clay county, a large number of citizens of Clay county obtained and prepared a rope with which to hang defendant out of the second story window of said court-house, and which was prevented by means unknown to defendant; that the people of Clay county have continually threatened to hang this defendant,

and still say that they will hang him, regardless of all law, if not hung by the law in Clay county, Texas; that said people of Clay county have organized, and did organize before the trial of this case, and agreed between themselves that, if a change of venue was granted defendant in this case, they would hang him before defendant left the court-house, or that, if this case was continued, that they would hang defendant at once, or that, if defendant was cleared by a jury, they would then hang him before he could leave the court-house; that at all times when this defendant was brought from the jail of Clay county to the court-house, said mob was there, ready, willing, and determined to execute their said threats; that the prejudice was so great against defendant that not a man could be found who was willing to risk his life and liberty by making an affidavit for a change of venue in this case; that the district attorney himself stated to defendant's counsel, and (as defendant is informed and believes) to the court, that the prejudice against defendant in Clay county was so great that he himself would make a motion to change the venue if there was any law authorizing him so to do; *that the honorable district judge who tried this case had full knowledge of the above facts, and that the defendant's attorneys, who were appointed by the court to defend him, applied in person to the court, and stated the above facts to him, and asked the court to change the venue of his own motion, as defendant could in no event obtain a fair and impartial trial in Clay county, which the court refused to do, giving no reason therefor; that, although defendant was not ready for trial, and his attorneys had only been appointed by the court to defend him a day or two before the trial, the defendant and his attorneys were forced and compelled to announce ready for trial, and go into the trial of this case, for the reason that they well knew, and had been told by a large number of persons then present in the court-house, that unless defendant did go into trial that said persons would then and there take defendant out of the charge of the officers by force, and hang him until he was dead, and defendant well knew that said persons were determined to do so; that in obtaining a jury to try said case, about three hundred persons disqualified themselves as jurors in defendant's case on the ground that they had formed an opinion as to defendant's guilt, and that said opinion formed was against defendant; that defendant was compelled to take several jurors who were on the jury that tried this case, who were wholly disqualified by reason of having formed an opinion, for the reason that he was bound to obtain a jury and try the case, or be hung by a mob; that in truth and in fact twelve men could not be found in Clay county who had not formed such an opinion as to the guilt or innocence of defendant as would influence them in finding a verdict, and that said prejudice is still so great against defendant in Clay county that the people say openly that if this case is reversed by the court of appeals that they will hang the defendant; that the prejudice was and is so great against defendant that the court found it almost impossible to get an attorney to defend defendant in this case, and that all the attorneys at the bar refused to defend defendant, and the court was compelled to require and force attorneys to defend this defendant.*

"Defendant further says that the reason he did not file his motion for a new trial within two days after the verdict of the jury was returned, and not before this time, is because the attorneys who were appointed by the court to defend the defendant in the trial of the case positively failed and refused to make a motion for a new trial, or appeal this case for defendant, although urged and requested by defendant so to do; the said attorneys giving as their reason that they had already done a large amount of work in this case, and that, if they appealed the case, they would make a large number of enemies in Clay county; and defendant says that he has been at all times, and still is, wholly unable to employ counsel or pay them a fee in this case. That he has no means whatever, and he has tried to get assistance from his friends, but

has wholly failed; and that, since the verdict of the jury was rendered in this case, this defendant has been without counsel to represent him or advise him until this, the fourteenth day of April, 1886, when the court appointed counsel to perfect this defendant's appeal. Wherefore defendant prays that this motion be entertained by the court, and the verdict of the jury and judgment of the court heretofore rendered in this cause be set aside, and a new trial granted defendant in this case."

This motion for a new trial was subscribed and sworn to by the defendant. If but one-tenth part of it be true, then there can be no question but that it should have been granted on account of error of the court in trying the case under such circumstances. One of the statutory grounds for a new trial is where the court "has committed a material error calculated to injure the rights of the defendant." Code Crim. Proc. art. 777, subd. 2. There is a direct charge, it will be noted, in this motion that the facts stated were known to be true by the trial judge. If the statements were not true, it would appear to have been an easy matter to deny and controvert them. It is provided by the statute that "the state may take issue with the defendant upon the truth of the causes set forth in the motion for a new trial, and in such case the judge shall hear evidence, by affidavit or otherwise, and determine the issue." Code Crim. Proc. art. 781. The language is, "the state *may* take issue." We will not say that it is the duty of the state to take issue in every case where a motion for new trial is made, as, for instance, where the ordinary formal grounds only are assigned, as that "the verdict is contrary to the law and the evidence, and the court misdirected the jury as to the law," and the like; but, where the integrity and impartiality and fairness of the trial is attacked, and the same is capable of proof, it seems to us but reasonable that the state should take issue upon the causes set forth, and that in such cases, unless the facts stated are in themselves patent and against the motion, the judge should hear evidence and determine the issue upon the evidence. *Reynolds v. State*, 7 Tex. App. 516; *Childs v. State*, 10 Tex. App. 183; *Stanley v. State*, 16 Tex. App. 399, 400; *Harris v. State*, 17 Tex. App. 559; *Moore v. State*, 18 Tex. App. 212.

If the facts surrounding the prisoner were such as are detailed as having taken place before the trial, and those facts were, as charged, known to the judge, and he had good reason to believe or was satisfied from said facts "that a trial alike fair and impartial to the accused and to the state" could not be had in the county, he should upon his own motion have ordered a change of venue to any county in his own or in an adjoining district, stating in his order the grounds for such change of venue. Code Crim. Proc. art. 576; *Cox v. State*, 8 Tex. App. 254. The power to change the venue of cases is by the constitution vested in the courts, to be exercised as provided by law. Const. art. 3, § 45; Code Crim. Proc. art. 18; *Cox v. State*, 8 Tex. App. 254; *Webb v. State*, 9 Tex. App. 490; *Bohannon v. State*, 14 Tex. App. 271. At all events, if information of such facts and circumstances as are stated was brought to the knowledge of the judge by the attorneys whom he had appointed to defend, and who were officers of his court, and who stated good and sufficient reasons why defendant was unable to make the statutory motion himself, it was his duty at least to inquire into the matter and hear testimony in order that he might know what his duty was in the premises, and act upon it accordingly. And if, as stated, the district attorney knew the facts, and that "on account of the lawless condition of affairs in the county a fair and impartial trial as between the accused and the state could not be safely and speedily had," "or that the life of the prisoner would be jeopardized by a trial in the county in which the case was pending," then the statute gave him the right to move, and it was his duty to move, for and try to obtain a change of venue. Code Crim. Proc. art. 577.

Among English-speaking peoples "the right of trial by jury" has always been considered, and Sir William Blackstone justly denominates it "the palla-

dium of civil rights." Our constitution requires that it "shall remain inviolate." Bill of Rights, § 15. As an essential factor in the protection of the life and liberty of the citizen, it is considered so important that our laws declare that "the defendant to a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case." Code Crim. Proc. art. 23. But he is not only entitled to a trial by jury, but our constitution characterizes the kind of jury which is to try him, and says, "the accused *shall have a speedy public trial by an impartial jury.*" Bill of Rights, § 10. Not only so, but it is also the will and policy of the law that the "trial shall be alike fair and impartial to the accused and the state." An impartial jury and a fair trial is what the state demands, and in her demands she is no respecter of persons. She has one law for all,—the high and the low, the rich and the poor, the friendless, the most debased and hardened of criminals. The greater and more horrible the crime charged the greater and more imperative the necessity that these safeguards—these landmarks of the law—should be constantly looked to and kept steadily in view, lest, perchance, they should be forgotten, denied, or ignored in those natural promptings of a manly, it may be, and certainly a human, instinct, which, standing appalled and outraged at the very contemplation of such heinous iniquity, condemned the suspected criminal in advance, and mainly, perhaps, through the magnitude and terribleness of his imputed crime. In such cases, when the popular mind is inflamed, and popular indignation is ready and clamorous to become the executioner of its own vengeance, it is the part of an honest, fearless, manly judiciary to uphold the standard of the law, and to vindicate its majesty and integrity regardless of all consequences.

This appellant may be guilty of one of the most horrible crimes ever known in the annals of crime in this or any other country. He may justly deserve to "die the death" that has been awarded him in this proceeding. But if, from the circumstances surrounding the trial which led to his conviction, there is ground to believe that the same was probably not fair and impartial, and if error prejudicial to the rights of the accused is manifest in the rulings of the court, it is the duty of this court, on appeal, to see that the conviction shall not stand, and that, if the defendant is to be hung, he be hung according to law.

For the errors we have pointed out and discussed the judgment is reversed and the cause remanded.

MAY v. STATE.¹

(Court of Appeals of Texas. December 17, 1886.)

1. CRIMINAL PRACTICE—CONTINUANCE—DILIGENCE.

Diligence to procure the attendance at the trial of an absent witness is essential to the award of a postponement.

2. MURDER—INSTRUCTIONS—DEGREES.

Charge of the court is properly confined to murder of the first degree when, as in this case, the evidence shows only a killing upon express malice, and negatives a homicide of a lower degree.

3. SAME—TESTIMONY OF ACCOMPLICE.

In the absence of testimony tending to inculpate a state's witness as an accomplice, the trial court properly refused a special charge upon the law of accomplice testimony.

Appeal from district court, Lamar county.

The appellant in this case was convicted in the first degree for the murder of one Henry Moore, in Lamar county, Texas, on the sixth day of January, 1885. A life term in the penitentiary was the penalty assessed.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

The state proved that, while walking along the highway behind the deceased, talking to him, the appellant deliberately shot the deceased through the head, explaining to the one witness that he had sent deceased word that he would kill him if he stole any more of Vincent's cattle. One witness for the defense testified that, a few days before the killing, deceased asked him where he could find defendant; that he was going to kill defendant for accusing him of cattle-theft; and that, knowing deceased to be a dangerous man, he (the witness) reported the threat to the defendant.

No appearance for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. 1. We perceive no error in the action of the court refusing defendant's application to postpone the trial of the cause. No sufficient diligence was shown to obtain the testimony of the absent witnesses. The facts expected to be proved by all the absent witnesses, except the witness Riggs, were proved by other witnesses on the trial, and were not controverted by the state. As to the facts expected to be proved by the witness Riggs, there is no probability whatever of their truth, as shown by the evidence adduced on the trial. Defendant's confession, and all the evidence in the case, conclusively contradict the existence of such facts.

2. It was not error to omit to charge the law of murder in the second degree and manslaughter. There is not a particle of evidence in the case which would demand or even warrant such charges. The evidence conclusively shows a clear case of murder upon express malice. When the evidence, as in this case, totally fails to raise an issue of a lower degree of homicide than murder in the first degree, the court need not and should not charge upon any lower grade of homicide. *Smith v. State*, 15 Tex. App. 189; *Darnell v. State*, Id. 70; *Davis v. State*, 14 Tex. App. 645; *Benevides v. State*, Id. 378; *Rhodes v. State*, 17 Tex. App. 579; *Bryant v. State*, 18 Tex. App. 107; *Johnson v. State*, Id. 385; *Jackson v. State*, Id. 586.

3. There was no error in refusing to give the special charge requested by defendant in regard to accomplice testimony. There was no evidence showing that the witness Crowder was an accomplice with defendant in relation to the murder. Defendant himself stated that Crowder had nothing to do with it, and the other evidence in the case corroborates his statement. It could not have changed the result had the special charge been given, and had the jury believed that Crowder was an accomplice, because his testimony was fully corroborated by other evidence.

4. There is no error in the charge of the court. It is a full, fair, and correct explanation of the law applicable to the case. The definition and explanation of express malice therein given is in accordance with the authorities. Willson, Crim. Forms, No. 710, p. 332, and cases there cited.

We find no error whatever in the conviction. The evidence establishes a most malicious and atrocious murder, and, but for the bad character of the deceased, the jury would doubtless have assessed against the defendant the death penalty. The judgment is affirmed.

TOOKE v. STATE.¹

(Court of Appeals of Texas. January 26, 1887.)

CRIMINAL PRACTICE—RIGHT OF ACCUSED TO BE HEARD IN PERSON.

The constitutional right of an accused to appear and be heard in person in his own behalf applies only to trial in the *nisi prius* court. See the opinion *in extenso* on the question.

Appeal from district court, Travis county.

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

The conviction in this case was for swindling, and the penalty assessed was a term of four years in the penitentiary.

No appearance for the appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. This appeal is from a sentence of four years in the penitentiary upon a conviction of swindling. Appellant is an attorney at law, and he has addressed a letter to the court requesting that an order be made to have him brought from the jail of Travis county, in which he is confined, to Galveston, in order that he may appear in person before and in person present to this court the appeal he has taken from the judgment of the lower court. We have caused his letter to be filed, and will treat it as a motion to that effect. As shown by the record appellant was represented in the trial court by three attorneys of the Austin bar, two of whom, at least, have for years been officers of this court, and are known to be attorneys of standing and ability. It is further shown that the case was conducted by them for the defense with skill and ability; at least, it is not shown by the record that anything was omitted by them in the conduct of the case likely to benefit their client. The question arising from the motion is, has an appellant in a criminal case a right to demand that he be allowed to present his appeal *in propria persona* in the court of last resort? We have been unable to find any case in which this precise question has been adjudicated, in our own or any of the courts of the United States.

It is provided in our state constitution that "in all criminal cases the accused shall have a speedy public trial by an impartial jury. * * * He shall have the right of being heard by himself or counsel, or both; shall be confronted by the witnesses against him," etc. Const. Bill of Rights, § 10. This identical provision is found in the constitution of 1845, (1 Pasch. Dig. p. 48,) and has been retained unaltered in each subsequent organic instrument. In the sixth article amending the constitution of the United States the provision is that the accused shall have the assistance of counsel for his defense. Rev. St. 7. Mr. Cooley says: "With us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel." Cooley, Const. Lim. (4th Ed.) 412. In addition to counsel, our constitution, it will be observed, gives him the right of being "heard by himself."

At *nisi prius* trials the right of being heard cannot be denied the accused. In *Word v. Com.*, 8 Leigh, 743, it was held that "upon the trial of a question of fact in a criminal case the accused has the right to be heard by counsel before the jury, and the court has no right to prevent him from being heard, however simple, clear, unimpeached, and conclusive the evidence in its opinion may be." And in *People v. Keenan*, 13 Cal. 531, the court say: "It is unquestionably a constitutional privilege of the accused to be fully heard by counsel. An opportunity must be afforded him for full and complete defense."

We are of opinion that a fair and legitimate construction of our constitutional provision limits the right of a defendant to be "heard by himself" to the *nisi prius* trial. The language of section 10 shows that the intention was to declare rights pertaining to the trial before a jury or court where the charge was being investigated on the introduction of evidence. This we think is apparent from the reading of the section, which is: "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or by counsel, or both; shall be confronted with the witnesses against him; and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense unless on an indictment of a grand jury," etc. Evidently these matters all relate to proceedings in the trial court; and the order

of argument in the trial court is specially provided for by statute. Code Crim. Proc. arts. 667, 668. That the construction we have placed upon the defendant's right to be heard in person is correct is further shown by the legislative declaration that "the defendant to a criminal action need not be personally present upon the hearing of his cause in the court of appeals; but he may appear in person in cases when by law he is not committed to jail upon appeal." Code Crim. Proc. art. 840. And "where the defendant appeals in any case of felony, he shall be committed to jail until the decision of the court of appeals can be made and received." Code Crim. Proc. art. 841.

Presentation and argument of cases on appeal are regulated by the rules of the court. In criminal cases the same rules as are prescribed for the supreme court in civil cases apply to the court of appeals. See 2 Tex. App. 637-639, 645. There is no rule other than that mentioned in article 840, Code Crim. Proc., contemplating the fact of the personal presence of the accused in the court of appeals on the hearing of an appeal. Besides, the fact that there is no law for such procedure, the impolicy of such a rule is strikingly apparent. In the first place there is no necessity for his appearance, since all the matters which can legitimately come before the court should be, and are supposed to be, in the transcript of the record. And again, if such a rule should be established or recognized, there is not an appealed felony case scarcely in which the right would not be claimed and demanded, and the state subjected to thousands of dollars of needless and useless expense in complying with it. We do not think that any such right is even contemplated, much less guaranteed, by the constitution and laws of the state; and we are further of opinion that the establishment of such a precedent would be decidedly detrimental to the pecuniary interests of the state, without proving of the least benefit to parties appealing. Appellant's motion to be brought in person before this court to enable him to present his appeal is overruled.

With regard to the disposition of the case upon its merits, we deem it only necessary to say that we have given this record our most mature consideration, and are constrained to declare that we have been unable to find in it any reversible error. Wherefore the judgment is affirmed.

SERIO v. STATE.¹

(Court of Appeals of Texas. January 8, 1887.)

1. RAPE—NOLLE PROSEQUI AS TO PART—INSTRUCTIONS.

The indictment in this case contained two counts, the first of which charged the rape of a child under the age of 10 years, and the second the rape of a woman by force, threats, and fraud. Held that, the state having entered a *nolle prosequi* as to the first count, it was no longer an issue in the case, and therefore the trial court, by charging the law of such a rape, committed a fatal error.

2. SAME—APPLICATION OF CHARGE TO "CASE."

The "case" to which the statute requires the charge of the court to apply means the case as made by the evidence. If, then, the evidence shows the rape to have been committed by one or two of the several means, viz., force, threats, or fraud, but not by all three of those means, it is error to charge the jury upon all three of the said means. In other words, though the indictment charged the three means, the charge should be confined to the means only that was proved by the evidence. See the opinion for instructions of the court held erroneous in the particulars indicated. Note, also, that the charge upon the subject of penetration, while correct in the abstract, is misleading, and therefore incorrect in its application to the case.

Appeal from district court, Cameron county.

The conviction in this case was for the rape of Concepcion, *alias* "Chona," Olivera, in Cameron county, Texas, on the tenth day of August, 1886. The death penalty was assessed against the appellant. The testimony for the state

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

established a rape by force *only*. The defense relied upon an *alibi*. The decision does not otherwise call for a statement of the case.

No appearance for appellant. *Asst. Atty. Gen. Burts*, for the State.

HURT, J. This is a conviction for rape, with the death penalty assessed. The indictment contains two counts: (1) That defendant had carnal knowledge of a female under the age of 10 years; (2) that the said Genaro Serio did feloniously and unlawfully make an assault in and upon said Concepcion, *alias* "Chona," Olivera, and did then and there, by means of said assault, and by force, threats, and fraud, and without the consent of the said Concepcion Olivera, *alias* "Chona" Olivera, then and there, rape and ravish, and have carnal knowledge of, the said Concepcion Olivera, *alias* "Chona" Olivera; she, the said Concepcion, *alias* "Chona," Olivera, being then and there a woman. Upon the trial a *nolle prosequi* was entered upon the first count, and hence the appellant was tried alone upon the second count.

The record furnishes not the slightest fact or circumstance tending to show that the rape was accomplished by *threats* or *fraud*. The court, however, charged the jury as follows: "(1) You are instructed that rape is the carnal knowledge of a woman, without her consent, obtained by force, threats, or fraud, or the carnal knowledge of a female under the age of ten years, with or without consent, and with or without the use of force, threats, or fraud. * * * (3) The threats must be such as might reasonably create a just fear of death or great bodily harm, in view of the relative condition of the parties, as to health, strength, and all other circumstances of the case. (4) The fraud must consist in the use of some stratagem by which the woman is induced to believe that the offender is her husband, or in administering, without her knowledge or consent, some substance producing unnatural sexual desire, or such stupor as prevents or weakens resistance, and committing the offense while she is under the influence of such substance. It is a presumption of law, which cannot be rebutted by testimony, that no consent was given under the circumstances in this paragraph of the charge."

Appellant at the time excepted to the whole charge—*First*, upon the grounds that it did not contain the law of the case; and, *second*, that it was calculated to mislead and confuse the jury. That part of the charge relating to rape upon a female under the age of 10 years was indirectly, if not directly, called to the attention of the court. This appears from the exception reserved at the time.

It is the duty of the court to submit to the jury, by proper instructions, the law applicable to the very case. What, therefore, is this case? It is that charged in the indictment, and supported by evidence. The appellant was tried upon the second count, the first count having been eliminated by a *nolle prosequi*, so far as the trial was concerned. The appellant being tried upon the second count alone, the state must be held to show that the carnal knowledge was obtained by force, threats, or fraud; and this, even though the proof might show that the female, at the time of the commission of the offense, was under the age of 10 years. This is evident; for with the elimination of the first count disappears from the indictment every allegation that the female was under the age of 10 years. It follows, therefore, that the portion of the charge relating to rape upon a female under the age of 10 years was not the law applicable to the case upon trial.

Again, the case, as below stated, is that which is properly alleged, and which is supported by evidence. The second count alleges a rape by force, threats, and fraud. If, therefore, the state could show that the carnal knowledge was had by either of the means alleged alone, or by the first two (to-wit, force and threats) combined, a conviction would be proper, since all these means are charged. If the evidence tended to show a rape consummated by force and threats, it would become the duty of the trial judge to submit to

the jury the law applicable to both phases of the case. Similarly with regard to rape by fraud. But notwithstanding all the means contained in the Code are charged, viz., force, threats, and fraud, still the case would be that which has evidence to support it, and to the case as made the charge should be confined. In the case under consideration there is no evidence tending to support a rape by threats or fraud. Hence the charge should have been restricted to a case in which force alone was used. The court should have treated the case just as though the indictment contained no allegation of threats or fraud; thus pointedly directing the minds of the jury to the case made by the testimony.

Again, the whole charge being excepted to, because being calculated to mislead and confuse the jury, we must look to all its parts to determine whether or not the exceptions were well taken. Looking, then, to the charge as a whole, our attention is drawn to the following: "Penetration only is necessary to be found upon a trial for rape." The proposition is correct if presented to the jury in such a manner as not to mislead. As presented in the charge complained of, it may have had the effect to induce the jury to believe that all that was necessary upon a trial for rape was to prove the fact of penetration. The jury should have been instructed that, to have carnal knowledge of the woman, it was not required to prove an emission; that, if the evidence showed a penetration of the male parts of the defendant into the female parts of the woman, this would be sufficient. We are not attempting to give a precedent for a charge upon this offense, but we are endeavoring to show that the charge as given, being unconnected with the subject of sexual intercourse between the parties, may have misled the jury, to the injury of the appellant.

We are of the opinion that the court erred in referring to rape upon a female under the age of 10 years, in the charge relating to a rape committed by threats, in the charge which relates to a rape by fraud, and in the charge upon the subject of penetration. The second and third errors were not made in defining the offense of rape simply, but were carried into that part of the charge (the fifth paragraph) which seeks to make a direct application of the law to the facts of the case. This being the case, we are of opinion that, taking the charge as a whole, the errors therein contained were calculated to injure the rights of the defendant.

The judgment is reversed, and the cause remanded.

WADE v. STATE.¹

(Court of Appeals of Texas. January 8, 1887.)

1. LICENSE—OCCUPATION TAX—VALIDITY OF ORDER IMPOSING—RETAILING LIQUOR.

See the opinion *in extenso* for an order of the commissioners' court held sufficient to operate as a levy of a county occupation tax upon retail liquor dealers, and therefore to have been properly received in evidence.

2. SAME—PROOF OF OCCUPATION—WEIGHT OF EVIDENCE.

As tending to establish the nature of the defendant's occupation, the court properly admitted evidence that his son, as his employe, sold medicated bitters, the defendant never having paid the tax levied on retail liquor dealers. But see the statement of the case for a special instruction upon the question held to have been properly refused as being upon the weight of evidence.

3. SAME—EVIDENCE.

See the opinion for evidence held sufficient to support the conviction.

Appeal from county court, Burleson county.

The conviction in this case was for pursuing the occupation of selling intoxicating liquors without having first paid the occupation tax levied there-

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

for. The penalty assessed was a fine of \$450. The opinion states the effect of the evidence adduced upon the trial.

The special requested instruction referred to in the second head-note of this report reads as follows: "Defendant asks the court to instruct the jury that if you believe from the evidence that the son of the defendant, during his absence, sold bitters in quantities less than one quart, this sale cannot be imputed to defendant unless it has been also proven that the defendant had authorized him to so sell; and the fact that he was the son of the defendant raises no presumption that he was defendant's agent for the purpose of selling liquor unlawfully." The motion for new trial raised the question discussed in the opinion.

E. G. Ragsdale and *W. K. Homan*, for appellant. *J. H. Burts*, Asst. Atty. Gen., for the State.

WILLSON, J. 1. There is no particular form prescribed by law for an order of the commissioners' court levying an occupation tax, nor is there any statute prescribing the requisites of such an order. With reference to the occupation tax upon liquor dealers it is provided that the commissioners' courts of the several counties shall have power to levy and collect a tax for the counties equal to one-half the state tax upon such occupation. Acts 17th Leg. Reg. Sess. p. 21, § 2. At a regular term of the commissioners' court of Burleson county, convened in May, 1886, an order of said court was made and entered as follows: "There shall be levied and collected on all occupations pursued in said county of Burleson, which are not specially provided for by the laws of this state, a tax of one-half of the state occupation tax as levied by the laws of the state." This order, we think, is a sufficient and valid levy of an occupation tax for the county upon the occupation of liquor dealer. It was not essential to name the precise amount of the tax levied, because that amount is made certain by reference to the statute of the state, which fixes the amount of the state occupation tax at \$300 per annum for the occupation of engaging in the sale of spirituous, vinous, or malt liquors or medicated bitters in quantities of less than one quart. Acts 17th Leg. Reg. Sess. p. 112, § 1. The tax levied for the county, being one-half said state tax, must therefore be \$150, and could not be any other amount. We are of the opinion that the court did not err in admitting said order in evidence, and did not err in instructing the jury that said order levied a tax in favor of said county upon said occupation of \$150. It was the province of the court to construe the order and instruct the jury as to its legal effect.

We are cited by counsel for defendant to the case of *Mansfield v. State*, 17 Tex. App. 468. It is claimed by counsel that this court in that case held a similiar order of a commissioners' court to be invalid and insufficient. It will be found, by a careful examination of that case, that the question as to the validity and sufficiency of the order was not before this court, and was not discussed or passed upon by us. The trial court held the order to be invalid, and rejected it when offered in evidence by the state, but this ruling of the trial court was not presented for revision in this court, and was not determined or considered in disposing of the case.

2. Considering the charge of the court as a whole, we think the law of the case was fully and correctly given to the jury. All of the special instructions requested by defendant, except one, appear to have been given. The one refused was, in our opinion, properly refused. That the defendant's son, while in charge of defendant's bar-room, sold medicated bitters while conducting defendant's business, was admissible as a circumstance tending to prove that the defendant was engaged in the occupation of selling medicated bitters. The special instruction refused related to this evidence, and was, we think, a charge upon the weight of said evidence, and therefore was properly refused.

3. There is sufficient evidence, in our judgment, to support the conviction.

Several instances of the sale of medicated bitters by defendant during the months of July and August, 1886, are clearly established by the evidence. As to whether or not the evidence showed that defendant had pursued or engaged in the occupation of selling spirituous liquors or medicated bitters, without first obtaining license therefor, was fully and clearly submitted to the jury as a question of fact for their determination. The jury found against the defendant upon this question of fact, and that finding is sustained by the evidence. *Mansfield v. State*, 17 Tex. App. 468.

We find no error in the conviction, and the judgment is affirmed.

RANGEL v. STATE.¹

(Court of Appeals of Texas. January 8, 1887.)

1. LARCENY—OF CATTLE—INDICTMENT—ARREST OF JUDGMENT.

See the statement of the case for the substance of an indictment held sufficient to charge the offense of theft; wherefore the motion in arrest of judgment alleging the insufficiency of the indictment to negative the consent of the owners to the taking, was properly overruled.

2. WITNESS—ACCOMPLICE.

Accomplices under the common-law rule, were, before conviction and sentence, competent witnesses for or against each other. The change in the rule by the Code of this state does not affect the competency of such accomplices to testify for the state.

3. SAME—LEADING QUESTION.

Leading questions are such as may be answered by yes or no. "Was this [exhibiting a fac-simile] the brand that was on the animal killed?" was clearly a leading question, and in permitting it the trial court erred, under the circumstances of this case.

4. LARCENY—INSTRUCTIONS.

See the opinion *in extenso* for a state of proof to which the trial court, having failed in its charge to apply the law controlling accomplice testimony, erred in refusing a requested instruction upon that subject.

Appeal from district court, Cameron county.

This was a conviction for theft had under an indictment, the charging part of which reads as follows: " * * * Jose Ma. Rangel on or about the fifteenth day of July, A. D. 1886, in Cameron county, Texas, did fraudulently take and steal from and out of the possession of, and without the consent of, John Kennedy, then and there holding same for the Kennedy Pasture Company one certain head of neat cattle, then and there the property of said Kennedy Pasture Company, and without the consent of the said Kennedy Pasture Company, with intent to deprive said John Kennedy and said Kennedy Pasture Company of the value thereof, and to appropriate the same to the use and benefit of him, the said Jose Ma. Rangel, against the peace and dignity of the state." The penalty imposed by the jury was a term of two years in the penitentiary. The rulings of the court do not call for a statement of the evidence.

No appearance for the appellant. *Asst. Atty. Gen. Burts*, for the State.

WHITE, P. J. Objections to the indictment contained in appellant's motion in arrest of judgment were not maintainable, and it was not error to overrule said motion.

It was not error to permit the state, over objections of defendant, to introduce as witnesses against him the two *participes criminis*, Juan Bravo and Atenogenes Segura, who were charged with the same offense by separate indictments. Parties charged as principals, accomplices, or accessories, whether in the same indictment or different indictments, cannot be intro-

¹ Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

duced as witnesses for one another. This is statutory. Code Crim. Proc. art. 731. But we have no statute that parties so situated may not be introduced as witnesses *against* one another. In so far as the prosecution is concerned, the rule at common law with regard to the admissibility of such evidence is unchanged by our statute. "At common law, accomplices, under certain exceptions, before conviction and sentence, were competent witnesses either for or against each other; and this rule has not been so changed by the Code of this state as to disqualify such witnesses from testifying in behalf of the state." *Myers v. State*, 3 Tex. App. 8.

While the witness Juan Bravo was testifying, the district attorney handed witness a paper purporting to be a certificate of the brand of the Kennedy Pasture Company, the alleged owner of the animal in question; a representation of the brand being contained in said certificate. After witness had examined the same, the district attorney for the purpose of identifying this brand with the one on the stolen animal, asked said witness the following question, viz.: "Is this the brand that was on the animal killed?" Defendant, by counsel, objected because the question was leading, but the court overruled the objection, and permitted the witness to answer. "A leading question is one which may be answered by yes or no, and suggests the desired answer." *Mathis v. Buford*, 17 Tex. 152; 1 Whart. Ev. (2 Ed.) § 499; *Tinsley v. Carey*, 26 Tex. 350; *Kennedy v. State*, 19 Tex. App. 620. Tested by the rule, under the peculiar circumstances shown in connection therewith, the question was clearly leading, and the court erred in overruling the objection.

The testimony in the case tended to implicate the state's witness Tobias as a *particeps criminis* in the theft of the animal. The witness Segura says: "Tobias himself buried the bones [of the stolen calf] inside the *jacal*. * * * I do not know how long Tobias remained. He certainly remained until the meat was finished." In the sixth paragraph of his charge to the jury, the court properly instructs them with regard to the necessity of corroboration in so far as the accomplice testimony of the witnesses Segura and Bravo was concerned, but does not charge the necessity of corroboration with regard to the testimony of Tobias, in case the jury should conclude from the evidence that this witness also was a *particeps criminis*. Upon this omission of the court, defendant's counsel based a special exception to the charge, and again called the error to the attention of the court in the motion for a new trial. It was an essential part of the law of the case that the jury should have been properly instructed upon this phase of the evidence, inasmuch as this witness was corroborating the testimony of the other accomplices.

For the errors indicated, the judgment is reversed, and the cause remanded for another trial.

EPPERSON v. STATE.¹

(Court of Appeals of Texas. January 26, 1887.)

1. EMBEZZLEMENT—By BAILEE—INSTRUCTIONS.

If, at the time he sold the property intrusted to his care as a bailment, the bailee had conceived and had the intent to defraud his bailor of the value of the property, and appropriate the same to his own use, it is immaterial whether or not he had authority to sell the property. Harboring the intent at the time of the sale, his subsequent sale of the property and conversion to his own use of the proceeds, whether or not he had authority to make the sale, was an embezzlement of the property. See the opinion *in extenso* for a charge of the court upon the question which, harmonizing with the rule, is held correct.

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

2. SAME—EVIDENCE.

See the statement of the case for evidence held sufficient to disclose a fraudulent intent, and to support a conviction for embezzlement.

Appeal from district court, Grayson county.

The first count in the indictment in this case, upon which the appellant was tried and convicted, charged the appellant with the embezzlement of an organ of the value of \$57, the property of R. A. Caylor, in Grayson county, Texas, on the twenty-first day of September, 1885. A term of two years in the penitentiary was the penalty assessed by the jury.

The state's proof disclosed that the appellant received an organ from one R. A. Caylor, as agent to sell the same for the said Caylor, and to pay over the proceeds to the said Caylor; that he sold the same at once, failed to pay over the proceeds to said Caylor, and long afterwards denied to said Caylor that the sale was consummated; but averred that negotiations for the sale of the same were then in progress. The state further proved sundry false statements in connection with the transaction, and that appellant sold the organ as his own property. Two witnesses testified for the appellant that Caylor admitted to them that he made an outright sale of the organ to appellant on credit. This testimony was denied by Caylor when placed on the stand in rebuttal.

Bryant & Dillard, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. There are two counts in the indictment, the first charging embezzlement of an organ, and the second embezzlement of the proceeds of a sale of said organ. After the evidence was all in, the state elected to proceed upon the first count, and the conviction was had upon said first count for the embezzlement of the organ. It appears from the evidence that the defendant, as agent for one Caylor, received the organ in question for sale. He was to sell said organ for \$57, of which amount \$20 was to be paid in cash, and the remainder was to be paid in notes of the purchaser secured by a lien on the organ. Defendant sold the organ to one Earnhart, and received in payment in money, \$45, and the balance of the purchase price was paid by Earnhart in boarding defendant's wife. He never accounted to Caylor for the amount received for the organ from Earnhart. Caylor had the possession and control of the organ at the time the defendant received it, although the legal title thereto remained in the manufacturers, Estey & Camp.

Defendant excepted to the third paragraph of the court's charge, which is as follows: "If you believe from the evidence that the defendant received from the said Caylor the organ in question, under an agreement that the defendant should act as the agent of the said Caylor in the sale of said organ, and that defendant should sell said organ, and pay over to and deliver to said Caylor a certain sum in money or notes that defendant should secure from the sale of said organ, and you further believe that defendant sold said organ as his own property, and not as agent for said Caylor, and that at the time of said sale the defendant had the fraudulent intent to appropriate the proceeds of said sale to his own use, and that in pursuance of said intent the defendant afterwards appropriated the proceeds of said sale to his own use and benefit, without the consent of said Caylor, the defendant would, under such circumstances, be guilty of embezzling the organ; but if you believe it was the intention of the defendant to act in good faith towards said Caylor, and carry out his alleged agreement, and that he, after said sale, conceived for the first time the intention to appropriate the proceeds of the sale, he would not be guilty of embezzling the organ."

We do not think the exceptions to this paragraph of the charge are well grounded. As we understand the law, it clearly and distinctly states the correct rule as announced in the decisions upon the subject.

In *Leonard v. State*, 7 Tex. App. 417, this court uses the following lan-

guage: "We are of the opinion that, notwithstanding appellant may have had authority to make a sale of the cotton alleged to have been embezzled, yet, if he sold the same with the formed intention to defraud the owner, and to convert it to his own use and benefit, he is as much guilty of embezzlement of the cotton as if he had no authority to make such sale. What is embezzlement? A fraudulent appropriation of the property of another by a person to whom it has been intrusted. There is no settled mode by which this appropriation must take place, and it may occur in any one of the numberless methods which may suggest itself to the particular individual. The mode of embezzlement is simply a matter of evidence, and not pleading; and the appellant in this case was charged, in the usual form, that he 'did embezzle, fraudulently misapply, and convert to his own use' the particular property described. If he sold it with the honest purpose of delivering the proceeds to the owner, and, after such sale, conceived the fraudulent intention, he would not be guilty of embezzlement of the cotton at least. But if the sale was simply a means to effectuate his fraudulent purpose to convert the property to his own use,—in other words, to steal it,—it is as much an act of conversion as if he had shipped it clandestinely to a foreign port, and there disposed of it."

The case of *Baker v. State*, 6 Tex. App. 344, cited by counsel for defendant in support of exceptions to said paragraph of the charge, is not in point, the question therein decided being different, and the statute upon which said decision is based having been materially changed with respect to the question involved in said decision.

We are of the opinion that said paragraph of the charge is not only correct in principle, but that it was applicable to and demanded by the evidence in the case, and that there is sufficient evidence to warrant the finding of the jury that, at the time defendant sold the organ, he entertained the fraudulent purpose of appropriating the proceeds of such sale to his own use. The question of his intent in making said sale—whether it was fraudulent or honest—was properly and clearly submitted to the jury.

There are some other objections made by defendant to the charge of the court, but we are of the opinion that the charge is, in all respects, sufficient and unobjectionable; and, such being the case, there was no error in refusing the special charges requested by the defendant.

There is no error in the conviction, and the judgment is affirmed.

RICE v. STATE.¹

(Court of Appeals of Texas. January 12, 1887.)

1. CRIMINAL PRACTICE—PRELIMINARY EXAMINATION—CONFESSION—EVIDENCE OF.

Though warned by the justice of the probable consequences of his plea, the accused, on his examining trial, pleaded guilty, upon the suggestion of the injured party that to do so would secure the lightest penalty. Proof of this plea on the final trial was objected to. *Held*, that the objection was properly overruled. See the opinion on the question.²

2. SAME—CONFESSIONS—WHEN ADMISSIBLE.

Notwithstanding the earlier decisions on the question, the doctrine now obtains that, to render a confession inadmissible upon the ground that it was induced by the promise of some benefit to the accused, such promise must be positive, must be of such character as would be likely to influence the accused to speak untruthfully, and must be made or sanctioned by some person in authority. The inducement insisted upon in this case does not come within the rule.³

¹Reported by Messrs. Jackson & Jackson, official reporters of the Texas court of appeals.

²Merely advice to tell the truth, in the absence of threat or other inducement, is not sufficient to exclude a confession. *People v. McCallam*, (N. Y.) 9 N. E. Rep. 502; *Com. v. Preece*, (Mass.) 5 N. E. Rep. 494; *Heldt v. State*, (Neb.) 30 N. W. Rep. 626.

³For general discussion as to when confessions are, and when not, admissible in evidence, see *Hoober v. State*, (Ala.) 1 South. Rep. 574, and note.

3. SAME—COMPLAINT TO IDENTIFY OFFENSE.

As pertinent to show the particular charge to which the defendant pleaded guilty, and to identify the offense to which the confession of guilt related, the trial court properly admitted in evidence the complaint to which the defendant pleaded guilty before the magistrate.

4. SAME—CONTINUANCE.

The truth of the facts set out in the application for continuance not appearing to be probably true when viewed in the light of evidence adduced on the trial, the ruling of the trial court refusing the continuance will not be revised.

Appeal from district court, Wheeler county.

The conviction in this case was for the theft of a horse, the property of Ike Mansker, in Wheeler county, Texas, on the twentieth day of June, 1886. A term of five years in the penitentiary was the penalty imposed by the verdict. The theft by the appellant was established by overwhelming testimony.

W. H. Grigsby, for appellant. *Asst. Atty. Gen. Burts*, for the State.

WILLSON, J. This conviction is for the theft of a horse, the property of one Mansker. Before indictment found, the defendant had been arrested under warrant of a magistrate issued upon a complaint charging defendant with said theft, and, upon examination of said charge before said magistrate, the complaint was read to the defendant by the magistrate, and the defendant pleaded guilty thereto. Upon the trial of this case upon the indictment, the state was permitted, over the objections of the defendant, to prove said plea of guilty made before said magistrate. This ruling of the court is insisted upon as error. It was proved that, before said plea was made, the magistrate cautioned the defendant that what he might say would be used in evidence against him. It was also proved that, just prior to said caution and plea, Mansker, the owner of the horse, had advised the defendant "to plead guilty to the theft of the horse, that it would go better with him." Defendant's plea of guilty was not made as a voluntary statement under article 262 of the Code of Criminal Procedure. It was not reduced to writing, and signed by the defendant, but was merely an oral statement that he was guilty of the charge contained in the complaint. It was therefore an *extrajudicial*, not a *judicial*, confession. To have constituted it a *judicial* confession it must have been made in a voluntary statement of the accused taken before a magistrate in accordance with law. But, notwithstanding it is to be regarded as an extrajudicial confession, it was admissible in evidence if *voluntarily* made, after having been first cautioned that it might be used against him. Code Crim. Proc. art. 750. It is made clear by the evidence that before making the plea the defendant was properly and sufficiently cautioned that it might be used against him.

The only serious question is, was the plea a *voluntary* confession? It is contended by defendant's counsel that it was not, because the defendant was induced to make said plea by the advice of Mansker, the owner of the horse, that "it would go better with him" to so plead. Under the earlier decisions upon this subject, the objection to the confession would perhaps be well taken, but the almost universally recognized doctrine now is that, to render a confession inadmissible upon the ground that it was induced by the promise of some benefit to the accused, such promise must be positive, and must be made or sanctioned by a person in authority. It must also be of such character as would be likely to influence the accused to speak untruthfully. Whart. Crim. Ev. § 651 *et seq.*; *Thompson v. State*, 19 Tex. App. 595. The confession in this case is not within the rule stated, and was, we think, a voluntary confession, within the meaning of the statute, made after the defendant had been duly cautioned that it might be used against him, and it was not error to permit said confession to be proved.

It was not error to permit the state to read in evidence the complaint to which the defendant had pleaded guilty before the magistrate. This was per-

tinent and competent evidence to show the particular charge to which the defendant had pleaded guilty, and to identify the offense to which the confession of guilt related with the offense for which the defendant was on trial.

We will not revise the action of the court in refusing the defendant's application for a continuance, because, in our opinion, the evidence adduced on the trial does not show that the facts set forth in said application, as to the testimony of the absent witnesses, were probably true. Code Crim. Proc. art. 560, subd. 6.

We have found no error in the conviction, and the judgment is affirmed.

STAPLETON v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 10, 1887.)

1. COURTS—CRIMINAL JURISDICTION—CHANGE IN JUDICIAL DISTRICT.

The Kentucky circuit courts being vested by the Kentucky constitution with original jurisdiction in all criminal cases, they can only be deprived of it by direct legislation, and, in case of repeal of the legislation, the jurisdiction immediately revives. If, after an indictment has been found, the county in which it is found is removed from the judicial district to which it has previously belonged, and the criminal court of the district is deprived of jurisdiction over that county, the jurisdiction of the circuit court revives, and the indictment is properly tried in that court.

2. HOMICIDE—SELF-DEFENSE—EVIDENCE.

Evidence examined, and held not to show that accused acted in self-defense in taking the life of deceased, but to show that accused sought to provoke a fight, and, after deceased had whipped him, he went off, and armed himself, returned, and killed deceased.

3. CONTINUANCE—ABSENT WITNESS—HOMICIDE.

In a murder trial, a continuance on account of the absence of a witness was refused the accused. The accused expected to prove by the witness that deceased had threatened his (accused) life. Held, that the appellate court would not reverse because of such refusal, it appearing that, even if threats were made, accused had no fear of deceased, or, if he had, sought to provoke deceased, that he might have an excuse for killing him.

Appeal from circuit court, Magoffin county.

Indictment against appellant, John Stapleton, for the murder of Callahan White. Verdict of guilty, and defendant sentenced to penitentiary for 21 years, from which defendant appeals. The indictment was found in the Magoffin criminal court, Magoffin county being then in the sixteenth judicial district; but before the trial the county was put into another district by act of the legislature, and the indictment was transferred to the Magoffin circuit court. The act, however, although repealing the criminal court of the sixteenth judicial district, as to Magoffin county, did not in express terms restore criminal jurisdiction to the Magoffin circuit court. Defendant objected to the order of transfer as erroneous.

A. H. Howard, and T. Y. Fitzpatrick, for appellant. P. W. Hardin, for appellee.

PRYOR, C. J. The transfer of the case from the Magoffin criminal court to the Magoffin circuit court was proper, as was held by this court in a similar case of *Anderson v. Com.*, ante, 127.

The instructions were all proper, giving to the accused the full benefit of the plea of self-defense, and no error in the record that we perceive calculated in any manner to prejudice the rights of the accused. That previous difficulties between these parties had produced a state of feeling resulting in the killing of White is no doubt true, but here the life of the deceased was taken at a time when he was in no danger of bodily harm, and after the fight had terminated. Such is the testimony on the part of the commonwealth, and while appellant's statement is to the contrary, and to some extent corroborated, the jury were the sole judges of the fact, and believed what the witnesses for the commonwealth

stated in regard to the killing, and not the statements of the witnesses for the defense. It is manifest that the accused originated the difficulty on the day the fatal shot was fired. He passed by the home of White, within a few steps of his door, and, turning his face towards it, cried out, "This is the bull-dog," and crowded. A neighbor and relative of the deceased was in the house at the time, and remarked to the deceased that, if he would go out and whip the accused, he would pay the costs. To this the deceased assented, and made, as the proof shows, an assault on the accused with his fists, getting the better of the fight, and chastising the accused for his rude conduct. While this was improper on the part of the deceased, still it did not justify the taking of his life when the accused was in no danger of the slightest bodily harm. He had already been whipped for his insolence, and was on his way from the scene of the fight, when he returned and shot White with a pistol. There was no excuse or provocation for it, except the heat and passion of the accused caused by the fight he had just had with the deceased. The wife of White, when she saw him pass her home, says, "There goes the rogue." Whether the accused heard it or not is uncertain. He says that he did, but, if so, the statement of the woman was no inducement for his conduct. He then had his pistol with him, and had shown it on the same day to others, saying that "he meant business."

He presented an affidavit for a continuance, to the effect that the deceased had threatened to take his life, and that those threats had been communicated to him. The court overruled his motion in the exercise of a judicial discretion, the correctness of which is evidenced by the proof before us. It would not have changed the result, and should not, because it is plain that the accused, who now says he expected White would take his life at any time, had no fear of him whatever, or, if he had, his effort was to provoke him that he might shoot him.

If the state of facts existed that he expected to prove by Mrs. Hall, he would not have passed within a few steps of the door of the deceased, crying out, "Here is the bull-dog," and crowing as a game-cock of the mountains, with a view of challenging his adversary. White could then have shot him from his door-steps, and could have taken his life when he assaulted him; but it was apparent that he had no such intention, and equally as apparent that the accused apprehended no danger.

The judgment, in our opinion, must be affirmed,

BROWN v. CONNELL.

(Court of Appeals of Kentucky. March 22, 1887.)

STATUTE OF LIMITATIONS—FRAUDULENT CONVEYANCE—VENDOR AND PURCHASER.

Gen. St. Ky. c. 71, art. 3, § 6, providing that "in actions for relief for fraud the cause of action shall not be deemed to have accrued until the discovery of the fraud, but no such action shall be brought ten years after making the contract or perpetration of the fraud," a deed duly acknowledged and recorded cannot after the lapse of 10 years be set aside, even by a purchaser of the land for full value, although the deed may have been made for the purpose of delaying and defrauding creditors, and upon no consideration. A fraudulent or voluntary conveyance being permitted to stand for 10 years without attack, the grantee under it acquires thereafter a perfect title.¹

Appeal from circuit court, Trimble county.

Marc Mundy, Trout & Peak, and W. S. Morris, for appellant. Carroll & Barbour, for appellee.

BENNETT, J. On the thirtieth day of December, 1864, J. J. Connell, by deed duly acknowledged and recorded in the proper office, conveyed to his

¹See Duff v. Duff, (Cal.) 12 Pac. Rep. 570, note; King v. Graham, (Ky.) 1 S. W. Rep. 822; Dorsey v. Phillips, Id. 687.

wife and children the tract of land in controversy. The appellee is one of said children. He was at the time of the conveyance about one year old. On the first day of November, 1875, J. J. Connell, his wife, and all of his children, except the appellee, who was at the time an infant, conveyed to appellant said tract of land. The conveyance was by deed, duly acknowledged and recorded in the proper office. The consideration expressed in the deed was \$9,041. The appellee, upon his arrival at lawful age, instituted suit against the appellant, for the purpose of recovering one-fifth of said land, which he claimed by virtue of his father's conveyance. The appellant resisted the appellee's right to recover upon two grounds: *First*, that the conveyance by appellee's father was made with the design of delaying, hindering, and defrauding creditors and purchasers; *second*, that the conveyance was voluntary, without any valuable consideration therefor.

Section 1 of article 1, c. 44, of the General Statutes, provides, in substance, that every gift or conveyance of any real estate, made with the intent to delay, hinder, or defraud creditors, purchasers, or other persons, shall be void as against such creditors, purchasers, and other persons. The second section of the same article provides, in substance, that every gift or conveyance by a debtor of any of his estate, without a valuable consideration therefor, shall be void as to all of his then existing creditors, but shall not, on that account alone, be void as to creditors whose debts are thereafter created, nor as to purchasers with notice of the voluntary alienation.

Under the first section of the statute *supra*, the rule is that, if the conveyance is actually fraudulent, the subsequent purchaser for value is not affected by either constructive or actual notice of the conveyance. Under the second section, the rule is that a voluntary conveyance is *prima facie* fraudulent as to a subsequent purchaser, and, unless he has actual notice of the conveyance, his title is perfect; and he is not affected by the fact that the voluntary conveyance is of record. Actual, and not constructive, notice must be brought home to him. *Jones' Adm'r v. Jenkins*, 7 Ky. Law R. 410. But the protection afforded to purchasers for value by these sections of the statute is only for a limited period.

• By section 6 of article 3, c. 71, it is provided that, "in actions for relief for fraud or mistake, * * * the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after making the contract or the perpetration of the fraud." This section of the statute bars any right of action to set aside any gift or conveyance denounced by section 1, art. 1, c. 44, as actually fraudulent, or, by section 2 of the same article, as constructively fraudulent after the lapse of 10 years from the time of making such conveyance. Such gift or conveyance when executed is valid as against all persons except those whose rights are saved by said sections. The subsequent purchaser for value under the first section may disregard the fraudulent conveyance *in toto*; under the second section, the subsequent purchaser is also protected, unless he has actual notice of the voluntary conveyance. But the saving of the rights of the protected class does not last longer than 10 years. If the fraudulent or voluntary conveyance is permitted to stand for 10 years without any action on the part of the protected class, then, as against that class, the donee or vendee under the voluntary or fraudulent conveyance acquires a perfect title. See *Dorsey v. Phillips*, 1 S. W. Rep. 667, (MS. Opinion, December, 1886.)

J. J. Connell having made the conveyance to his wife and children more than 10 years before appellant's purchase, it is not necessary to decide whether the conveyance was actually fraudulent. Nor is it necessary to decide, if the conveyance was only constructively fraudulent, whether appellant was a purchaser with actual notice, because, in either case, the lapse of 10 years (the statutory period of limitations) perfected the appellee's title as

against J. J. Connell's creditors or purchasers for value from him after the period of 10 years had elapsed. Upon the lapse of that period of time, the appellee's title became as perfect and complete as if he held the title by purchase for value, or as if he had acquired the legal title by 15 years adverse possession of the land. And the appellant having purchased after the lapse of 10 years from the conveyance, acquired no title by his purchase. He was as much bound to take notice of the conveyance, and the appellee's right thereunder, as if the appellee had been an innocent purchaser for value, by deed duly recorded.

The question of improvements was not passed upon by the lower court. Upon the return of the case that matter will be settled.

The judgment of the lower court is affirmed.

SEILER and another v. BRENNER.

(*Court of Appeals of Kentucky.* March 22, 1887.)

PARTNERSHIP PROPERTY—EVIDENCE—JUDICIAL SALE.

Upon the evidence in this case, held that the property in controversy, bought at judicial sale, was purchased for a partnership composed of A. and B., and not for A. individually, although the bonds for the purchase money were executed by A. as principal and B. as surety. Neither was there sufficient evidence to establish a sale in writing by A. and B. of any interest in the property to a third party.¹

Appeal from chancery court, Kenton county.

This was an action by appellee, John Brenner, to prevent a deed being made to the property in controversy to appellants, Seiler and Daverzac. Judgment for Brenner. Seiler and Daverzac appeal.

Hallam & Myers, for appellants. *Cleary, Hamilton & Cleary*, for appellee.

BENNETT, J. On and before the twenty-fifth day of April, 1883, the appellee, Brenner, and the appellant, Seiler, were partners in the brewery business, in the city of Covington. On the twenty-fifth day of April, 1883, the master commissioner of the Kenton circuit court, under a judgment of that court, sold, at public outcry, the piece of real estate known as the Lexington Pike Brewery, now in controversy in this suit. The fact is clearly established that, at the commissioner's sale of said property, the appellee was the only bidder, and that the property was knocked down to the firm of Brenner & Seiler at the price of \$10,000. It also satisfactorily appears that it was agreed by appellee and Seiler that the property was to be purchased for the firm, and for its use in the business of the firm. It also clearly appears that, after the purchase of the property, it was agreed that the purchase should be entered in the name of Seiler, and that he should appear as principal in the bonds for the payment of the purchase money, and the appellee as his surety; that this arrangement was made, not for the purpose in fact of vesting the title to the property in Seiler individually, but as a matter of convenience, to avoid calling on outsiders to go their security on the bonds for the purchase money.

The claim of Daverzac to one-third of the property by purchase cannot be sustained. In the first place the pretense that he had bid on the property \$1,000 more than was bid by Brenner consists in the fact that he gave to the commissioner, as the commissioner was on his way to the sale, a bid of \$11,000 on the property. This bid was doubtless a mere passing remark, and was doubtless so received by the commissioner, as he did not cry the bid.

Brenner denies positively and persistently that he ever consented to Daverzac becoming a part owner of the property. It stands to reason that he did

¹ Real estate purchased for partnership purposes is partnership property, although the title is taken in the name of an individual. *Mallory v. Russell*, (Iowa,) 32 N. W. Rep. 102; *King v. Remington*, (Minn.) 29 N. W. Rep. 352, and note.

not. The property was evidently bought to facilitate the partnership business. The firm, at the time of purchase, was able to purchase and hold the property without crippling its business; so there was no necessity of taking in a third man as a part owner of the property, bought to be used in the business. It also appears that, within three days after the purchase of the property by the firm, Brenner started on his trip to Europe, and he did not return until about three months thereafter. After his return, when informed that Daverzac claimed to own one-third interest in the property by an arrangement with Seiler, he expressed surprise and disapprobation, and manifested open opposition to the arrangement from that time forward.

Appellant Seiler, in his answer, stated that the sale of one-third interest in the property to Daverzac was by writing, which was in the possession of Daverzac. Daverzac having been made a party to the action, adopted the answer of Seiler. This writing was never filed with the papers, nor is there any reason given for not filing it. Its terms are not specifically set out in the answer, or in the subsequent pleadings, to enable the court to pass upon its sufficiency. The conclusions to be drawn from this are unfavorable to the appellants. A perusal of this paper might have shown that the transaction was not taken out of the statute of frauds, or that it contained some statement or provision prejudicial to the claim of the appellants, as presented before the court. The proof is clear that the property was bought at the commissioner's sale by Brenner & Seiler as a firm, and for the firm.

The remaining question is whether or not the appellant Daverzac bought one-third interest in the property from the firm, either by direct negotiations with both members of the firm, or from Seiler as a member of the firm, by the authority of the other member; and, if it was so bought, whether or not the transaction was sufficiently evidenced by writing to take it out of the statute of frauds. The lower court, in a very clear and able opinion, which we commend to the perusal of the parties, decided these questions against the appellants. We agree with the conclusions of the lower court.

The judgment is affirmed.

NEEDHAM v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky. March 26, 1887.)

1. JURY—LAW AND FACT—RAILROADS—NEGLIGENCE.

In an action against a railroad company to recover for its willful neglect, resulting in the death of plaintiff's intestate, the question of willful neglect is not a question of law, but a mixed question of law and fact, which it is the peculiar province of the jury to determine, especially as to the degree of it.

2. MASTER AND SERVANT—MACHINERY AND PREMISES—NEGLIGENCE.

It is the duty of the employer to use ordinary care in providing for the use of the servant safe machinery, and premises in safe condition, but he is not an insurer, and if the employee knows of the danger, and, without objection, continues to use them, and injury results to him, he cannot hold the employer liable.

3. NEGLIGENCE—ORDINARY CARE.

Ordinary care is that degree which is exercised by ordinarily prudent persons under similar circumstances.

Appeal from common pleas court, Jefferson county.

R. C. Davis and Matt O'Dougherty, for appellant. *Wm. Lindsay, H. W. Bruce, and Lytleton Cooke*, for appellee.

HOLT, J. John Needham, while in the employ of the appellee, the Louisville & Nashville Railroad Company, as a switchman, and when engaged in the night-time in running one of its trains into its freight depot at Louisville, Kentucky, was thrown between, and killed by being run over by, the cars. It was the habit of the switchman, in taking the trains into the depot, to either ride on the cars, or run along a path at the side of the track. In this path was a hole or dry well, partially filled with *debris*, and covered over with

a car door. The well had been in this condition for a long time, and its size and depth are variously stated by the witnesses. Its existence and condition, as well as that of the premises, was well known to the deceased, he having been in the employ of the company for several years. There is evidence tending to show that the hole was entirely covered by the door, and also testimony to the effect that enough of it was open at one side to admit a man's foot, and that there was also a hole in the door sufficient for this purpose. Near the entrance to the depot, and near the track, was a brick column. It is claimed, upon the one side, that the deceased lost his life, when running along in the pathway at the side of the train, by stepping into the hole, and being thereby thrown under the train; while, upon the other, it is said, as he was riding upon a ladder on the side of the car, he so carelessly swung his body out that he came in contact with the pillar, and was thereby knocked under the car.

But one witness professes to have seen the killing, and he testifies that it occurred as last stated. All of the jury, however, did not believe his version of the transaction, as they did not find that his death was caused in the one way or the other. His widow brought this action under section 3, c. 57, of the General Statutes, to recover damages for the death of her husband through the *willful* neglect of the company or its servants.

The petition avers that this neglect not only consisted in leaving the well in the pathway, but in failing to light the entrance to the depot. The jury were directed to find a special verdict. It is as follows:

"*Question 1.* Was there or not a pathway at or near the place where John Needham was killed, designed by defendant for the use of its employes, switchmen, and others, and used by them while in defendant's service? *Answer.* We say there was.

"*Q. 2.* Was there a hole in said pathway? *A.* We say there was.

"*Q. 3.* Was said hole, at and before the time of said Needham's death, covered over with a car door? *A.* We say, 'Yes, except a small hole on the east side.'

"*Q. 4.* Was there any hole in said car door, or covering, or along-side the same, in said pathway, sufficient in size to admit a man's foot, or cause him, when passing along said pathway, to stumble and fall, or to be thrown to the ground? *A.* We say, 'Yes.'

"*Q. 5.* If, in answer to No. 4, they say that, at and before the time named therein, there were any holes in said car door, or along-side the same, in said pathway, of the size and description mentioned, then they will say whether or not the existence of such holes were, before the day said Needham was killed, known to the defendant's employes in charge of its tracks and pathway in the depot where he was at work, or, by the use of proper diligence on their part, could have been so known to them? *A.* We say, 'Yes.'

"*Q. 6.* Was the pathway referred to in question No. 1, (if there was such a one,) at and before the death of Needham, in a reasonably safe and good condition, and reasonably fit for use by said Needham and others in like service? *A.* We say we of the jury are unable to agree on an answer to this question.

"*Q. 7.* Was the condition of said pathway, before the death of Needham, known to defendant's employes in charge of the depot, and the tracks or pathway therein, or could they, by use of proper diligence, have known its condition? *A.* We say, 'Yes.'

"*Q. 8.* Did defendant or its employes, before and at the time of Needham's death, keep a light at the entrance of said freight depot? *A.* In answer to question 8, we of the jury say, 'No.'

"*Q. 8½.* Was the keeping of such lights at such entrance necessary for the safety of Needham, and other switchmen engaged at night on work about said depot? *A.* We say, 'No.'

"*Q. 9.* Did defendant, or its employes in charge of said depot, before the death of Needham, know that such light was so necessary, or could they, by

the use of ordinary diligence, have known it? A. We say they did not know that it was necessary; could have known it, if it was necessary.

"Q. 10. Did said John Needham, at and before the time when killed, know the condition of defendant's depot and premises at and near the place where he received his injuries which resulted in his death, and, if so, how long had he known their condition? A. He did know it, and must have known it for several years.

"Q. 11. At the time when said Needham fell between or under the cars, and received the injuries which caused his death, was he standing or walking on the ground or pathway near the track, or was he riding on the side of a freight car? A. We of the jury are unable to agree in the answer to this question.

"Q. 12. Did Needham lose his life because of a fall occasioned by the hole named in question 2, and occurring as he (said Needham) was walking or passing on the ground, along the pathway, near the track, or did he lose his life by falling or being knocked off the side of a freight car, in consequence of striking against or coming in contact with a brick wall or column at the south end of defendant's freight depot? A. We say we of the jury are unable to agree in the answer to this question.

"Q. 13. Was the car door over said hole, if there was such door over it, sufficiently heavy to keep it in place, without being otherwise fastened to the ground? A. We say, 'Yes; it was.'

"Q. 14. Was Needham, on the evening before his death, furnished with a lantern to enable him to see how to discharge his duties? A. We say we answer, 'He was.'

"Q. 15. Was the said freight depot lighted with gas when the said Needham was killed? If so, how many gas-lights were then burning therein? A. We say we answer, 'Thirty-two lights were burning.'

"Q. 16. Was the death of said Needham caused by the willful negligence of defendant's employees, or any of said employees? A. We say we answer, 'No.'

"Q. 17. If they answer question number 16 in the affirmative, then they will say in what acts or act of omission or commission did such negligence consist. A. We say * * *.

Q. 17½. Could the said John Needham have avoided the injuries which caused his death by the exercise of ordinary care and diligence on his part? A. We say we of the jury are unable to agree in an answer to this question.

"Q. 18. If they say, in answer to question 16, that the death of Needham was caused by the willful negligence of the employees of defendant, then they will, in answer to this, say what sum in damages plaintiff should recover of defendant because of said death? A. We say * * *."

The company moved for a judgment upon it in its favor, while the appellant, holding that it was not a complete verdict, or sufficient to authorize a judgment, moved the court to set it aside, and grant her a new trial. She now complains of the action of the court in rendering a judgment for the appellee.

It is true that the jury were unable to agree as to whether Needham, when he lost his life, was walking along the path, or riding upon the cars, or whether he lost his life by falling into the hole, or by being knocked off the side of the car; but they did find that it was not necessary to have any more light at the depot entrance than the company had provided; that the deceased had a lantern to enable him to see how to perform his duties; that he knew, and had known for several years, the condition of the premises at the place where he was killed, *and that his death was not caused by the willful neglect of the company.*

It is urged that the last finding is but the inference or conclusion of the jury. The issue, however, was as to the existence of *willful* neglect.

Whether one has been guilty of neglect is not only a question of law, but of fact, and it is peculiarly the province of the jury to find the *degree* of it. In the case of *Louisville & N. R. Co. v. Collins*, 2 Duv. 115, it is said: "After full and careful consideration, we are satisfied that the engineer was guilty of some negligence. The *degree* of it was a question of fact, which, on such apparently conflicting testimony, the jury had a right to decide." Again, in *Louisville C. & L. R. Co. v. Mahony*' *Adm'rs*, 7 Bush, 237: "Whether these and other facts developed on the trial sustained the charge of willful neglect it was the peculiar province of the jury to determine." And in *Claxton's Adm'r v. Lexington & B. S. R. Co.*, 13 Bush, 642, the court said: "Under such a state of proof, it was for the jury, and not for the court, to determine whether the company's negligence was willful."

Suppose the jury had found that Needham lost his life by stepping into the hole, and being thereby thrown under the car, yet it would have been the province of the jury to have said whether the company should be charged with willful neglect. *This was the issue*. If there had been no special verdict, but a general one, the jury would have found for the company, although they may have believed that the death occurred as the appellant claims, inasmuch as they found the non-existence of willful neglect upon the part of the company. If, however, the degree of negligence was a question of law merely, yet not only the jury has said that there was no willful neglect, but the court has passed upon the question by affirming the finding of the jury by its judgment.

Again, it is the duty of the master to use ordinary care in providing for the use of the servant safe machinery, and premises in safe condition. He is not, however, an insurer; and if the servant knows that they are unsafe, and without objection continues to use them, and injury results to him, he cannot hold the master responsible. There may be cases where he has the right to rely upon the superior knowledge or the means of knowledge of the master, but the above is the general rule.

In this case the jury found that Needham knew the condition of the premises, and had so known them for years; and, if the question of liability had been submitted to the court alone, or had properly belonged to it alone, a like judgment would probably have resulted.

We perceive no error in the instructions which were given to the jury. They were told: "Ordinary care is that decree which is exercised by ordinarily prudent persons, under similar circumstances." This instruction expresses the law in plain and concise terms, and is not in our opinion open to objection. Judgment affirmed.

BOGENSCHUTZ v. SMITH.

(Court of Appeals of Kentucky. March 29, 1887.)

1. APPEAL—SUFFICIENCY OF PLEADINGS—MOTION FOR NEW TRIAL.

The action of the trial court in overruling a demurrer to the petition need not be made a ground for new trial in order to enable the court of appeals to determine the sufficiency of the petition. No motion for new trial is necessary to bring the sufficiency of pleadings before the appellate court.

2. MASTER AND SERVANT—KNOWLEDGE OF SERVANT—PLEADING.

In an action by an employee against his employer, to recover for an injury received from the dangerous condition of the premises where he was required to work, and the employer's neglect to repair the same, the employee must aver want of knowledge on his own part of the defect.¹

Appeal from circuit court, Kenton county.

This was an action brought by appellee, Smith, against appellant, Bogen-schutz, to recover damages for injuries sustained by appellee while in the em-

¹ See note at end of case.

ploy of appellant owing to the defective and dangerous condition of the premises where, and the machinery with which, appellee was at work, and appellant's failure and neglect to repair same. Appellee obtained a verdict and judgment, and Bogenschutz appealed, and the court of appeals reversed the judgment. For the opinion on reversal see 1 S. W. Rep. 578. The opinion below is in response to appellee's petition for a rehearing.

Stevenson & Goebel and *R. Richardson*, for appellant. *J. F. & C. H. Fisk*, for appellee.

HOLT, J. This case was carefully considered before it was decided, and we have examined the lengthy petition for a rehearing with care. It is true that the action of the lower court in overruling the demurrer to the petition was not made a ground for a new trial, but this was not necessary to enable this court to consider it. No motion for a new trial is required in order to bring the sufficiency of the pleadings before this court. The averment of want of knowledge of the dangerous condition of the premises upon the part of the servant was necessary to the statement of the cause of action. The verdict did not, therefore, cure the omission. The question of knowledge is distinct from that of contributory negligence. Great doubt has existed in our minds, however, whether this omission was not supplied, and the issue made by the denial in the answer to the effect that the gangway was not obstructed to any extent. The case must, however, in any event, be reversed for the other errors pointed out in the opinion, and the doubt should be resolved against the defective pleading.

It is bad pleading to anticipate the defense, but, in a case like this one, the averment by the injured servant that he was not aware of the defective condition of the premises is requisite to the sufficient statement of a cause of action. The master is not an insurer of the safety of the servant; nor is he required to see or know that the machinery or premises furnished by him for the use of the servant are absolutely safe. The measure of his duty is the exercise of ordinary care under the circumstances of the case. Business demands, reason dictates, and judicial precedents fix this as the correct rule; and it applies both to machinery and premises furnished by the employer for the use of the employe. We perceive no reason for any distinction between the two. If the servant knows of the defective condition of the machinery, or the dangerous condition of the premises, and continues to use them without objection, he must ordinarily be held to assume the extra risk consequent thereto; and the result is the same although injury may accrue to him when the master or his superintendent is present. Undoubtedly there are cases where the servant may rely upon the master's care and judgment as to the safety of the machinery and premises in use. The latter may have a superior means and opportunity for knowledge. Thus, a brakeman on a railroad should not be required to inspect its track, or know that it has been safely constructed; but, although the company may know that it is unsafe, yet, if the employe has actual knowledge of it, and, without objection, continues to incur the risk, he cannot look to the master in case of injury. This is the general rule; but the law to be applied must depend upon the circumstances of the case. The instructions given related in part to matters not in issue by the pleadings. It is urged that the two amendments offered by the appellee presented them. They were, however, rejected by the court; and yet it instructed the jury as if they were a part of the record. If it did not show that they were refused, this court would treat them as having been filed; but a verdict cannot be sustained where it clearly appears that it may have resulted from instructions of the court upon questions not put in issue by the pleadings, although the party may have sought to put them in issue.

Upon the return of the cause, the parties should be allowed to file any proper amendatory pleadings, and the petition for a rehearing is overruled.

NOTE.

In an action to recover for injuries sustained by a servant in consequence of defective premises, machinery, or appliances, or of incompetent fellow-servants, he must allege that the unfitness or defect was known to the master, or was such as, with reasonable diligence, he ought to have known, and that the plaintiff did not know and could not reasonably be held to know of it, *Wason v. West*, (Me.) 3 Atl. Rep. 911; *Hull v. Hall*, Id. 38; *Indiana, B. & W. Ry. Co. v. Dailey*, (Ind.) 10 N. E. Rep. 631; *Lake Shore & M. S. Ry. Co. v. Stupak*, (Ind.) 8 N. E. Rep. 630; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, (Ind.) 5 N. E. Rep. 187; but it has been held that, in an action by a railroad employe against the company, for damages caused by personal injury, where the plaintiff's right of action depends upon his ignorance of certain conditions,—as defects in defendant's switch-engine and unskillfulness of its engineer,—it is not incumbent upon the plaintiff to aver such ignorance in his complaint, but rather it is for defendant to aver and prove knowledge on part of plaintiff, *Cole v. Chicago & N. W. Ry. Co.*, (Wis.) 30 N. W. Rep. 600.

BULLITT v. CITY OF PADUCAH.

(Court of Appeals of Kentucky. March 29, 1887.)

CONSTITUTIONAL LAW—LICENSE—ATTORNEYS AT LAW.

A license upon attorneys at law, or any other profession, calling, or trade, may be imposed by a municipal corporation acting under legislative authority; and it is no valid objection to the license that it is imposed upon one profession or trade, and upon no other.

Appeal from circuit court, McCracken county.

Gilbert & Reed and *W. G. Bullitt*, for appellant. *E. W. Bagby*, for appellee.

PRYOR, C. J. The city of Paducah, for the purpose of raising means to meet its obligations, obtained an amendment to its charter, by which it was empowered to exact a license upon certain occupations and business pursuits, including attorneys at law, to aid those paying revenue on their taxable property in discharging the indebtedness. That indebtedness consisted in bonds given by the city to aid certain railroad improvements that had been constructed so as to run within the city limits. The city council proceeded by ordinance to impose a license upon nearly every business pursuit, including lawyers, merchants, physicians, druggists, etc. The license was \$10, imposed upon the appellant, who was an attorney at law, and, he refusing to pay, the ordinance was enforced against him.

It is well settled that a license upon any trade, profession, or calling may be imposed under legislative authority. It is, in effect, a tax upon the profession or calling, and we see no reason why the municipal authority of Paducah, being invested with this power by the amendment to its charter, may not impose this local tax, and apply the collections to the payment of its indebtedness incurred either before or after the license is exacted. Nor do we understand that the rule of uniformity in imposing the burden applies when a mere license is required. It must be levied on all alike, in the same profession or avocation. Nor is it indispensable that every avocation or business within the particular locality shall pay a license. The council would have no right to demand a license of one attorney, and exempt all others, or one merchant, and relieve the others from the burden. If each class is taxed alike, there is no constitutional objection to the law; and the fact that the railroad agent or milliner is not required to pay the license does not invalidate the ordinance as to the other business pursuits. Such legislation applied to cities and towns is now one of the usual modes of raising revenue. See *Desty*, Tax'n, 308-306, 308.

Judgment affirmed.

KRAFT'S GUARDIAN and others v. KOENIG and others.

(Court of Appeals of Kentucky. March 31, 1887.)

DURESS—DEED—GUARDIAN AND WARD.

In an action by a grantor to set aside a deed executed by her, as having been obtained by the duress of her guardian and his wife over her, it appearing that the deed was executed only six months after she had attained her majority; that it conveyed a two-thirds interest in property, to which she was exclusively entitled, to her half brother and sister; that she was ignorant of her rights, and acted without legal advice; that the influence of her guardian and his wife, with whom she lived, though it did not amount to actual duress, was such as to destroy her free agency, although they were not to benefit by the deed: *held*, that the deed was properly set aside, notwithstanding the beneficiaries were infants, to whom no fault or fraud could be imputed.¹

Appeal from Louisville chancery court.

M. A. & D. A. Sachs, for appellants. *Frank Hagan* and *Chas. G. Hulsewede*, for appellees.

LEWIS, J. Appellee Emma Kraft, now Koenig, was five years of age when her father died, and thirteen when her mother died, leaving two children by a second husband. Shortly after the death of her mother, appellant Henry Schuff was appointed her guardian, and she was sent to Europe, where she remained until 19 years old, when she returned to the house of her guardian, whose wife was her aunt, and resided there until some months after the deed she seeks to set aside was executed by her. There is no averment or proof that either her half-brother or half-sister, the beneficiaries of the deed, both of whom were infants at the time, did anything to induce her to execute it. She alleges that she was coerced by her guardian and his wife, the latter, as she testifies, being the principal actor, to make the deed against her will, and that it was made by her in ignorance of the nature or extent of her interest in the property.

It was made about 6 months after she arrived at the age of 21 years, and ceased to be the ward of appellant Henry Schuff. What motive either he or his wife had in procuring the execution of the deed, if they did so, does not clearly appear. The effect of the deed was to transfer to her half brother and sister an undivided interest of two-thirds in a lot on Market street in the city of Louisville, the whole of which was devised to her by her father. Henry Schuff, it seems, acting under the belief that, by the will of her mother, the lot belonged to the three children, instead of her only, had accounted to her in his settlement as guardian for only one-third of the rents, retaining the balance in his hands for the half brother and sister, of whom he was likewise guardian. But that fact does not show enough interest or advantage likely to result to him from the execution of the deed to account for his solicitation on the subject, and the means she states he and his wife resorted to for the purpose. The only satisfactory explanation for their alleged conduct is that her aunt was influenced, either by affection for the other two children, or desire to have the will of her sister, the mother of appellee, carried out. But whatever may have been their motive, appellee avers in her petition, and testifies as a witness, to acts on their part which, if true, show that she did not make the deed of her own free will, but was coerced to do so, and made it without a full knowledge of its effect.

She testifies that both her guardian and his wife urged her to make it, and became angry because of her reluctance to do so, and that the latter not only upbraided her for her unwillingness to make it, but represented to her that it would be a disgrace for her to refuse to carry out her mother's will, and threatened to drive her out of the house if she did not do so. She is corrobor-

¹ See note at end of case.

rated to some extent by two witnesses, one of whom testifies he heard her aunt on one occasion threaten to drive her out of the house if she did not make the deed, and that appellee was at the time very much excited and distressed. The other witness, who is also her aunt, testified that she was at the time easily influenced and terrified by her aunt, her guardian's wife, and to a considerable degree by him, and that late at night of the day the deed was made she came to the house of the witness very much distressed at having been forced against her will to execute it. Her aunt, the wife of her guardian, does not testify as a witness, nor attempt to contradict these damaging charges against her.

It appears from the evidence that a few days before the execution of the deed she and her guardian went to the law office of Mr. Sachs to consult him about the extent of her interest in the property left at the death of her mother, and that he subsequently examined the wills of her father and mother, and, upon the return of her and her guardian to his office, he had a deed prepared for her to sign; but she took it away to show to her betrothed husband; and in a few days they made a third visit to the lawyer's office, when the deed was executed.

Mr. Sachs gave his deposition, which the chancellor excluded upon the ground that he was appellee's attorney, and his evidence related to privileged communications, and was therefore incompetent; and that action of the chancellor is one of the grounds relied on for reversal. His testimony is contradictory of what she states occurred at the several interviews, and tends to show she acted freely and intelligently in making the deed. But, as said by the chancellor in his opinion, the alleged undue influence was used previous to the interview with Mr. Sachs, and the natural result of it had been accomplished. In his deposition Mr. Sachs states that he explained to appellee, after examining the wills, that in the event of one construction of her father's will she would get a certain interest, and in case it was construed otherwise she would get less, and at all events she would get more than her half brother and sister. In this connection it is proper to refer to the recitals of the deed, which are as follows: "Whereas, under the will of W. C. Kraft, and under the will of Elizabeth Kraft, all of said parties have become the owners of certain real estate in said city, * * * on the south side of Market street, * * * and it is questionable whether or not the first party has a larger interest than the parties of the second part, they being all the only children and heirs at law of Elizabeth Kraft, and it being desirous that all of said parties shall individually own said property in equal parts, now, in consideration of the premises and one dollar each in hand paid," etc.

Appellee was, at the date of that deed, twenty-one years and six months old, without knowledge of, or the experience and capacity sufficient to acquaint herself with, the extent of her interest in the lot conveyed, even if she had examined the title papers. She resided with and relied on her guardian for advice, and, unless Mr. Sachs was her legal adviser, she had none. He made the impression on her, by his statement, that the extent of her interest depended upon which one of two constructions was put upon her father's will, when it admits of but one, and by that she was entitled absolutely to the whole of the Market-street lot.

There are two incorrect statements contained in the recitals of the deed: *First*, it was not true, as stated, that appellee's half brother and sister, or either of them, owned any interest whatever in the Market-street lot; and, *second*, there was no room for question as to who of the three owned the larger interest, because appellee owned the whole of it. The will of W. C. Kraft is as follows: "I give and bequeath to my beloved wife, Elizabeth Kraft, all my real, personal, and mixed estate of which I may be possessed at the time of my demise, for her and her child, Emma Kraft, sole use and benefit, and give my beloved wife full power and authority to sell my real estate what

I now hold on Walnut near Clay street, but no other; and I appoint my beloved wife executrix, * * * without security." The wife had the power to sell, and it appears did sell, the Walnut-street property; but the Market-street lot was not subject to her power to sell; and the only interest she had in it was a life-estate, which terminated at her death, and then appellee became the absolute owner in fee. Consequently, the will of Elizabeth, even if it could be construed to embrace the lot on Market street, did not operate to pass any interest in it to her other two children.

We think, even considering the deposition of Sachs as part of the record, there is enough in this record to show—*First*, that the deed was not the free and voluntary act of appellee, but that the measures used and the influences brought to bear on her by her recent guardian and his wife were such that, while not amounting to actual duress, did constrain her will and overcome her free agency; *second*, she was ignorant of the nature and extent of her interest in the property conveyed, and, if not fraudulently deceived by her guardian in respect to it, she certainly was deprived of the information she was entitled to from him, and that it was his duty to give, before influencing her to make the deed.

Though the beneficiaries of the deed are infants, and no fault or fraud can be imputed to them, still they have no right to profit by the fraud or coercion used by others in their interest.

Judgment affirmed.

NOTE.

Any social or domestic force, though not sufficient to amount to duress, which controls free action in the matter, will justify the court in setting aside an instrument obtained thereby. *Munson v. Carter*, (Neb.) 27 N. W. Rep. 208.

See, also, *June v. Willis*, 30 Fed. Rep. 11, and note.

TABOR and others v. MERCHANTS' NAT. BANK.

(*Supreme Court of Arkansas*, March 12, 1887.)

1. PROMISSORY NOTES—ACTION ON—PRESUMPTION AS TO PURCHASE FOR VALUE—BURDEN OF PROOF.

In an action upon a promissory note, the production of the note, and proof that the indorsement was made before maturity, raises the presumption that the plaintiff paid value for the note, that he is an innocent holder, and that he acquired it in the due course of business; but, if the proof subsequently offered by the defendant shows that the note in its inception was so infected by fraud as to destroy the title of the original holder, the presumption of the payment of value is thereby overcome, and the burden of proof is shifted to the plaintiff to show that value was given for the note.¹

2. SAME—CONDITIONAL SUBETYSHIP—DELIVERY TO MAKER—INNOCENT PURCHASER.

One having signed a note as surety delivered it to the maker upon the understanding that it was not to be delivered to payee until another should have signed it as co-surety, but the maker fraudulently delivered it to the payee without obtaining the co-surety's signature. *Held*, that the surety, having signed and intrusted the note to the maker, was to be considered as constituting the latter his agent, and, having clothed him with the means of perpetrating a fraud, must bear the loss; it not appearing that the payee had any knowledge, at the time of taking the note, of the agreement between the maker and surety.

3. SAME—PURCHASER FOR VALUE—NOTE TAKEN IN PAYMENT OF DEBT.

One who takes negotiable paper before maturity, and without notice of any defect of title, in discharge of an existing antecedent debt, is a purchaser for value.

Appeal from circuit court, Sebastian county.

Collins & Balch, for appellants.

¹ As to the presumption arising from the production of the note, see *Cheney v. Stone*, 29 Fed. Rep. 885; *Manistee Nat. Bank v. Seymour*, (Mich.) 31 N. W. Rep. 140.

As to the effect of fraud in the inception of the note, see *Lerch Hardware Co. v. Columbia Nat. Bank*, (Pa.) 5 Atl. Rep. 778, and note.

COCKRILL, C. J. The Merchants' National Bank sued the appellants upon a note signed by them and one Jerre Wolf, who was not sued. The note was made payable to the German Insurance Company of Freeport, Illinois, and was indorsed in blank. The appellants filed an answer in which it was alleged that they signed the note "as sureties for Wolf in payment of an antecedent indebtedness then owing by said Wolf to the German Insurance Company" upon the express agreement that Wolf should not deliver the note to the payee until W. L. Taylor and Alvie Smith had signed it with them, but that, in violation of the agreement, Wolf delivered the note to the payee, and that the bank knew the facts when the note was indorsed to it, and denied that the indorsement was made before maturity. A jury was waived, and the court made the following finding of facts, viz.: "(1) That the note sued on was signed by E. A. Tabor, Jesse Turner, Jr., and O. P. Brown, at the instance and request of Jerre Wolf, one of the makers, with the understanding and agreement that the same was not to be delivered to the German Insurance Company, to which the said Wolf was indebted, until W. L. Taylor and Alvie Smith should sign it as sureties with them; that said note was delivered to the German Insurance Company without the signatures of Taylor and Smith; and that the insurance company had no knowledge of the manner in which the signatures of the above-named parties had been obtained. (2) That the said note was assigned to the plaintiff before maturity, in regular course of business." And judgment was entered for the plaintiff.

The appellants contend that the finding is not sustained by the evidence in so far as it relates to the insurance company's want of knowledge of the condition upon which the appellants' signatures were obtained by Wolf. As to that point it is only necessary to say that no testimony was offered by either side. It is argued, however, that the facts found are not sufficient to sustain the judgment. The contention is that the proof that the note was put in circulation by Wolf, in violation of the agreement with the appellants, cast upon the plaintiff in the action the *onus* of proving, not only that the note had been indorsed to it before maturity, but also that it was acquired upon a valuable consideration. There was no proof of the consideration paid by the plaintiff. The fact of indorsement by the insurance company to the plaintiff was not put in issue, as counsel seems to suppose. The complaint alleged that the indorsement was made before maturity for a valuable consideration, and the answer avers that the note "was not" assigned to the plaintiff before maturity, but in truth and in fact that the assignment "was made long after maturity, and that the assignment was not made for a valuable consideration." The defendants had previously undertaken to test the sufficiency of the indorsement by demurrer, but the demurrer was overruled, and by pleading over to the merits they waived all objection to the ruling of the court in that respect, (*Chapline v. Robertson*, 44 Ark. 202; *Jones v. Terry*, 43 Ark. 230,) and did not renew the objection in any other form.

The answer, so far from containing a denial of the assignment, (see *Mansf. Dig. § 477*), is an admission of its validity; and when the plaintiff proved, as was done, that the assignment was in fact made before the maturity of the instrument, the statutory rule that a blank assignment shall be taken to have been made at a date most to the advantage of the defendant was overcome. *Trader v. Chidester*, 41 Ark. 242. The production of the note, and proof that the indorsement was made before maturity, raised the presumption that the plaintiff had paid value for the note; that it was an innocent holder, and had acquired it in due course of business. But, if the proof subsequently offered by the defendants to establish their defense shows that the note in its inception was so infected by fraud as to destroy the title of the original holder, the presumption of the payment of value was thereby overcome, and the burden of proof was shifted to the plaintiff to show that value was given for the note. 1 Daniel, Neg. Inst. § 814; Benj. Chalm. Dig. p. 109, art. 97; 2 Greenl.

Ev. § 172; *Commissioners Marion Co. v. Clark*, 94 U. S. 278, 285; *Collins v. Gilbert*, Id. 753; *Nickerson v. Ruger*, 76 N. Y. 279; *National Bank v. Green*, 43 N. Y. 298; *Kellogg v. Curtis*, 69 Me. 212; *Gray's Adm'r v. Bank of Kentucky*, 29 Pa. St. 365. The reason assigned for the rule is that, "where there is fraud, the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and such presumption operates against the holder, and it devolves upon him to show that he gave value for it." *Bailey v. Bidwell*, 13 Mees. & W. 78; *Collins v. Gilbert*, *supra*.

If, therefore, the evidence shows that the note was invalid in the hands of the insurance company by reason of the fraud practiced upon the appellants by their principal, Wolf, then the plaintiff, who is the indorsee, having failed to rebut the presumption of invalidity that is raised against it, was not entitled to recover. But, when we come to the consideration of that question, we find no allegation in the answer, and there is no proof to show, that the insurance company had notice of the condition upon which the appellants had signed the note. It was complete in form, there was nothing on its face to arouse suspicion, and the answer alleges that it was given in payment of a debt due from Wolf to the insurance company. The inquiry is, therefore, was the insurance company, under these circumstances, affected by the fraud practiced by Wolf upon his sureties?

It was ruled by this court, at the present term, that the delivery of an official bond by a surety to the principal obligor, upon the condition that it should not be delivered until signed by other parties, did not have the effect of constituting it an escrow, as though delivered, under like circumstances, to a stranger. *State v. Churchill*, *ante*, 352. While there is some conflict in the authorities upon this point as to non-negotiable instruments, we are aware of no case which holds that such an effect is given where a negotiable instrument perfect in form is delivered to the maker. In such cases, where the question arises between the injured party to the note and a payee who has taken it for value, without notice of the condition, the former, having executed it and intrusted it to a maker, is regarded as having constituted him his agent to negotiate it, and, having clothed him with the means of perpetrating the fraud, must bear the loss. *Passumpsic Bank v. Goss*, 31 Vt. 315; *Farmer's & M. Bank v. Humphrey*, 36 Vt. 554; *Ayres v. Milroy*, 53 Mo. 516; *Bank of Missouri v. Phillips*, 17 Mo. 29; *Smith v. Moberley*, 10 B. Mon. 266; *Merriam v. Rockwood*, 47 N. H. 81; *Gage v. Sharp*, 24 Iowa, 15; *Daniels v. Gower*, 54 Iowa, 319, 3 N. W. Rep. 424, and 6 N. W. Rep. 525; *Graff v. Lague*, 61 Iowa, 704, 17 N. W. Rep. 171; *Deardorff v. Foresman*, 24 Ind. 481; *Clark v. Bryce*, 64 Ga. 486; *Stoddard v. Kimball*, 6 Cush. 469; *Clark v. Thayer*, 105 Mass. 216; 1 Daniel, Neg. Inst. § 854.

The insurance company had the right, then, to assume that the appellants had authorized Wolf to deliver the note to it for them; and as it is not shown that the company had notice of the violated condition, or any reason to suspect its existence, the appellants have failed to connect it with the fraud, or to establish a *prima facie* case against it, if value was paid for it by the note. Cases *supra*.

In the case of *Bertrand v. Barkman*, 13 Ark. 150, it was ruled that one who takes negotiable paper in payment of an antecedent debt, before maturity, and without notice, actual or otherwise, of any defect thereto, receives it in due course of business, and becomes, within the meaning of the commercial law, a holder for value, entitled to enforce payment without regard to the defenses that may exist between the other parties to the paper; and this is in accord with the very general concurrence of judicial authority. 1 Daniel, Neg. Inst. § 832; *Harrell v. Tenant*, 30 Ark. 684; *Railroad Co. v. National Bank*, 102 U. S. 14; *Oates v. National Bank*, 100 U. S. 239; *Stoddard v. Kimball*, *supra*; *Bank of Missouri v. Phillips*, *supra*.

It follows, then, that, the appellants having failed to establish the invalidity of the note in the hands of the first holder, the necessity of proving the payment of value for the indorsement was not cast upon the bank, and it was entitled to recover. Affirmed.

LITTLE ROCK & FT. S. RY. CO. v. EUBANKS, Adm'x.

(*Supreme Court of Arkansas. March 12, 1887.*)

1. MASTER AND SERVANT—RAILROAD COMPANY CONTRACTING FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE.

An employer is bound to furnish his employe with suitable machinery and appliances to do his work, and with a reasonably safe place to do it in, and cannot relieve itself from its duty in this respect by special contract with the employe: and an agreement entered into by one with a railroad, upon being employed as brakeman, to take upon himself all risks incident to his position on the road, and not to hold the railroad company liable for any injury he may sustain by accident or collision on the trains of the road, or by defective machinery or carelessness or misconduct of himself or any other employe of the company, is not binding on him so as to relieve the company from liability for an accident caused by its failure to repair its road.

2. SAME—ACTION AGAINST RAILROAD—DEFECTIVE TRACK—VERDICT NOT SUSTAINED BY EVIDENCE.

In an action to recover damages from a railroad for its negligence, resulting in the death of plaintiff's intestate, alleged to have been caused by a "switch" or "frog" being so ill constructed and defective as to render it unsafe for use, and by reason whereof the intestate, being employed as a brakeman, while in the discharge of his duty at the time, was thrown from the car, run over, and killed, the only evidence introduced by plaintiff to prove negligence being that the switch rail was a little lower than the other rail, and his witnesses not stating that this was a defect that could be remedied, and defendants proving that it was necessary to have the switch rail lower than the main rail, *held*, there was no evidence to sustain the finding for plaintiff, and it must be set aside.

3. SAME—EVIDENCE AS TO CONDITION OF TRACK BEFORE ACCIDENT.

Where a defective track is alleged to have been the cause of the accident, it is often impracticable to adduce evidence of the condition of the track at the precise time the casualty occurred. It is enough to prove such a state of facts, shortly before or after, as will induce a reasonable presumption that the condition is unchanged; but evidence of the condition three years before trial, and twenty-one months after the accident, is inadmissible.

4. SAME—CONTRIBUTORY NEGLIGENCE—BRAKEMAN EXCHANGING PLACES WITH ANOTHER WITHOUT ORDERS.

Contributory negligence must be affirmatively proved, as it will be presumed that the injured party was in the exercise of due care until the contrary is made to appear.¹ And it is not sufficient to establish contributory negligence on the part of the injured brakeman that he exchanged places with one of his fellow-brakemen without orders from the conductor, although it is probable he would not have been injured had he remained in the position to which he had been assigned; it not appearing that the place he assumed was more dangerous than the one he vacated.

Appeal from circuit court, Franklin county.

J. M. Moore, for appellant. *T. B. Martin* and *Ed. H. Mathes*, for appellee.

SMITH, J. Appellee, as administratrix of *J. C. Eubanks*, sued appellant in the Franklin circuit court, alleging that she was mother of deceased, and administratrix, etc.; that on the seventh of October, 1884, her intestate was employed under a contract as brakeman on appellant's railway, and that on or before that time appellant's railway, at the town of Ozark, was in a defective condition, in this: "The defendant had constructed on its said road, and as a part of it, on the track thereof, at said place, a switch and a frog, which

¹ See *Township of Kingston v. Gibbons*, (Pa.) 6 Atl. Rep. 115; *Hopkins v. Utah Northern Ry. Co.*, (Idaho,) 13 Pac. Rep. 343; *Huckshold v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 2 S. W. Rep. 794; *Thorpe v. Missouri Pac. Ry. Co.*, Id. 3, and note.

was so worn, ill constructed, and defective as to render it unsafe and unfit for use." The complainant alleges knowledge by appellant of these defects, and that by reason thereof, and the unsafe condition of the road at that point, and appellant's negligence, her intestate, while in the performance of his duty as brakeman under his contract, was thrown from the car, run over, and killed. The answer denies that the switch or frog was defective, ill constructed, or unfit for use, or that plaintiff's intestate was thrown from the car and killed by reason of any such defects; denies that deceased was free from negligence; and alleges that his death was caused by negligence on his part. The answer also sets up and relies upon the following contract executed by deceased before his employment by defendant as a release of liability. "Clinton Eubanks, having been employed, at his request, by the Little Rock & Fort Smith Railway in the capacity of brakeman, hereby agrees with said railway, in consideration of such employment, that he will take upon himself all risks incident to his position on the road, and will in no case hold the company liable for any injury or damage he may sustain, in his person or otherwise, by accidents or collisions on the trains or road, or which may result from defective machinery, or carelessness or misconduct of himself or any other employe and servant of the company." The issues were submitted to a jury, which returned a verdict for the plaintiff for \$9,360, upon which judgment was entered. A motion for a new trial was subsequently overruled, and a bill of exceptions was signed saving the points hereinafter noticed.

1. The execution of the contract copied above was admitted by the plaintiff. But the court refused this prayer of the defendant: "If you find that, before entering the service of defendant, deceased executed the release, a copy of which is set out in defendant's answer, you are instructed that, by reason of said release, plaintiff will be precluded from recovering anything in this suit, and you will find for defendant."

A common carrier or a telegraph company cannot, by precontract with its customers, relieve itself from liability for its own negligent acts. This, however, may be on the grounds of its public employment. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Little Rock, M. R. & T. Co. v. Talbot*, 39 Ark. 523; *St. Louis, I. M. & S. Ry. v. Lesser*, 46 Ark. 236; 1 Whart. Cont. § 438. The validity of the contract before us is not affected by such considerations. The relation existing between the parties to it is essentially a private relation,—that, namely, of master and servant. And the question is whether a servant employed in the operation of dangerous machinery can waive in advance the duties and liabilities which the master owes him, and which do not depend on contract, but spring out of the relation itself. Of course, if he can waive them so as to bind himself, a waiver will also bar his personal representative; for the personal representative only succeeds to the right of action which the deceased would have had but for his death.

In 1880 the English parliament passed the "employers' liability act," the object of which was to make employers liable for injuries to workmen caused by the negligence of those having the supervision and control of them. In *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, it was held that a workman might contract himself and his representatives out of the benefits of this act. An opposite conclusion has been reached by the supreme courts of Ohio and Kansas. They hold that it is not competent for a railroad company to stipulate with its employes, at the time of hiring them, and as part of the contract, that it shall not be liable for injuries caused by the carelessness of other employes. *Lake Shore & M. S. R. Co. v. Spangler*, 8 N. E. Rep. 467, (Sup. Ct. Ohio, 1886;) *Kansas Pac. Ry. Co. v. Peavey*, 29 Kan. 169, 44 Amer. Rep. 630, 11 Amer. & Eng. R. Cas. 260. In the notes to the last-mentioned case, as reported in the two series of reports last cited, the substance of *Griffiths v. Earl of Dudley* is set out. This, however, is not precisely the same

question we have to deal with; for the negligence of a fellow-servant is not in fact and in morals the negligence of the master, although by virtue of a statute it may be imputed to the master. It is impossible for the master always to be present and control the actions of his servants. Hence a stipulation not to be answerable for their negligence beyond the selection of competent servants in the first instance, and the discharge of such as prove to be reckless or incompetent, might be upheld as reasonable, notwithstanding a statute might abolish the old rule of non-liability for the acts and omissions of a co-servant. But the supreme court of Georgia have, in several cases, sustained contracts like the one before us as legal and binding upon the employe, so far as it does not waive any criminal neglect of the employer. The effect of these decisions is that the servant of the railroad company, for instance, not only takes upon himself the incidental risks of the service, but he may by previous contract release the company from its duty to furnish him a safe track, safe cars, machinery, and materials, and suitable tools to work with. *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Western & A. R. Co. v. Strong*, 52 Ga. 461; *Galloway v. Western & A. R. Co.*, 57 Ga. 512. On the other hand, in *Roesner v. Hermann*, 10 Biss. 486, 8 Fed. Rep. 782, a contract by a master against his own negligence was declared to be void as against public policy; GRESHAM, J., saying: "If there was no negligence, the defendant needed no contract to exempt him from liability; if he was negligent, the contract set out in his answer will be of no avail." Compare *Memphis & C. R. Co. v. Jones*, 2 Head, 517, where it was decided that such a contract would not protect the master against gross negligence.

It is an elementary principle in the law of contracts that "*modus et conventio vincunt legem*,"—the form of agreement and the convention of parties override the law. But the maxim is not of universal application. Parties are permitted, by contract, to make a law for themselves only in cases where their agreements do not violate the express provisions of any law, nor injuriously affect the interests of the public. *Broom, Leg. Max.* *543; *Kneetle v. Newcomb*, 22 N. Y. 249. Our constitution and laws provide that all railroads operated in this state shall be responsible for all damages to persons and property done by the running of trains. *Const.* 1874, art. 17, § 12; *Mansf. Dig.* § 5537. This means that they shall be responsible only in cases where they have been guilty of some negligence; and it may be questionable whether it is in their power to denude themselves of such responsibility by a stipulation in advance. But we prefer to rest our decision upon the broader ground of considerations of public policy. The law requires the master to furnish his servant with a reasonably safe place to work in, and with sound and suitable tools and appliances to do his work. If he can supply an unsafe machine or defective instruments, and then excuse himself against the consequences of his own negligence by the terms of his contract with his servant, he is enabled to evade a most salutary rule. In the English case above cited it is said this is not against public policy, because it does not affect all society, but only the interest of the employed. But surely the state has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community; and it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railroad company, and every owner of a factory, mill, or mine, would make it a condition precedent to the employment of labor that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils of occupations which are hazardous even when well managed; and the final

outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity.

2. The next question is whether the testimony is sufficient to support the verdict. The freight train upon which deceased was a brakeman was bound for Fort Smith, but had stopped at Ozark station, about 11 P. M., and the trainmen were engaged in switching off cars from the main track to a side track. The plaintiff's intestate was assisting in this operation, being on top of one of the cars, with a lantern in his hand. The evidence does not show clearly what it was that caused him to fall between the cars; but it is probable that he was thrown off by the jolting of the car, and that this jolting was produced by the car having left the track. The theory of the plaintiff's case was that there was a defect in the switch or in the frog, or in both, which caused the car to run off at that particular place.

The substance of the testimony on this point was as follows:

J. V. Bourland, for plaintiff, testified: "It was about 11 o'clock at night when I rushed to the railroad. They were taking deceased from under the wheels. It was about twelve to fifteen feet from the frog towards the depot. He was lying across the track. Could see where the border or flange of the wheel cut the rail and frog. Think the car got off at the frog, and it jumped across the ties. Heard train had got off there before. Knew of as many as two or three getting off there. Conductor and two or three others were there. Don't know how many cars were attached to engine. Think both trucks of second car from rear of train were off. The wheels on one side of the car were off. Don't know whether the track is in good or bad repair. About fifteen or twenty feet south of the frog is where the man was killed. I know of no cars being off there before. Judge from indentations on the ties; don't know how long they had been there. Judge from the scar on the frog that the car-wheels ran on top of it and the track about two feet. Don't know how long the scar had been there, or if it had been made by this car. Am satisfied the scar I saw on the frog was made by this car running off. Did not examine on the outside of the ties or switch rail to see if there were any indentations on the ties. Was there next morning. Saw scars on the old ties where the accident occurred. Two or three days afterwards these old ties were gone, and new ones in. Live at Ozark. Was never employed on a railroad."

Henry Woollum: "Don't remember exact time of the accident. Was in Argenta at the time; running as fireman on an extra. Was at Ozark six or eight days before, going into defendant's employ. Don't know as to condition of switch at time of accident, but afterwards it was bad. Shortly after the accident, was yard-master of this yard, and was notified by engineers that this switch was in bad condition; notified section foreman, whose duty it was to fix it; also told McLoud, road-master. The train dispatcher gave notice to me two or three times to run slow over that switch. This was the train dispatcher under Mr. Hartman, three years ago, while I was running an engine. [Evidence of above notification of condition of track, switch, etc., objected to. Objection overruled, and exception saved.] The defect in the switch was that the switch rail was one and one-half inches lower than the main track. An engine got off the track there one night, and I tried two or three times to get over, and could not do so. The foreman came down and fixed it. The wheel would drop between the switch and main rail. This was two months after the accident occurred, and while I was yard-master. It would throw the train to north side of the track; could throw it south. Kyle, the section boss, fixed it. Did not notice ties cut by wheels. Switch rails are between main rails of track. It was a split switch. Engine was hard to get over; cars would go over because so much lighter. It is the duty of road-master and section foreman to look after track. I knew there was a defect there, but not what it was. Was notified switch was defective after accident

occurred. Could not see any defects. I went and looked. Every time engine would go off to the north side. Have been in railroad business about nine years. This frog and switch are the kind usually used. I made no report of defects to officers of road. Looked at track inside of fifteen days after accident. Had coal cars off here while engineer. Cause of engine jumping was that switch rail was lower than main rail."

None of the remaining witnesses for the plaintiff professed to have any knowledge of the condition of the track; but two of them stated that they had seen a car off the track about the same place recently before the accident occurred.

For the defendant the following witnesses testified:

L. Treadway: "Was conductor of the train, and handling the switch,—switching cars. Gave signal to back; heard jumping, and signaled to stop. Went down to where car was; saw it was Eubanks under the car, and said: 'My God! how did he get over here?' Saw signal from man on top of second car from rear end to 'come back;' did not see him afterwards. He was killed eight or ten feet east of frog, and one hundred and eight or ten feet east of switch; body was under last pair of trucks of second car at the rear of train. Had been handling switch thirty-five or forty minutes; it was all right, and a good one. I examined car and track after the accident; both were all right. I pulled the car over the ties up to the frog to get it back on. The track at this point has been good ever since I've been on the road,—eighteen months. The car rolled about six feet after it jumped; only one pair of truck off. He was my rear brakeman, and his position was rear brakeman on train or caboose. He ought to have stayed in rear of the train, and caught cars as they came back. He was in the head brakeman's place, and I gave him no orders to change. Brakemen were all under my orders. I did not know of the change until after his death. We passed over this track ten or fifteen times that night before the accident. Car ran off because of something on the track to throw it, not on account of defective frog. The signs on the ties were made by us in trying to get the car back on the track. It is the duty of the yard-master and section boss to look after the track. McLoud and Kyle filled those positions; both competent men. There was no defect in the switch, frog, or track in any respect. Am not in defendant's employ now. Had three brakemen. It was necessary for some one to be on top of car with engine. I would be willing to swear point-blank that it was the body of the man that threw the car off. It is a brakeman's duty to do work anywhere on the train when necessary. After a brakeman has been assigned to a position he has no right to change places without orders from the conductor. I gave no such orders in this case, nor knew of it until I found deceased dead."

McLoud: "Am road-master, and have charge of track. Was at place of accident the next morning after it occurred. Examined track, switch, and frog, and found everything all right. Nothing has been done to change switch, frog, or anything else since the accident. New switch ties were put in a day or two before injury, and were all right. Trains ran over the track the day and night before the injury. Nothing was the matter with the track. It is necessary for the point of the switch rail to be a little lower than main rail, so as to slip under in order to make a switch. If a car passes the frog, and gets off, it would require something to throw it off. Both switch, frog, and track were in good condition at the time, and are now. If switch is being made, and frog is defective, and the car leaves the track, it would go off on north side. There is a little open place between the rails at frog; and, if the wheels strike the point of frog, it would go through this, and off the north side. Mr. Kyle is section foreman, and a competent man."

Kyle: "Was section foreman, and duty to keep track in good order. Came down morning after accident, gauged the track, and found it all right; switch,

frog, and track were in good condition. I put in ties day before accident; surfaced, leveled, and gauged the track. All regular trains passed over day before the accident. No report was ever made to me that track was defective. About two months before accident a king-bolt broke on a lumber car, and threw it off near the water tank. The frog is east of switch eighty feet. I put in new ties October 8th. The accident occurred next night. Put new ties from point of switch up to, and five under, the frog. I have done no work there since. Have been railroading twenty-one years."

John Edwards: "Was a hand under Mr. Kyle. There was nothing wrong with the switch, frog, or track. They are the same to-day as then, no work having been done there since."

The evidence of Rock Smith and Charles Cole was, in substance, same as Edwards.

Aside from the testimony of Woollum, there is nothing here that tends to prove the existence of the defect complained of; and Woollum's testimony, when analyzed, will be found to be vague, inconclusive, and contradictory, based largely on hearsay, and relating chiefly to times long antecedent or subsequent to the accident. He says expressly that he was not acquainted with the condition of the switch at the time of the accident. His statements as to its condition three years before the trial, and some twenty-one months before Eubanks was killed, should have been excluded. Proof of what occurred two months afterwards was also irrelevant to any issue that was before the jury, being too remote to afford any fair inference. The evidence in such cases should be confined to the time, place, and circumstances of the injury and negligence then and there. *Parker v. Portland Pub. Co.*, 69 Me. 174; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537. Where a defective track is alleged to be the cause of the casualty, it is often impracticable to adduce evidence of the condition of the track at the precise moment the casualty occurred. It is enough to prove such a state of facts, shortly before or after, as will induce a reasonable presumption that the condition is unchanged. Woollum had not examined the track before the accident; nor can his examination afterwards be brought nearer than 15 days. Assuming that there was no change of condition within that time, the only defect he was able to discover was that the switch rail was a little lower than the main rail. He does not seem to be very positive that this was a defect which could be remedied; and the evidence for the defendant shows that it is necessary for the point of the switch rail to be lower than the main rail, so as to slip under in order to make a switch. The evidence, then, is lacking on a material point which it was essential for the plaintiff to establish,—that the appliance was defective. It may be said this was a question for the jury. But the jury could not infer it without proof. The duties of a railroad company to its servants in these matters are not measured by the same rule that is applied in the case of passengers. Railways do not warrant to their servants the safe condition of their line and machinery; and they guaranty only that due care shall be used in constructing and in keeping in repair and in operation the line, appliances, and machinery. *Patterson, Railway Accident Law*, § 284, and cases cited; *Little Rock & Ft. S. R. Co. v. Duffey*, 35 Ark. 602; *St. Louis, I. M. & S. Ry. v. Harper*, 44 Ark. 529; *St. Louis, I. M. & S. Ry. v. Morgart*, 45 Ark. 318; *Probst v. Delamater*, 100 N. Y. 266, 3 N. E. Rep. 184. So far as appears, the deceased lost his life by a casualty, which, in the absence of evidence showing that the defendant was in fault, must be ascribed to the ordinary risks incident to his employment. *Little Rock & Ft. S. Ry. Co. v. Townsend*, 41 Ark. 382.

3. The testimony fails to establish the defense of contributory negligence. Eubanks merely exchanged places with one of his fellow-brakemen without orders from the conductor. Although it is probable he would not have been injured if he had remained in the position to which he had been assigned, yet

it is not shown that the place he assumed was more dangerous than the one he vacated. In this connection we notice the court charged that the plaintiff must prove that her intestate was free from fault or negligence. This was an error in favor of the defendant; and we only call attention to it for the purpose of another trial. Contributory negligence is a defense to be affirmatively proved. It will be presumed the injured party was in the exercise of due care until the contrary is made to appear.

4. In other respects the jury was properly charged, except that the court should have granted this prayer of the defendant: "If you find the defects relied on in this action were such as are common to railroads, and such as could not have been avoided by reasonable care and attention on the part of defendant, you will find for defendant." A direction of this sort was necessary to guard the jury against being misled by the testimony in relation to the difference in height between the main and switch rails.

Reversed, and a new trial ordered.

ST. LOUIS, I. M. & S. RY. CO. v. MUDFORD.

(Supreme Court of Arkansas. March 19, 1887.)

1. CARRIERS—DAMAGES FOR DELAY—GENERAL RULE.

The measure of damages for delay in the transportation of goods beyond the time specified, or, if not specified, beyond a reasonable time, is, as a general rule, the difference between the value of the goods at the time and place they should have been delivered and their value when they were in fact delivered, computed at the place of destination, with interest, less freight unpaid.¹

2. SAME—SALE AT A BARGAIN—NOTICE TO CARRIER—FALL IN MARKET.

But, where the owner of the goods shipped has made an advantageous sale of them, provided they are delivered within a certain time, of which sale the carrier is informed, and they are delivered to the carrier to be transported to the place of delivery, and the carrier, through negligence, fails to deliver them at their destination in time, and the owner, in consequence, loses the benefit of his bargain by reason of the market price being less than the contract price, the measure of damages, as the result of the breach of the carrier's contract, is the difference between the contract price and the market value.

4. SAME—SHIPPER'S LOSS OF TIME.

Where, however, the carrier has no knowledge of such special circumstances or contract of sale, the rule is as first above stated in cases of neglect or delay in the transportation of goods, and the shipper is not entitled to damages for his loss of time in looking after or inquiring for the goods during transportation; especially not at a place other than their destination.

Appeal from circuit court, Nevada county.

Dodge & Johnson, for appellant. *Scott & Jones* and *J. D. Cook*, for appellee.

BATTLE, J. Plaintiff alleged in his complaint that he, on the eighth of February, 1881, shipped over defendant's road, from Texarkana, Arkansas, one box containing 47 gin-sharpening machines, consigned to Goble Bros., Cincinnati, Ohio; "that, at the time of shipment, plaintiff and his agents at various places had contracted and taken sundry orders for the machines greater than the number shipped, and that said machines had been contracted and bargained away for \$25 each; that the machines shipped were the only ones plaintiff had for the purpose of filling these orders; that, owing to some slight defect, they had been shipped to Cincinnati to be repaired, and then immediately returned; that it should only have required fourteen days to carry, repair, and return said machines, so that plaintiff could have filled his orders; *that defendant had knowledge of all said facts, and, knowing the same, carelessly and negligently delayed the carrying and delivering of said ma-*

¹ See *East Tennessee, V. & G. R. Co. v. Hale*, (Tenn.) 1 S. W. Rep. 620.

chines, thus causing plaintiff to lose the sale of said machines, to his damage in the sum of \$1,000." The defendant answered, and admitted the receipt and shipment of the machines on February 8, 1881; "that it received the same for transportation to Cairo, there to be delivered to a connecting carrier, to be forwarded to Goble Bros. & Co., at Cincinnati, Ohio." "It admitted the delay in the delivery of said goods to the consignees at Cincinnati, but denied all negligence or fault on its part in causing said delay. It denied the price of said machines; denied that plaintiff had made any such contracts as alleged, or that plaintiff had lost the sale of said machines by or through any fault on its part." It specifically denied that plaintiff had contracted to sell machines as he alleged in his complaint, or that it had notice or knowledge of such contracts; and averred that all the knowledge it had, or contract of shipment that had been made, was contained in the bill of lading. "The answer further charged that the goods were delivered to its connecting carrier at Cairo in due time; were then carried to Cincinnati, and there tendered to consignees, who were ordered by plaintiff not to receive the goods, and in consequence the goods were left in the hands of the carrier."

Evidence was introduced at the trial tending to prove that the machines were delivered and shipped on the eighth of February, 1881, and reached Cincinnati, Ohio, their place of destination, on the sixteenth of May, 1881; and that plaintiff, at the time of the shipment, had contracted to sell and deliver to persons residing in the states of Arkansas, Louisiana, and Texas a large number of machines of the kind and class he had shipped; that he had contracted to sell more than he had shipped; that the machines shipped were all he had; and that he failed to perform his contracts, and lost the sale of his machines, by reason of the failure to deliver the machines at Cincinnati in due time. But there was no evidence that defendant had notice, information, or knowledge of these contracts, or of plaintiff's ability or inability to perform them. The court, at the request of plaintiff, gave to the jury three instructions over the defendant's objections; and gave two, at the request of defendant, and refused one; and gave one, on its own motion, over defendant's objections.

One of the instructions given at the instance of plaintiff over the objections of defendant, reads as follows: "If the jury find that there was any depreciation in the market of said machines, arising from the time of the year or season in which said machines should by the defendant have been delivered to the connecting line, and the time or season at which they were so actually delivered, such depreciation, together with the value of time lost by plaintiff, if any such has been proven, in necessarily looking after said lost property, is the measure of damages; and, if the jury in this case find for the plaintiff, the measure of their verdict will be as above stated."

The one asked by defendant, and refused by the court, is as follows: "The court instructs the jury that in case of a delay in the transportation of machines beyond the time stipulated, or, if there is no stipulation, beyond a reasonable time, for the transportation and delivery of same, the damages would be the direct and actual loss sustained thereby,—such as the decline in the value of the property at the time and the place where it should have been delivered; and its value when it was delivered, or when delivery of the same was tendered, if it has declined in value, would be the proper mode of estimating the damages, unless the delay was inevitable, as where it was caused by the act of God or the public enemy. From this amount, however, it would be proper to deduct the freight, where that had not been paid."

And the one given by the court, on its own motion, reads as follows: "The court instructs the jury that in case of a delay in the transportation of merchandise beyond the time stipulated, or, if there is no stipulation, beyond a reasonable time for the transportation and delivery of the same, the damages would be the direct and actual loss sustained thereby; such as the decline in

the value of the property, [the difference between the value of the property in the market where it was to be exposed for sale at the time when it should have been delivered,] and its value when it was delivered, or when delivery of the same was tendered, if it has declined in value, [and the jury should find that the delay of the carrier was the occasion of the loss in the reduction or change of the market value of said property, this would be the proper mode of estimating the damages,] unless the delay was inevitable, as where it was caused by the act of God or the public enemy. From this amount, however, it would be proper to deduct the freight, where that had not been paid."

The jury returned a verdict in favor of plaintiff for \$250. Defendant filed a motion for a new trial, which was overruled, and he saved exceptions and appealed.

We consider it unnecessary to notice any question in the case except that as to the measure of damages. In cases like this, where goods have been delivered to a common carrier for transportation, and were not delivered at their destination within the time specified in the contract, or, if no time was specified, within a reasonable time, the damages recoverable on account of the delay, if goods of the particular kind shipped have fallen in market value during the delay, as a general rule, is the difference between the value of the goods at the time and place they should have been delivered, and their value when they were in fact delivered, with interest, after deducting the unpaid cost of transportation; the value at the time when they were in fact delivered being computed at the place of destination. *St. Louis, I. M. & S. Ry. v. Phelps*, 46 Ark. 485; 3 *Suth. Dam.* 216, 218. The theory of the rule is this: "Where there is a negligent delay in transportation, the thing which the owner does not receive, when he is entitled to it, is goods of their value at that time. The thing which he afterwards receives is goods of a value at a different time, which is not necessarily the same value. * * *. If the market value of the goods is less when they are actually delivered than it was when they ought to have been delivered, the fall in the market value is not a cause, but an incident or consequence, of the diminution in the intrinsic or merchantable value of the goods, and evidence of the injury which the owner has suffered by the wrongful act of the carrier;" and the diminution in the market value is a real and actual loss of a portion of the real and intrinsic value, as much as a change for the worse in the quality of the goods. When the parties entered into the contract of shipment, it is presumed that they had in contemplation this loss as the probable result of the breach of it, and contracted with reference to it. Hence the law imposes on the carrier the duty to pay it as a compensation for the injury he has done by the failure to perform his contract. 3 *Suth. Dam.* 218; *Hadley v. Baxendale*, 9 *Exch.* 341. But there may be special circumstances under which the application of this rule would be unjust; as where the owner of the goods had made an advantageous sale of them, provided they were delivered within a certain time, and delivers them to a carrier to be transported to the place of delivery, and the carrier through negligence fails to deliver them at their destination in time, and the owner loses the benefit of his bargain. In this case, if the carrier was informed of the sale and its conditions, and the market value of the goods when and where they should have been delivered was less than the contract price, the result of the breach of the carrier's contract, which both parties would reasonably contemplate and contract in reference to, and for which the carrier would be liable, would be what the owner would lose by the failure to deliver in time, and that would be the difference between the contract price and the market value of the goods when delivered. But, on the other hand, if these special circumstances were wholly unknown to the carrier, the measure of damages would be as first stated. 3 *Suth. Dam.* 228; *Simpson v. London & N. W. Ry. Co.*, 1 *Q. B. Div.* 274; *Hadley v. Baxendale*, 9 *Exch.* 341; *Vicksburg, etc., R. Co. v. Ragsdale*, 46 *Miss.* 458; *Gee v.*

Lancashire & Y. Ry. Co., 6 Hurl. & N. 211; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; *Deming v. Railroad Co.*, 48 N. H. 455; *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489.

Appellee testified that he went to Texarkana 15 or 20 times to inquire about these machines, and lost much time by reason thereof. He is not entitled to recover any damages on that account. The goods had been shipped from Texarkana to Cincinnati, and Texarkana was not the place to look for them. There was no necessity for incurring such loss. Such damage is not direct, but remote and contingent. *Ingledew v. Northern R. R.*, 7 Gray, 86; *Mississippi R. Co. v. Kennedy*, 41 Miss. 679; *Woodger v. Great W. Ry. Co.*, L. R. 2 C. P. 318.

For the errors indicated, the judgment of the court below is reversed, and this cause is remanded, with instructions to the court to grant appellant a new trial.

FILES, Auditor, v. STATE *ex rel.* POCAHONTAS & H. R. Co.

(*Supreme Court of Arkansas.* March 28, 1887.)

1. TAXATION—SALE—REMITTITUR—RAILROADS—EXEMPTION FROM TAXATION STRICTLY CONSTRUED.

The Arkansas act of 1869 (Mansf. Dig. §§ 5489, 5490) provides that, where the owner of lands which have been sold to the state for taxes shall donate them to aid in the construction of a railroad, the auditor shall issue a certificate for the lands to the railroad, and thereupon all claim for taxes shall be remitted and discharged. *Held*, that this act applies only to lands sold under the general revenue law, and not to those sold under the subsequent act of 1881; this latter act providing that lands sold under it shall be redeemable only upon the payment of the amount due the state, with certain costs.

2. SAME—STATUTES—CONSTRUCTION.

A grant to a person to take the benefit of past-due taxes to his own use is like the right of exemption from future taxation, and must be strictly construed.

3. SAME—EXEMPTION—CONSTITUTIONAL LAW.

The act of 1869, so far as it provides that lands so donated "shall not be listed nor subject to taxation until conveyed to actual purchasers" by the company, is unconstitutional, because in conflict with Const. Ark. art. 16, § 6, which declares void all laws exempting property from taxation.

Appeal from circuit court, Pulaski county.

Dan W. Jones, Atty. Gen., for appellant. *U. M. & G. B. Rose*, for appellee.

COCKRILL, C. J. The appellee presented a petition for a *mandamus* to the Pulaski circuit court to compel the auditor to issue it a certificate of redemption of land from sale for non-payment of taxes in pursuance of the act of April 8, 1869. The petition described many tracts of land which, it was alleged, had previously belonged to one Baber; and it was alleged that, while Baber was the owner of the lands, they had been forfeited to the state at different times for the non-payment of taxes,—the greater part of them for the taxes of the year 1868; that subsequently proceedings were taken against the lands under the overdue tax law of 1881; that they were condemned by decree of court for the payment of the taxes and the penalties due and the costs of the judicial proceedings, and that, upon a sale had thereunder were stricken off to the state; that after the sale, and before the time for redemption granted in such cases by the act of 1881 had expired, Baber donated the lands to the relator, the railway company, to aid the construction of its road; that, while the period of redemption was still unexpired, it had demanded the certificate of redemption from the auditor, and that he had refused to grant it. The auditor demurred to the petition, his demurrer was overruled, he refused to plead further, the court granted the relief prayed, and he appealed.

The act of 1869, under which the right of redemption is claimed, with the preamble, is as follows:

"Whereas, the title to large quantities of lands heretofore sold to the state for taxes, and yet unredeemed, remains in doubt, whereby the improvement of the same is prevented, and the state is receiving no revenue therefrom, therefore—

"Section 1. Be it enacted," etc., "that whenever any person having title to or being the owner of any lands which have been or may be stricken off to the state, or forfeited for non-payment of taxes, shall donate or subscribe the same in aid of the construction of some railroad, and the same shall be reported to the auditor of state as provided in section two hereof, the auditor shall grant his certificate, as in case of redemption, and thereupon all taxes or claim of the state on account of non-payment of taxes on each tract of land so subscribed or donated shall be remitted and discharged; provided, that a lien shall exist in favor of the state for the taxes hereby remitted, which may be enforced, and said taxes collected according to law, if such railroad shall not be completed through the county in which or nearest to which such lands are selected within five years from the date of such subscription or donation." See Mansf. Dig. §§ 5489, 5490.

The other sections prescribe the duty of the railroad company as to delivering lists of the lands to the auditor, and provide that they "shall not be listed nor subject to taxation until conveyed to actual purchasers" by the company.

The latter provision is so manifestly in contravention of section 6 of article 16 of the present constitution, which declares void all laws exempting property from taxation, except as provided in the same instrument, that it has been omitted from the last revision of the statutes, as it was from the revision had under the constitution of 1868, which required the listing of all property for taxation, except certain specific classes. *Fletcher v. Oliver*, 25 Ark. 289. Whether the release or remission of taxes already due is an exemption from taxation "for the years remitted," so as to render the first section of the act obnoxious to the same constitutional provisions, is a question not argued by counsel, and the consideration of it is not necessary to the final decision of this cause in the light we view the act. The ostensible object of the act of 1869, however variant from that intent the practice under it may have been, was to "aid in internal improvements," as its title imports. This was to be effected in two ways, viz.: *First*, railroads were to be succored; and, *second*, lands to which the state's right of ownership was doubtful, and which would for that reason be unsalable, and therefore unproductive of revenue or other benefit to the state, were to be placed in the line of development. These results were to be accomplished by the co-operation of the state and the owner of the land, but only in cases where the land had been or might thereafter be "stricken off to the state, or forfeited for non-payment of taxes," as the act declares. The terms "stricken off" and "forfeited to the state" for non-payment of taxes are of frequent use in the revenue acts, and are commonly of equivalent meaning there. As used in the act of 1869, they evidently refer to sales made under the revenue law for non-payment of taxes. It was this class of titles that were looked upon with suspicion, owing to the informalities commonly attending the assessment or levy of taxes, or other duties of officers connected with the collection of the revenue, and there was no other law providing for striking off or forfeiting lands to the state for non-payment of taxes.

Now, the act of 1881 is entitled "an act to enforce the *payment* of overdue taxes." Its provisions show that its object was the collection, and not the donation, of the revenue. It recognized, as did the act of 1869, the instability of titles based upon forfeitures for the non-payment of taxes, and the consequent improbability that the lands would be of any practical benefit to the

commonwealth while the title rested upon the claim derived through the machinery of the general revenue laws. But the remedy for the correction of the evil adopted in this act is altogether different from that of 1869. Instead of the heroic remedy of joining the owner in a release of all rights to third parties in order to subject the lands to taxation for the future, it proposed to institute judicial proceedings against the lands, the result of which would be to force the payment of the taxes due, or else quiet the state's title, and thus enable her to put the lands upon the market. As a matter of grace to the owner a new period of redemption was fixed. The legal right to redeem lands forfeited more than two years before the passage of the act of 1881 existed by virtue of that act alone. But the privilege of reclaiming the lands was burdened by the act with a condition, and could therefore be exercised only upon strict compliance with the condition; that is, that the amount due to the state, together with the costs of the judicial proceedings, should be paid. The privilege of redeeming upon any other terms is nowhere granted. It is reasonable, however, to presume that the statute mentions in express terms all the favors it was intended to grant. The collection of the revenue is essential to the preservation of government, and the state's right to receive it is not to be cut off or affected unless the intention to do so is plainly expressed. A grant to a person to take the benefit of past-due taxes to his own use, like the right of exemption from future taxation, is to be strictly construed, and the right is not taken by implication in one case more than the other.

We conclude, then, that the right to redeem, without actual payment of the amount due, as provided by the act of 1869, was intended to be limited to cases of forfeiture under the general revenue law, and does not apply to lands purchased by the state at judicial sale under the overdue tax law of 1881. The relator was not, therefore, entitled to the relief asked.

The demurrer to the petition should have been sustained. The judgment must be reversed, and the cause remanded, with instructions to sustain the demurrer. It is so ordered.

JOHNSON v. BRANCH, Adm'r.

(*Supreme Court of Arkansas. March 26, 1887.*)

1. JUDGMENT—OPENING—EQUITY—ACCIDENT.

Where it appeared that no opportunity was afforded the party against whom a judgment in an action at law was rendered to move for a new trial, because the court adjourned and the term lapsed before the motion could be made and disposed of, *held*, this was such an accident as would give jurisdiction to a court of equity to grant relief, provided the party complaining was otherwise entitled to it. The accident alone does not warrant the interference of equity. The judgment must appear to give the winning party an advantage which a court of equity would not permit him to hold, in order to warrant its extraordinary interference with the proceedings at law.

2. STATUTE OF FRAUDS—LANDLORD AND TENANT—ATTORNEYS.

Land which was under lease for a term of years was sold by the owner, and the lessee attorned to the new owner, who permitted him to remain in possession, accepted rent from him, and permitted him to make repairs and improvements. *Held*, that the new owner could not afterwards evict him, before the expiration of his term, upon the ground that there was no writing between them binding the new owner to the original lease, so as to satisfy the statute of frauds.

3. TRIAL—LAW AND EQUITY—APPEAL.

Where an equitable defense is presented in an action at law, and the trial of the issue is had *at law without objection*, it is not such error as will justify reversal upon appeal.

4. NEW TRIAL—PROCEDURE—BILL IN EQUITY.

Where a bill in equity is filed to obtain a new trial in an action at law, an error in the trial at law, though sufficient to secure a reversal on appeal, might nevertheless be disregarded in passing on the merits of the bill.

Appeal from circuit court, Monroe county. In chancery.

S. J. Price, for appellant. *John C. Palmer*, for appellee.

COCKRILL, C. J. This is an appeal from a judgment in equity directing a new trial in an action at law. It was shown that there was no opportunity afforded the party against whom the judgment was rendered to move for a new trial, because the court adjourned and the term lapsed before the motion could be made and disposed of. This was such an accident as would give jurisdiction to a court of equity to grant relief, provided the party complaining was otherwise entitled to it. *Vallentine v. Holland*, 40 Ark. 338; *Harkey v. Tillman*, Id. 551. The accident alone does not warrant the interference of equity. The judgment must appear to give the winning party an advantage which a court of equity would not permit him to hold, in order to warrant its extraordinary interference with the proceedings at law. It grants relief against judgments in aid of justice, not as a recompense for the accident; and, although the law court may have committed error upon the trial, if the judgment is not against conscience, it will not meddle with it. *Cases supra*. The accident, or some other ground of equitable interposition, and the injustice of the judgment, must concur.

In this case, the appellant, Johnson, who was the defendant below, as well as in the action at law, took a lease of lands which were subject to a prior mortgage. The appellee's intestate, Mrs. Branch, was the mortgagee, and, after the lease had been executed by her mortgagor, she purchased the equity of redemption in satisfaction of the mortgage. Johnson attorned to her, paid her the rent called for by his lease for two years, repaired the fences, and recovered the building as required by its terms, and made other valuable improvements upon the land, the benefit of which could not have inured to him except by occupation for the full term of his lease; but, two or three years before the term expired, Mrs. Branch brought an action of unlawful detainer against him, and had him evicted under a writ of possession issued at the institution of the action. The defense offered was that the plaintiff by her conduct had affirmed or adopted the terms of the lease executed by the mortgagor while in possession. Mrs. Branch accepted the issue tendered, and the preponderance of the proof, as we have it, tended to establish the truth of the answer. The plaintiff asked and the court gave the following charge to the jury: "The jury is instructed that, after the mortgage was executed by Counts [Johnson's lessor] to Mrs. Branch, the legal title and estate was in Mrs. Branch, and that any lease made by Counts after the mortgage was void as against the plaintiff, *unless they believe the plaintiff ratified it.*" And again: "The jury is instructed that, before the plaintiff could accept or ratify the lease from the mortgagor to the defendant, the plaintiff would necessarily be compelled to know what was contained in the lease; and, if the jury believe that plaintiff did not know what was contained in said lease, they must determine from the evidence whether that was a ratification of it by the plaintiff." These instructions show the ground selected by Mrs. Branch to meet the defense, and maintain her action. The issue was resolved against her, and judgment was rendered against her, for possession of the premises and damages.

The position now taken for the first time by Mrs. Branch's counsel is that nothing less than an agreement of lease in writing could satisfy the statute of frauds, and that, no such agreement having been proved, no defense to her action was presented. We do not think it is necessary to determine whether the conclusion drawn follows strictly from the premises stated. It has been ruled in New York that the simple attornment by the lessee of the mortgagor to the mortgagee, or one standing in his right, is in effect a continuation of the existing lease; that the effect is simply to put the latter in the place of the original landlord. *Austin v. Ahearne*, 61 N. Y. 6. See note 5, 1 Tayl. Landl. & Ten. (8th Ed.) 192. But whatever may be the correct determination of that question, we feel assured that the judgment at law upon the whole is never-

theless right. If the appellee's contention is correct, that the attornment of Johnson to Mrs. Branch was equivalent to an eviction under a paramount title, and reletting of the premises by her, still, as the jury have settled it that the new tenancy was in fact upon the terms and conditions of the old one, her representative is in no better condition than if she had entered into a parol agreement to lease the land for a term of years, let the lessee into possession, and permitted him to make valuable improvements under it. *Morrison v. Peay*, 21 Ark. 110, was such a case, and this court refused to allow the lessor to dispossess the tenant, holding that possession and making permanent improvements under the agreement took it out of the operation of the statute of frauds. The court quotes this language with approval: "A party who has permitted another to perform acts on the faith of an agreement [of lease in parol] shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed." See *Gartside v. Outley*, 58 Ill. 210. It is true that case was in equity, and this at law; but when an equitable defense is presented, and the trial of the issue is had at law without objection, it is not error for reversal upon appeal to this court. *Moss v. Adams*, 32 Ark. 562; *Little Rock & Ft. S. Ry. v. Perry*, 37 Ark. 164. But so jealously is a bill for a new trial watched, that error in the trial at law which would cause a reversal of the judgment on appeal would be disregarded in equity.

It was error, therefore, to undertake to grant the relief sought. The decree is reversed, and the bill dismissed.

HANKINS v. LAYNE, Ex'r.

(*Supreme Court of Arkansas. March 26, 1887.*)

1. EQUITY—JURISDICTION—EXECUTORS AND ADMINISTRATORS.

The courts of chancery cannot interfere to correct errors and irregularities arising in the administration of estates in the courts of probate unless actual fraud is proved, or such errors and irregularities are so gross and reckless as to make the inference of fraud necessary; nor can they take upon themselves to correct frauds in unconfirmed settlements. But they can interpose to correct frauds in confirmed settlements, and other frauds and gross mistakes in the course of administration not within, or having passed from, the jurisdiction of the probate court, and also to prevent impending irreparable injury, where the probate court cannot give effectual relief. The jurisdiction of the chancery court ceases when the special matter for which that jurisdiction has been invoked has been disposed of, and the cause should then be sent back to the probate court.

2. SAME—LACHES.

An executor's settled account, which had been approved and confirmed by the probate court, showed such false credits as called for the interposition of the chancellor; but, as it appeared that the account had been allowed to stand unassailed for more than 13 years after its confirmation in the probate court, *held*, that the chancery court would not undertake to review and correct it, especially as no reason for the delay in attacking it was alleged, and it was of record.

3. SAME—PROBATE COURT.

So long as an executor's settlement is pending on exceptions in the probate court, all fraudulent matters alleged in connection with it are still within the jurisdiction and under the control of the probate court, and cannot be questioned by bill in chancery.

4. SAME—FRAUD OF EXECUTOR.

An executor fraudulently suffered lands belonging to his testator's estate to be sold for taxes, and bought them in for his own use and benefit. *Held* that, although such a transaction was grossly fraudulent, it was wholly outside the jurisdiction of the probate court, and could be remedied in equity.

5. SAME—PARTITION.

As a general rule, there can be no partition in an action to settle a disputed title to land; but, where the court of chancery has possession of the case on some clear ground of equity jurisdiction wholly distinct from partition, then the cause may be retained for partition.

Appeal from circuit court, Little River county. In chancery.

Jones & Martin, for appellant.

SMOOTE, Special Judge. This is a suit in equity by appellant, Emma Hankins, against appellees John D. Layne and others, to surcharge and falsify the settlements of said John D. Layne as the executor of Benjamin H. Layne, deceased, for alleged frauds therein, and for the correction of other alleged frauds of said executor in the course of administration, and for partition of the lands of the estate of said deceased. It is stated in the complaint that Benjamin H. Layne died in Little River county, in 1866, after making his last will and testament, in which the appellee, John D. Layne, was named as executor; that the estate of said deceased consisted of valuable real and personal property, and that said John D. Layne qualified as executor, and had letters testamentary granted to him, in August, 1866, and, as such executor, about a year thereafter, filed an inventory of some choses in action; that there was a large amount of personal property other than said choses in action, of which no inventory or appraisal was ever filed; that said executor had filed three settlements, two of which had been confirmed,—the first on the fourteenth of June, 1870, and the second on the twenty-fourth of May, 1871,—and that the third is still pending on exceptions in the probate court; that said executor had taken fraudulent credits in said second and third settlements, which are particularly specified, but which, from the view we take of the case, we do not deem it necessary to set out here. And it is further charged that said executor has converted to his own use, and fraudulently failed to charge himself with, the personal property omitted to be inventoried and appraised, and has further fraudulently failed to charge himself with other sums which came to his hands during his executorship, and for rents collected by him and the like. The complaint further charges that there are large amounts of lands belonging to said estate which are particularly described, and that said executor fraudulently suffered a considerable part of them to be sold for taxes, and in collusion with one Stocker, had him to buy in some of them, and, in furtherance of said collusion, had said Stocker to convey them to said executor's wife, who is a party defendant, for the use and benefit of said executor; and that said executor bought in for his own use and in his own name others of said lands, knowing them to belong to the estate, and that the plaintiff has become largely interested therein by the purchase of shares. The complaint further states that said executor has been removed, and one D. C. Hankins appointed administrator *de bonis non* in his place, and that all debts against the estate have been paid off in full. The complaint was demurred to generally, and for want of jurisdiction. The demurrer was sustained, and the complaint dismissed, and the case has been brought here by appeal.

If it is determined that the complaint states a good cause of action over which the chancery court has jurisdiction, then it should not have been dismissed, as to that, upon demurrer. The extent to which a court of chancery has jurisdiction to interfere, for the purpose of correcting frauds and errors arising in the management of estates in course of administration in the courts of probate, is well settled. It cannot lift an estate out of a probate court, and proceed to administer it in equity. It cannot even interfere to correct errors and irregularities, where actual fraud is not alleged and shown, unless they are so gross and reckless as to make the inference of fraud necessary to the purposes of justice; nor can it take upon itself to correct frauds in unconfirmed settlements. But it can interpose to correct frauds in confirmed settlements, and other frauds and gross mistakes in the course of administration, not within, or having passed from, the jurisdiction of the probate court, and also to prevent impending irreparable injury, where the probate court cannot give effectual relief. But the jurisdiction of the chancery court ceases when the special matter for which that jurisdiction has been invoked, has been disposed

of. As a general rule, when that is done, the matter should be sent back to the probate court, with instructions, if necessary. There may be, perhaps, exceptional cases, where the court of chancery might retain the matter for final disposition; such as are indicated in *Reinhardt v. Gartrell*, cited below, and others like them. These conclusions have been reached from an examination and consideration of a long and uniform course of decisions heretofore rendered by this court. See *Moren v. McCown*, 23 Ark. 93; *Reinhardt v. Gartrell*, 33 Ark. 727; *West v. Waddill*, Id. 575; *Shegogg v. Perkins*, 34 Ark. 117; *Jones v. Graham*, 36 Ark. 383; *Jackson v. McNabb*, 39 Ark. 111; *Trimble v. James*, 40 Ark. 393.

We will now proceed to dispose of the questions here involved, under the principles we have adduced from the foregoing authorities, and others to which it may be necessary to refer incidentally.

The fraudulent credits alleged in the second settlement (which had been confirmed when this suit was brought) are of such a character that it is more than probable we would have held them fit subjects for investigation in chancery if the objection had been made in time. But it appears upon the face of the complaint that this settlement was confirmed on the twenty-fourth day of May, 1871, and the complaint was filed on the twenty-third day of April, 1885, more than 13 years after the settlement had been confirmed. There is no reason alleged for not bringing this suit for the correction of that matter sooner, and there was no concealment, as the credits were claimed in a public record. So the objection as to these credits is barred by limitation. *Hanf v. Whittington*, 42 Ark. 491; *McGaughey v. Brown*, 46 Ark. 25.

The third settlement, so far as this court knows, is still pending on exceptions in the probate court. Hence all the fraudulent matters alleged in connection with it are still within the jurisdiction of and under the control of the probate court, and cannot be questioned in this suit in equity. And the same is true of the frauds alleged against the executor for failing to charge himself, in any of his settlements, with the personal property he omitted to inventory, and other sums and property coming to his hands as such, or with which he ought to have been charged. The appellant, Mrs. Hankins, could, at the time she brought this suit, have called the attention of the probate court to these alleged fraudulent errors, by exception to the third settlement, or other proper proceeding for that purpose, and have had them corrected, if they exist in fact, and can still do so, so far as this court knows, as, upon the face of the record in this case, the third settlement still stands on exceptions and unconfirmed in the probate court. The probate court has exclusive original jurisdiction of such matters, (see Const. art. 7, § 34,) and courts of equity cannot exercise jurisdiction over them, except in cases of fraud in confirmed settlements, or upon the happening of some other circumstance which takes them out of the jurisdiction of the probate court. The probate court has ample power to charge an executor or administrator with any property or money of an estate with which he has fraudulently failed to charge himself, and, if need be, to compel him to file proper inventories and appraisements of its property coming to his hands as such, at any time before his final settlement and discharge. We therefore conclude that the demurrer was properly sustained as to all the charges of fraud against the second and third settlements, and as to the charges of fraud against the executor for failing to charge himself with other property and money not charged in any of his settlements, as specified in the complaint, and affirm the judgment to that extent.

But the alleged fraudulent dealings of the executor with the lands of the estate stand on an entirely different footing. These are wholly outside of the jurisdiction of a court of probate, and can be nowhere so effectually corrected as in a court of equity; and that courts of equity have jurisdiction to correct them is beyond doubt. Dealings with the lands of an estate by an executor or administrator, such as those specified in the complaint, are grossly fraudu-

lent, and a court of equity should give relief against them as soon as they are properly brought to its notice, and made manifest by evidence. *McGaughey v. Brown*, 46 Ark. 25. The judgment of the court below is therefore reversed as to these charges of fraud in dealing with the lands, and this cause is remanded to it, with instructions to overrule the demurrer to that extent, and to permit such of the defendants as desire to do so to answer, and upon final hearing to decree, in regard to the alleged frauds in the land matter, according to the evidence, and the law applicable thereto.

As the case goes back for further proceedings, it is probably not amiss to say something as to the partition prayed for. It is a general rule that there can be no partition in an action to settle a disputed title to lands. This rule is approved and reiterated. But to this general rule there is at least one exception; that is to say, where the court of chancery has possession of the cause on some clear ground of equity jurisdiction, wholly distinct from the matter of partition, then the cause may be retained for partition. Both the rule and the exception may be found by examining the following cases: *Trapnall v. Hill*, 31 Ark. 345; *Davis v. Whittaker*, 38 Ark. 435; *London v. Overby*, 40 Ark. 155; *Moore v. Gordon*, 44 Ark. 334; *Crisco v. Hambrick*, 47 Ark. 335, 1 S. W. Rep. 150. The exception to the rule is found in the facts in this case, and the court below, upon disposing of the other matters involved, should proceed to make partition of the lands among those entitled to them, according to their several interests, and in the manner prescribed by law.

BATTLE, J., did not sit in this case.

LOUISVILLE & N. R. CO. v. GOWER.

(*Supreme Court of Tennessee.* February 23, 1887.)

1. MASTER AND SERVANT—INJURY TO EMPLOYE IN COUPLING CARS—LUMBER PROJECTING FROM FLAT CAR.

The acceptance by a railroad company of a flat car loaded with lumber which projects 18 inches from the end of the car, does not entitle a brakeman who is injured thereby in coupling such car to a box car to an instruction that the company is, as matter of law, guilty of negligence.¹

2. NEGLIGENCE—EVIDENCE THAT PLAINTIFF HAS A FAMILY.

Plaintiff, in an action to recover for personal injuries resulting from defendant's negligence, cannot show that he has a wife and children; and, where defendant objected to such evidence, stating, as the ground of the objection, that plaintiff must recover, if at all, for damage sustained by him individually, and not that sustained by his family, *held*, that the admission of it by the trial judge, with the remark that he did not take that view of it, was prejudicial.

3. INSTRUCTIONS—REASONABLE CARE.

Explaining to a jury the "care of a man of ordinary prudence" as "just such care as one of you, similarly employed, would have exercised under the circumstances," is erroneous.

4. OBJECTION TO EVIDENCE—WAIVER.

A party is not deprived of the benefit of an objection to evidence of a certain fact by afterwards permitting another witness to testify to the same fact without objecting.

Appeal from circuit court, Davidson county.

Smith & Allison, for Louisville & N. R. Co. *Dodd, Guild & McWhirter*, for Gower.

SNODGRASS, J. Gower was a brakeman on a freight train of the Louisville & Nashville Railroad Company, and while in the discharge of one of his duties as such, that of coupling cars, was severely injured, and brought this action to recover damages for the injury sustained, in the circuit court of Davidson

¹See *Scott v. Oregon Ry. & Nav. Co.*, (Or.) 13 Pac. Rep. 98.

county. The injury occurred at Petersburg, Kentucky, on the night of April 5, 1880. About two miles from this point a car loaded with lumber had been taken into the train, and at Petersburg two flat cars were taken out of the train and left. These were put on the side track, and this necessitated the coupling of the lumber car with a box car. In making this coupling the accident to Gower occurred. It was his duty to make the coupling, and he did it without special order. He stood at the south end of the box car, signaled the engineer to back the lumber car to it, which was carefully done. When within a few feet of the box car, the plaintiff observed that the plank projected over the north end of the lumber car, the end to be coupled, and that it was necessary for him to stoop to avoid it in entering between the cars to make the coupling. He did enter in this way, and made the coupling, while doing which, having some difficulty in getting the coupling pin into the draw-head, he raised his head, and was caught between the box car and the projecting lumber, and badly injured. These are the facts of the case as detailed by plaintiff as a witness on the trial before the jury. He obtained a verdict and judgment for \$9,500, and the railroad company appealed. The commission of referees heard the case, and reported in favor of reversal upon several grounds, omitting others supposed by counsel of plaintiff in error to be objectionable, and both parties except to the report, and open the whole case for consideration by this court.

The first error necessary to be noticed is in the admission of evidence. The bill of exceptions shows that Dr. Hampton was the first witness introduced for plaintiff. He was asked if plaintiff had a family, and answered that he had a wife and children. The defendant "objected to the admission of any proof going to show that plaintiff had a family," stating ground of objection to be that plaintiff recovers, if at all, for the damages he has individually sustained, and not that sustained by his family, and that such evidence was irrelevant. The court replied: "I do not take that view of it, and I will allow the plaintiff to prove that he has a wife and children. But, if counsel for defendant desire to argue the question hereafter, I will hear them; and, if I conclude I am in error, I can then exclude it from the jury." To which action of the court defendant's counsel excepted. They did not again call it to the attention of the court. The commission of referees report this to be error, and counsel of Gower except. It is not seriously insisted, and, indeed, cannot be, that the evidence was relevant, but they interpose two objections to a reversal in consequence of it: *First*, that it is not material, and could have had no prejudicial effect; and, *second*, that the same evidence was admitted without objection when given by another witness.

In answer to the first objection it is clear that it was material when received under the opinion of the court. The counsel for the railroad company had put their objection upon the ground that the recovery was for the damages sustained by plaintiff individually, and not that sustained by his family. The court, by his reply, that "he did not take that view of it," and by his action admitting it, with such statement, to the jury, necessarily impressed them with the belief that the recovery would be affected by that evidence. It was equivalent to a charge that the loss to the family could be considered by them. It is well settled that no one else can recover in life than the one injured in cases of this character, and he only for the damages which he, and not others, has sustained. Under section 3130 of the Code, providing that the right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrong-doer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors, it was at one time held by this court that the recovery might be, in such action, for the dam-

ages to the deceased, and the damages resulting from his death to the parties for whose benefit the right of action survives. *Railroad Co. v. Prince*, 2 Heisk. 580, and other cases. Yet this doctrine, not in accord with the earliest construction of the statute on this point, (*Railroad Co. v. Burke*, 6 Cold. 46,) was rejected, and in the last reported cases (prior to the act of 1883, c. 186) it was uniformly held by this court that the first construction was the correct one, and that the damages recoverable were such only as the injured party had himself sustained, (*Railroad Co. v. Smith*, 9 Lea, 470; *Railroad Co. v. Pounds*, 11 Lea, 129.) But whatever fluctuation in judicial opinion prevailed as to the recovery which might be had by the widow or the children or the personal representative in an action brought, after death, by either of these representatives for the damages resulting from the death, it was never held that the injured party while living could, for an injury to himself, recover any more or other damages than those resulting to him from the injury complained of. The indicated view of the circuit judge in the admission of this evidence was erroneous, and it made the error, for the reasons stated, a very material and prejudicial one.

As to the second answer to the objection, that another witness was permitted to give same testimony without exception, it is sufficient to say that defendant having excepted to it when the first witness was examined, and having had his exception overruled, it was neither necessary nor proper for him to repeat the exception. One ruling on one question is enough, and a repetition of similar exceptions is not to be required, if, indeed, to be tolerated.

The next most material error in the case, and first of two only necessary to be noticed, though there are other errors in the charge, is the instruction to the jury on the question of negligence. The circuit judge charged the jury that "if the lumber car was so loaded that the ends of the lumber projected some eighteen inches over the rear end of the car, and that caused the act of coupling this car to another to be attended with more than ordinary danger, this was negligence in the agents of the company who so loaded it; and if the conductor accepted it so loaded, and attached it to his train, this was an act of negligence; and if an injury grew directly out of this negligence to the plaintiff, and plaintiff did not materially contribute to it, he is entitled to be compensated in damages." And again: "It is admitted that the lumber projected some eighteen inches over the rear end of the lumber car, and that this rendered the act of coupling this car to another car extrahazardous. I charge you that it was an act of negligence on the part of the conductor to have accepted a car so loaded; and if an injury grew out of this act of negligence to plaintiff he is entitled to recover, unless he himself was guilty of such negligence that but therefor the injury would not have happened; having in mind that, if he was acquainted with the extra hazard in making the coupling, he was required to exercise a degree of care proportioned to the danger of the risk required to be assumed." Or, in other words, the court told the jury that the reception of a car so loaded that the lumber projected 18 inches over the end of it was negligence *per se*, and that this was an extraordinary hazard, to which the railroad company must not subject its employees.

This is not the law. *Day v. Railway Co.*, 2 Amer. & Eng. Ry. Cas. 126; *Railway Co. v. Husson*, 12 Amer. & Eng. Ry. Cas. 24. Nor is the coupling of such cars necessarily the extrahazardous duty for the performance of which the servant is not presumed to contract in assuming the ordinary hazards and risks of the service in which he voluntarily engages. It may be extrahazardous in the sense that it is not a coupling ordinarily or frequently required, but it is one incident to the duties of the place, and not more hazardous, as a matter of law, than he stipulates to perform on the occasions, however rare or frequent, when such couplings become necessary in the variety of shipments made to meet the demands and necessities of trade and transportation. Lumber of all kinds, iron, steel, and finished structures must often neces-

sarily be transported on cars of shorter length than the material transported. It may not be practicable or proper to solidify the train by loading upon connected cars, and it must of necessity result that this loading will project and still the cars require to be coupled. To hold that such a service is not to be anticipated by a railroad employe as an occasional, incidental, though extremely hazardous duty to be performed, would be to do so in manifest disregard of the demands of the age upon transportation lines, and their common and well-understood service in conformity to such requirements. The manner in which this car was loaded was a fact proper for averment in pleading, and to be taken into consideration in connection with all the other facts of the coupling, and affecting it, to determine whether the company was guilty of such negligence as made it liable, but the loading was not of itself negligence, nor the acceptance of the car so loaded by others.

The charge was otherwise incorrect and misleading, particularly in defining the care necessary to have been exercised by plaintiff, Gower, in order to entitle him to a recovery. The court, after telling the jury that "it was the duty of plaintiff to exercise such a degree of care in making the coupling as a man of ordinary prudence would have done," adds: "Just such care as *one of you*, similarly employed, would have exercised under such circumstances. If he exercised that degree of care, and was nevertheless injured, he is entitled to your verdict. If he failed to exercise that degree of care, he cannot recover." The charge, as to exercise of such care as a man of ordinary prudence would have done, was correct, but it was thought not full enough by the judge, who illustrated what he meant by reference to the care which each one of the jurymen would have exercised. His charge, so limited, was erroneous. It does not appear that all or any of the members of the jury were men of ordinary prudence, and yet the judge tells them that what he means by the exercise of such care as a man of ordinary prudence would have exercised is that it was the exercise of such care as one of them would have exercised if similarly situated. Under this instruction, if any member of the jury thought he would have done what Gower did in the coupling, he would of course have determined that Gower acted with the care required, and was entitled to recover. This illustration used to define what he meant by "the care of a man of ordinary prudence," and thereby becoming its definition, was erroneous. The care that he was required to exercise was that of a man of ordinary prudence in that dangerous situation, and not "just such care as one of the jury, similarly situated," would have done, be that much or little, as each member might be very prudent or very imprudent.

The judgment must be reversed, with costs, and the case remanded for a new trial.

HOPKINS v. BRYANT.

(*Supreme Court of Tennessee. January 21, 1887.*)

DOWER—FRAUDULENT CONVEYANCE—SEIZIN.

A. conveyed certain land to his wife in fraud of his creditors, and, pending a suit to set aside the conveyance and subject the land to the payment of his debts, died. Held that, as against a purchaser of such land at a sale under decree of court, the wife could not claim dower, as A. had not died seized of the land within the meaning of New Code Tenn. § 3244, but that she could claim any surplus existing after satisfaction of the debts.

Appeal from chancery court, Franklin county.

Simmons & Curtis, for Hopkins. *Marks & Gregory*, for Bryant.

SNODGRASS, J. Solomon Hopkins, the husband of complainant, conveyed to her in 1871 a tract of land in Franklin county. Soon afterwards a judgment creditor of Hopkins (Bryant) filed a bill against Hopkins and wife, attacking the conveyance for fraud, and seeking to subject the land to sale for

satisfaction of his debt. Hopkins and wife answered the bill, and insisted that the conveyance was *bona fide* and valid. Pending this suit, Hopkins died. The creditor obtained a decree in the supreme court, declaring the conveyance void as to him, and had the land sold, and bought it in satisfaction of his decree and cost. The bill in this case is filed by the widow, seeking to have dower assigned her out of the land. The chancellor dismissed the bill, and the commission of referees report in favor of affirmance of the decree. Complainant excepts.

The decree is clearly correct. Our statute provides "that, if any person die intestate, leaving a widow, she shall be entitled to a dower in one-third part of all the lands of which her husband *died seized and possessed* or of which he was *equitable owner*." New Code, § 3244. The husband, having conveyed the land to the wife, manifestly did not die seized and possessed of it, or its equitable owner. The wife accepted the conveyance, and both she and her husband urged in defense to the creditor's suit that it was valid. As between them it was valid, and was void only as to the creditor. Had there been a surplus arising from its sale, that surplus would have belonged to the wife. She cannot, of course, claim as owner, and to be endowed because her husband was owner. Nor can she have dower of her own land.

The report of the commission is approved, and the decree affirmed, with cost.

ELKINS and others v. CARSEY and others.

(*Supreme Court of Tennessee. 1887.*)

WILL—ESTATE—REMAINDER—GRANDCHILDREN.

When a testator devises land to two daughters "during their natural life, and to their children respectively at their death," the children of one of the remaindermen, who dies before the falling in of the life-estate, take an interest in the land, especially when a preceding clause in the will, by devising land to another daughter, "to her and to her children living at the time of her death," shows that it was the testator's intention that his grandchildren should take as tenants in common.

Appeal from chancery court, Davidson county.

H. H. Harrison, F. Stemmmons, and J. C. & J. M. Gant, for Elkins. M. B. Howell, for the Bank. W. D. & M. T. Covington, for Carsey.

REID, Special Judge. The question in this case is, where a testator devises land to two daughters, "during their natural life, and to their children respectively at their death," do the children of one of the remaindermen, who died before the falling in of the life-estate, take an interest in the land? We think a proper construction of the language quoted vests the remainder in the children of the life-tenants, on the death of the testator, descendable to their heirs, although the ancestor may have died before the termination of the life-estate. But, be this as it may, the clause immediately preceding it, by which the testator devised land to another daughter, "to her and to her children living at the time of her death," *i. e.*, devised the remainder to vest in a class *in futuro*, evidences that, by the language under consideration, he intended to vest the remainder *in presenti* in his grandchildren as tenants in common.

The report of the referees will be confirmed.

ROSE and Wife v. GARRETT.

(*Supreme Court of Missouri. February 28, 1887.*)

HIGHWAYS—STATUTORY PROCEEDINGS—REPORT—DAMAGES—LANDS.

In Missouri, proceedings under the act of 1883, (Sess. Acts 157,) to open a public road through the lands of several persons, will be held void, where the commissioners fail to qualify or make their report before the first day of the term of the county

court, or make a report that contains no description of the land or property taken, and for which damages are assessed; following *Anderson v. Pemberton*, 1 S. W. Rep. 216.

Appeal from circuit court, Johnson county.

J. J. Cockrell, for appellants. *S. P. Sparks*, for respondent.

RAY, J. This case is an incident to and grew out of the case of *Anderson v. Pemberton*, 1 S. W. Rep. 216, (decided at the last term.) The latter case was a proceeding commenced in the county court of Johnson county to establish a certain public road in that county. In the county court an order was made to establish and open up said road, from which an appeal was taken to the circuit court, where a similar order and judgment was also rendered, from which an appeal was taken to this court, where the judgment was reversed, and said proceedings held to be null and void, in a well-considered opinion by SHERWOOD, J. After the judgment of the court in said cause was rendered, and before the reversal thereof by this court, the plaintiffs in this case (who, in right of the wife, claimed to be the owner and in possession of a part of the land over which said proposed road ran, and who had neither relinquished the right of way nor been assessed or paid damages therefor) commenced this proceeding, in the Johnson circuit court, to enjoin the defendant, who is district road overseer in said county, from proceeding to open up said road, and tear down plaintiffs' fences, in conformity to the wrongful order of said court to that effect, and thereby expose plaintiffs' crops to destruction, and otherwise inflict upon plaintiffs irreparable damage, for which they have no adequate remedy at law, unless so restrained by the order of said court to that effect. Upon filing the petition in the present case, a temporary injunction was granted, which, upon the final hearing, was by the circuit court dissolved, and the bill dismissed, from which the plaintiffs appealed to this court.

As the judgment of the circuit court establishing the road in question has been reversed, and said proceedings held to be null and void by this court in the case of *Anderson v. Pemberton*, *supra*, it follows that the judgment of the circuit court in this case, dissolving the temporary injunction, and dismissing the bill, must now be held error for the reason assigned in said opinion; and for that reason, and the reasons there assigned, said judgment, so dissolving the temporary injunction, is hereby reversed, and said temporary injunction made perpetual, in which all the judges concur.

PUBKE v. CHURCHILL.

(*Supreme Court of Missouri. February 23, 1887.*)

1. BANKRUPTCY—COMPOSITION—Breach—EFFECT.

A composition in bankruptcy is no defense to an action on the original indebtedness after breach of the agreement on the part of the bankrupt. So held in the case of an action brought by a creditor who did not assent to the composition, and where the composition agreement provided that a failure by the bankrupt to perform should, "at the option of the creditor, work a release of his acceptance thereof."

2. SAME—COURTS—JURISDICTION.

The exclusive jurisdiction of the United States district court over actions upon claims against a bankrupt does not continue, in case of termination of the proceedings by composition, beyond the time allowed the bankrupt in which to perform the composition agreement.

3. SAME—REMEDIES.

The summary proceeding in the bankrupt court, provided by the statute, for the enforcement of a composition in bankruptcy, is cumulative, not exclusive.

Appeal from St. Louis court of appeals.

The following opinion was delivered in the court below by THOMPSON, J.:

"In 1877 the defendant filed his voluntary petition in bankruptcy, under the terms of section 17 of the amendatory bankruptcy act of June 22, 1874, compounded with his creditors on the basis of 25 cents on the dollar of his indebtedness, payable in three equal installments, in three, five, and seven years, giving his notes, without interest, for each payment, to be secured by certain life insurance policies in the aggregate amount of \$50,000, of which the first two annual premiums were to be paid to render them non-forfeiting. The plaintiffs in this action did not assent to this composition agreement. It was recorded, approved by the court, the policies were taken out, the notes were executed, and thereupon the bankruptcy proceedings were, by order of court, dismissed at the costs of the bankrupt. The notes which the bankrupt was required to execute in favor of the present plaintiffs, under the terms of the resolution of composition, were executed by him and tendered to them, but they refused to receive them, and thereupon they were, by order of the bankrupt court, deposited with the clerk. The proposition for a composition, as accepted by a resolution of the creditors and approved by the court, contained this clause: 'Any failure on my part to pay the notes or the insurance premiums, according to the terms of this composition, shall, at the option of the creditor, work a release of his acceptance thereof. And a compliance on my part with its terms shall, on the other hand, work a full discharge and release of my debts.'

"The present action is brought upon a note of the defendant, held by the plaintiffs prior to the bankruptcy and the composition. It was admitted, for the purposes of this trial, 'that the insurance aforesaid was not kept up after the first year, and that the installment notes have not been paid as provided in the composition.' Upon this state of case, the court, sitting as a jury, refused a declaration of law to the effect that the plaintiffs were entitled to recover, and gave judgment for defendant.

"We are of opinion that judgment should have been given for the plaintiffs. At common law and in equity a composition agreement works a release of the antecedent debt only when it is performed. *Clarke v. White*, 12 Pet. 178, 191; *Mackenzie v. Mackenzie*, 16 Ves. 372, 374; *Ex parte Bennet*, 2 Atk. 527. A well-understood exception to this rule exists in cases where the original debt is released upon an agreement to pay part of it, accompanied by giving additional security for such part payment. Another exception is admitted where the terms of the composition agreement clearly import that the effect of the making of the composition shall be *ipso facto*, to discharge the original indebtedness.

"1. The statute under which this composition was made was imported into our late bankrupt law from the English bankruptcy act of 1869. By its terms, in a case of voluntary bankruptcy, a composition between the debtor and his creditors, to the extent of two-thirds in number and one-half in value, would bind the non-assenting creditors whose debts were included in the bankrupt's schedule and who had notice of the proceedings. This provision has been justly held in derogation of common right, and hence to be strictly construed. *In re Shields*, 15 N. B. R. 532, 4 Cent. Law J. 557. Where the debtor surrendered his property, and it was applied under the bankrupt law to the satisfaction of his debts, he received from the court a discharge, which, with certain exceptions, protected him against actions for his antecedent debts. But where he compounded with his creditors under the statute now in question, he received no certificate of discharge. The resolution of composition when approved by the court and recorded, was in itself a discharge, if carried out by the debtor according to its terms. *Smith v. Morganstern*, 2 Fed. Rep. 674; *Denny v. Merrifield*, 128 Mass. 229, (per GRAY, C. J.); *Mason & Hamlin Organ Co. v. Bancroft*, 4 Cent. Law J. 295; *In re Bjornstad*, 5 Fed. Rep. 791; *In re Bechet*, 12 N. B. R. 201. In such a case no certificate of discharge was given, for it was not competent for the bankruptcy court, where

the debtor had not surrendered his property for the benefit of his creditors, to discharge him from his debts by the giving of such a certificate. But, unless the resolution of composition distinctly imports the contrary, it is clear upon principle, and upon an almost unbroken line of authority, that the composition becomes a discharge only when carried into effect by the debtor according to its terms, unless he has been prevented from carrying it into effect by the act of the creditor who seeks to avoid its effects as a discharge. *Edwards v. Coombs*, L. R. 7 C. P. 519; *In re Hatton*, L. R. 7 Ch. 723; *Ex parte Peacock*, L. R. 8 Ch. 682; *Goldney v. Lording*, L. R. 8 Q. B. 182; *Newell v. Van Praagh*, L. R. 9 C. P. 96; *Edwards v. Hancher*, 1 C. P. Div. 111; *Whittlemore v. Stephens*, 48 Mich. 573, 578; *Robinson v. Clement*, 73 Ind. 29, 33; *In re Negley*, 20 Fed. Rep. 499; *Mount Wollaston Nat. Bank v. Porter*, 122 Mass. 308; *Pierce v. Gilkey*, 124 Mass. 300; *Home Nat. Bank v. Carpenter*, 129 Mass. 1; *In re Hurst*, 13 N. B. R. 455, 463, 3 Cent. Law J. 78, (decision of EMMONS, J.); *In re Reiman*, 13 N. B. R. 128, 133, (decision by Mr. Justice HUNT); *In re Leipziger*, 18 N. B. R. 267.

"Two or three cases which hold the contrary have been pressed upon our attention. One of them purports to be a decision of Mr. Circuit Judge Woods, on a petition in review in bankruptcy. *In re Bailey*, 19 N. B. R. 77. We do not find this decision in the series of decisions of that learned judge reported by himself, and therefore we feel at liberty to conclude that it may have been reconsidered by him. Another is a decision of the court of appeals of Maryland, in *Deford v. Hewlett*, 49 Md. 51, 18 N. B. R. 518. The latter decision proceeds upon the ground that the giving of notes by a bankrupt, in pursuance of the composition agreement, were in the nature of payment, and hence were of themselves a satisfaction of the antecedent indebtedness. This ground is wholly fallacious. The statute required that the payment under a resolution of composition, in order to be valid, should be in money, and the giving of notes by the debtor is regarded as nothing more than a convenient form of expressing his obligation to pay money according to the composition agreement. They are in no sense payment, since to hold them so would, as was clearly reasoned by Mr. Circuit Judge EMMONS in the *Case of Hurst*, *supra*, be to proceed in the very face of the statute. The mere giving of notes has been held again and again not to be a performance of the composition agreement. *In re Reiman*, 13 N. B. R. 128, 133; *In re Hatton*, L. R. 7 Ch. 723; *Edwards v. Coombs*, L. R. 7 C. P. 519; *Robinson v. Clement*, 73 Ind. 29; *Pierce v. Gilkey*, 124 Mass. 300.

"2. But it is argued that judgment could not have been rendered for the plaintiffs in this action, because exclusive jurisdiction of the proceeding is vested, by the terms of the bankrupt law, in the United States district court. The bankrupt law does not by its terms impose a sweeping and unlimited stay upon actions in the state courts. It merely stays them 'until the question of the debtor's discharge shall have been determined, provided there has been unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge.' Rev. St. U. S. § 5106. This statute was framed before the amendatory act providing for composition with creditors was enacted, and hence it does not in terms apply to such a proceeding in which the bankrupt does not receive a formal discharge. But it furnishes an analogy upon which the courts have made a rule, and that rule is that the proceeding is deemed to be pending in the courts of bankruptcy during the time which is allowed the bankrupt in which to perform the composition agreement; and this, if we except the decision in *Re Bailey*, *supra*, is the utmost limit of the time during which the United States district courts have held that they were at liberty to enjoin actions in the state courts. *In re Hinsdale*, 9 Ben. 91, 97; *In re Nebensahl*, Id. 243, 246. One court has even restricted the period to the date of the approval of the resolution of the composition. *In re Lytle*, 14 N. B. R. 457.

"3. The statute under which this composition was effected provides for a summary proceeding in the bankrupt court by a creditor for the enforcement of the composition according to its terms. It is argued that this proceeding is exclusive, and the reason given for so holding is that it enables the bankrupt court to adjust the equities among all the creditors, and prevent one creditor from getting an advantage over the other creditors by bringing an action at law for his debt. This seems to have been the ground on which Mr. Circuit Judge Woods reasoned in *Re Bailey*, 19 N. B. R. 77. The force of this reasoning is admitted. The same provision existed in the English bankrupt act of 1869 upon which our statute of composition was modeled. But the English courts hold that the remedy there given was cumulative, and not exclusive; and so the American courts have held, where the point has been brought to their attention in several of the cases above cited. The reason and justice of the case seem to favor this conclusion, especially as applied to the facts of the case before us. Here, the agreement of composition was broken by the debtor after the first year by allowing the life insurance policies to lapse and become forfeited. A non-assenting creditor is now told that, on the happening of this event, he might have gone into the bankrupt court and proceeded against the debtor for a summary process as for a contempt. What good would this have done him? Suppose it might have ended in an order committing the debtor to jail until the composition agreement should be complied with, is there any reason to believe that this remedy would have been effective? Would he have been more likely to earn money to pay the life insurance premiums in jail than out of jail? This contention of the defendant allows him to say to the plaintiffs this: 'I can go into bankruptcy and get a sufficient number and value of my creditors to assent to a composition agreement. I can break the agreement the next day, and you, although you never assented to the agreement, have no other remedy than to compel me to perform an agreement to which you never assented, by putting me in jail.' We hold that this is not the law.

"4. But all doubt upon this question is cleared up by the terms of the composition agreement itself. It will be remembered that additional security was given in the form of the life insurance policies. This, if accepted without any expression of a contrary understanding, might, according to the common-law rule, have worked *ipso facto* a discharge of the antecedent debts of the assenting creditors. But they were cautious to express in the agreement that it should not have this effect, by making the debtor agree as follows: 'Any failure on my part to pay the notes or the insurance premiums according to the terms of the composition shall, at the option of the creditor, work a release of his acceptance thereof.' By the very terms of this agreement any assenting creditor is, upon the facts stipulated, at liberty to make his assent, and for stronger reasons a non-assenting creditor is not to be held bound. The agreement, then, stands, as to another creditor who may now dissent, as though it had never been made. And is a dissenting creditor, who has indulged his debtor for nine years, almost until the bar of the statute of limitations had attached, to be now told that his remedy is to go into the court of bankruptcy and prosecute the bankruptcy proceedings? Those proceedings, we have seen, were dismissed in 1877. Could they now be reinstated? If they could be, what would the creditor gain? What complications would not surround the matter after such a lapse of time? If this contention is true it was within the power of a debtor, by going into voluntary bankruptcy, and getting a composition with his creditors, and by breaking the terms of the composition agreement, to harass them indefinitely in pursuit of their just demands.

"The judgment is reversed, and the cause remanded.

"BAKEWELL, J., concurs. LEWIS, J., is absent."

H. F. Mills, for respondent. *T. A. Post*, for appellant.

BRACE, J. This case is before us on appeal from the judgment of the St. Louis court of appeals reversing the judgment of the circuit court rendered in defendant's favor. The judgment of the court of appeals is affirmed, on the grounds and for the reasons stated in the opinion of the court of appeals, (16 Mo. App. 334,) and this cause remanded to the circuit court of the city of St. Louis for further proceedings to be had therein in conformity with the opinion of said court of appeals.

BOCKOVER v. SUPERINTENDENT OF INS. DEPARTMENT.

(*Supreme Court of Missouri*. February 23, 1887.)

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT—INSURANCE—CORPORATIONS—INSOLVENCY.

Rev. St. Mo. § 6034, provides that if any insurance company of the state shall, under the requirements of any law of another state, have on deposit in such other state securities upon which the citizens of such state have, by virtue of its laws, a lien, claim, or right prior to that of the citizens of other states, and the company prove insolvent, no citizen or resident of the state or country in which such deposit is held shall be entitled to share in the distribution of the proceeds of the deposits or other assets in this state until the amount deposited in such other state or country shall be deducted from the claims of the person who, by the laws of such state or country, hold such prior or superior lien, and until the other policy claimants and creditors of said company shall have received from the proceeds of deposits or other assets an equal per centum upon their claims. *Held*, that this statute, in its application to policies issued in such other state, *before* its passage, is not unconstitutional, as impairing the obligation of the contract. The statute simply places the foreign policy-holder upon an equal footing with the home one.¹

Appeal from St. Louis circuit court.

Wm. S. Relfe, for respondent. *H. T. Kent*, for appellant.

BLACK, J. Bockover, the plaintiff, who is a citizen of the state of Virginia, insured his life in the sum of \$5,000 with the Life Association of America, a corporation organized under the laws of this state. The policy bears date September 28, 1872. The company became insolvent, and, at the instance of the superintendent of the insurance department of this state, was dissolved by a decree of the circuit court of the city of St. Louis on the tenth November, 1879. The plaintiff presented his claim, and it was allowed, in the sum of \$4,415.15, and placed in the fourth class of debts, under section 6047, Rev. St. 1879. The superintendent has declared dividends on this class of claims, amounting in all to 17.22 per centum. The company, in order to do business in the state of Virginia, deposited with the treasurer of that state securities amounting to the sum of \$10,000, for the benefit of policy-holders residing in Virginia. After the dissolution of the company, and prior to the payment of any dividends on the fourth class of debts, the plaintiff and others, citizens of Virginia, proceeded against the fund there. That proceeding resulted in a distribution of the amount there on deposit among the policy-holders of that state, and from which source plaintiff received \$534.84. The superintendent here paid the plaintiff \$225.45, which, with the amount he received from the Virginia fund, makes up the 17.22 per centum.

The plaintiff insists that he is entitled to receive the full amount of the dividends, regardless of the amount he received from the deposit of securities with the treasurer of Virginia. He therefore moved the court in which the affairs of the dissolved corporation were pending for an order directing the superintendent to pay him the further sum of \$534.83. The circuit court declined to award the relief prayed for.

¹For instances of legislation held to impair the obligation of contracts, and laws upheld as not impairing such obligation, see *Com. v. Jones*, (Va.) 1 S. E. Rep. note, 81. v.8s.w.no.8—53

The superintendent, as a justification of his action, relied upon section 6034, Rev. St., which is as follows: "If any company of this state shall, under the requirements of any law of another state or foreign government, have on deposit in such other state or foreign government securities upon which the citizens or residents of such state or government have, by virtue of its laws, a lien, claim, or right, prior or superior to that of the citizens or residents of other states, then no citizen or resident of the state or country in which such deposit is held shall be entitled to share in the distribution of the proceeds of the deposits or other assets in this state until the amount deposited in such other state or country shall be deducted from the claims of the persons who, by the law of such state or country, held such prior or superior lien, and until the other policy claimants and creditors of said company shall have received from the proceeds of deposits or other assets an equal percentum upon their claims." From the statutes of the state of Virginia, and the adjudications thereon, it is clear that the resident policy-holders of that state had a lien on the deposit for claims of the character here in question. *Universal Life Ins. Co. v. Cogbill*, 30 Grat. 72. The statute of this state is plain, and needs no comment. It furnished a complete justification to the superintendent for his refusal to pay the plaintiff more than enough to make him equal with the home creditors of the same class. This section of the statute was enacted in 1879, and became a law before the corporation was dissolved. But it is insisted that, as the policy was issued in 1872, the statute impairs the obligation of contracts, is retrospective, and therefore unconstitutional and void. It does not appear to be insisted that the legislature had no power to make this section applicable to the life association. Indeed, the section is but an amendment to the act of 1869, which reserved the right to amend or repeal the law. While the legislature might alter this general law, which is the charter of the company, still it cannot invalidate contracts of individuals made with the company. But we do not see that the law is of that character. It certainly does not, in terms, relieve the company of anything which it contracted to do. Statutes which merely affect the remedy are not within the constitutional provision, federal or state. It is said in *Tennessee v. Sneed*, 96 U. S. 69: "The rule seems to be that in modes of procedure and of forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right." The remedy may be so impaired as to affect the obligation of the contract, and cases of that character are cited by counsel for appellant. Nothing said in *Relfe v. Columbia Life Ins. Co.*, 76 Mo. 594, can have any application here, for there the company had been dissolved before section 6047 had become a law. That case goes upon the theory that the rights of the creditors are fixed upon the dissolution of the corporation, not before. No specific lien of the plaintiff upon the assets in the hands of the superintendent is displaced, for he had none. The statute simply places the foreign member of the association or creditor, as the case may be, upon an equal footing with the home member or creditor. Here the dissolved corporation was a mutual company, and the statute is eminently just and proper. If the section of the statute under consideration is unconstitutional, then with much more reason could the one which gives priority to death losses and matured policy claims be said to impair the obligation of contracts. To assert this doctrine is, upon principle, to deny to the legislature the power to rank debts of deceased persons, as to debts previously contracted, or to change the order of priority of payments as to existing contracts. Nor is the statute retrospective, for it does not apply to cases where the dissolution took place before the passage of the law. The judgment is affirmed.

(All concur.)

DUNCAN v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri. February 28, 1887.)

1. PLEADING—ELECTION—RAILROADS.

Rev. St. Mo. § 809, requires railroads to erect and maintain fences on the sides of their tracks, with openings and gates having latches or hooks, at all necessary farm crossings, and also to maintain cattle-guards, and makes a railroad liable for double damages for failure to comply with the statute, if cattle are killed in consequence. *Held*, in an action under the statute, that a complaint alleging the railroad's failure to maintain lawful fences, cattle-guards, gates, and openings, was sufficient, and defendant's motion to compel plaintiff to elect was properly overruled.

2. RAILROADS—STOCK KILLING—FENCES.

The statute requiring the railroad to provide gates with latches or hooks, and it appearing in this case that the gate was fastened only by a rail or stick laid over the top, and, some one opening it during the night, plaintiff's mare escaped onto the track, and was killed, it was not necessary for plaintiff to show, in order to recover, that sufficient time had elapsed after the gate was opened, and before the mare escaped, for the railroad to have discovered, and closed it.

Appeal from circuit court, Madison county.

R. A. Anthony, for respondent. *T. J. Portis*, for appellant.

BLACK, J. 1. The plaintiff's mare got upon the defendant's road through a gate in defendant's fence along the road where it passes through uninclosed lands, and was injured by the cars. The complaint states that the defendant failed to maintain lawful fences, cattle-guards, gates, and openings, etc., and the defendant moved to require plaintiff to elect upon which cause of action he would proceed. There is but one cause of action stated, or attempted to be stated, in the complaint. The plaintiff may allege a failure to maintain fences and cattle-guards, and proof of either, with proof of the other necessary averments, will entitle him to recover.

2. Defendant's first refused instruction is, in substance, that, if the gate was closed and fastened with a rail the night before the mare got on the road, and during the night was opened by some person or means, then, before the plaintiff can recover, the evidence must show that sufficient time elapsed after the gate was opened, and before the mare got on the track, in which defendant, by the use of reasonable care, could have discovered that the gate was open. One witness says the gate was closed in the evening when he went to town, but was open when he came back, and he then saw the animal in her injured condition. This witness, and all the others, agree that the gate never had any latch, hook, or other fastening on it until after the animal was injured; that it was open nearly all the time. Sometimes it was fastened with a rail or stick, but neither would prevent it from being blown open by the wind; that the section men worked at or near the place time and again. The law provides that these gates shall have latches or hooks. A rail or stick laid over the top of the gate, as seems to have been done in this case occasionally, is no compliance with the law at all. The gate then never had any fastening such as the law requires, and the doctrine that a reasonable time must elapse after the gate or fence gets out of repair, in which the defendant may discover its condition, has no application to the case. Again, there is but one conclusion to be drawn from the evidence, and that is that the gate got open for want of a suitable fastening. There was no evidence upon which to base the instruction.

3. The statute expressly requires the defendant to fence along uninclosed lands. Although the mare strayed away from plaintiff's premises, and got upon these commons, and thence, through the gate, on the road, still these facts constitute no defense whatever, and the second instruction was properly refused. Nor does the fact that the gate was at a private crossing help the defendant. Judgment affirmed.

(All concur.)

SMITH v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri. February 28, 1887.)

1. EVIDENCE—*RES GESTÆ*—RAILROADS.

In an action to recover damages of a railroad for killing plaintiff's stock, evidence of the statements of a section foreman as to the fact of the killing, made after the event, are inadmissible as part of the *res gestæ*.

2. RAILROADS—FENCES—STOCK—NEGLIGENCE.

In an action under the Missouri statute requiring a railroad to maintain a fence along its track, and, for failure to do so, making it liable for double damages for killing stock, is unnecessary to prove negligence on the part of the railroad.

3. BILL OF EXCEPTIONS—CONTRADICTING STATEMENTS OF.

A bill of exceptions, stating that certain instructions were given, a certificate of the clerk stating that none of the instructions were in fact given, is inadmissible. Statements of a bill of exceptions cannot be contradicted in this way. The proper practice is either to stipulate with the opposite side as to the corrections proper to be made, or to sue out *certiorari*.

Appeal from circuit court, St. Francois county.

This was an action commenced before a justice of the peace of St. Francois county, against the appellant railroad company, to recover for the killing of the sow and heifer of plaintiff. There was a judgment before the justice of the peace, and appeal taken therefrom to the circuit court, where the cause was tried by a jury.

The plaintiff was introduced as a witness, and stated, among other things, that "at the point where the heifer got on the track there was a strip of land not fenced, that had once been cultivated. I did not see the heifer myself after she was killed. The section foreman told me she was killed about the nineteenth of September, 1883. This conversation with the foreman was about the nineteenth of September, 1883." To the introduction of this testimony the defendant objected at the time, because the same was irrelevant, hearsay, and incompetent, which objections were by the court overruled, and to which defendant excepted. The witness, proceeding, said: "The section foreman told me that he drug the heifer into the woods, and buried her." To the admission of this testimony the defendant objected, because the same was hearsay, incompetent, and irrelevant, which objection was by the court overruled, and to which defendant excepted. There was other testimony showing that it was the duty of section foreman to remove all animals killed by trains from the railroad track. They bury or burn them.

At the conclusion of the evidence, the court, at the instance of the plaintiff, declared the law of the case to be as follows, to-wit: The court instructs the jury that negligence need not be proved by positive and direct evidence, but that it would be sufficient if the jury are satisfied of its existence from all the facts and circumstances of the case; to the giving of which instruction the defendant duly excepted. The defendant asked and the court gave an instruction telling the jury, if they found for the plaintiff, they would assess his damages at the reasonable market value of the animals killed. The finding of the jury was for plaintiff, and judgment was rendered accordingly. Defendant then filed motion for a new trial, which was overruled, to which action of the court the defendant duly excepted, and afterwards appealed, and filed his bill of exceptions which was allowed, signed, and ordered to be filed.

W. R. Taylor, for respondent. T. J. Portis, for appellant.

SHERWOOD, J. Action for double damages for killing a sow and heifer. Verdict for plaintiff on both counts, and double damages assessed by the court. The evidence of the killing of the stock was altogether circumstantial.

1. The declarations made by the section foreman were inadmissible, because not a part of the *res gestæ*,—not coincident with the event in which the

suit originated, but a mere emanation of a past occurrence. *McDermott v. Railroad Co.*, 87 Mo. 285; *Devlin v. Railroad Co.*, Id. 545; *Adams v. Railroad Co.*, 74 Mo. 553.

2. The issue in this cause was whether the animals of plaintiff got on the defendant's track at a point where it was required by law to erect and maintain a lawful fence. The question of negligence was wholly foreign to the issue. If the defendant failed to comply with its statutory duty, it became amenable to the penalties of the statute, whether guilty of negligence or not. Instructions which wholly ignore the issues raised by the pleadings do not *instruct*; are erroneous if given, and were properly refused. *Henry v. Bassett*, 75 Mo. 89.

3. It is claimed by plaintiff's counsel that none of the instructions said to have been given on the part of the plaintiff, nor those said to have been given on behalf of the defendant, were in fact given, and a certificate of the circuit court clerk has been filed in this court to verify that statement. It is scarcely necessary to say that errors in the transcript cannot be remedied or corrected in this way, nor the recitals in a bill of exceptions thus contradicted. *Baker v. Loring*, 65 Mo. 527; *State v. Daugherty*, 59 Mo. 104; *State v. Van Zant*, 71 Mo. 541; *Gardner v. Railroad Co.*, 68 Iowa, 588, 27 N. W. Rep. 768.

The proper course for a party to pursue in such circumstances is either to stipulate with his adversary as to any corrections to be made or omissions to be supplied, or else to suggest diminution, and sue out a *certiorari* in the ordinary way.

The judgment is reversed, and the cause remanded.

(All concur.)

WISLIZENUS v. O'FALLON.

(*Supreme Court of Missouri.* February 28, 1887.)

1. PROMISSORY NOTE—INDORSEMENT—PAROL EVIDENCE.

Recovery upon a promissory note, by one to whom it has been assigned, cannot be defeated by the maker showing a parol condition accompanying the making of it that it should be paid only in event it was used for a certain purpose, and that it had not been used for that purpose.¹

2. CONTRACT—CONSIDERATION—BANKRUPTCY.

The moral obligation to pay a debt is sufficient consideration to support the promise of a bankrupt made after his discharge in bankruptcy to pay a debt from which he had been discharged.²

Appeal from circuit court, Jefferson county.

Wislizenus & Kleinschmidt, for respondent. *F. T. Farish and Dinning & Bryns*, for appellant.

BRACE, J. This is an action on a promissory note, executed by defendant in favor of John O'Fallon, dated January 21, 1875, payable six months after date, for the sum of \$4,122.66, and assigned by him after maturity to the plaintiff. The defendant's answer is as follows: "He admits the execution and delivery of the note sued on; but, further answering, and for defense, defendant avers that he owed said John O'Fallon nothing, but that said note was made and delivered to John O'Fallon, the payee thereof, for the special purpose of using and employing the same in effecting a settlement of a certain judgment rendered in the circuit court, city of St. Louis, on February 5, 1873, against said John O'Fallon *et al.*, and releasing the levy of an *alias* exe-

¹As to the admissibility of parol testimony to explain an indorsement of a promissory note, see *Spencer v. Sloan*, (Ind.) 9 N. E. Rep. 150; *Houck v. Graham*, (Ind.) 8 N. E. Rep. 564; *Smythe v. Scott*, Id. 145; *Geneser v. Wissner*, (Iowa,) 28 N. W. Rep. 471, and note.

²See *Hobaugh v. Murphy*, (Pa.) 7 Atl. Rep. 139, and note.

cution issued on said judgment to the sheriff of Jefferson county, Missouri, and then on the nineteenth of January, 1875, levied on the personal property of said John O'Fallon. But defendant avers that the object of so making said note failed, and that the same was never so used and employed, but was retained by said John O'Fallon until long after its maturity and until recently, when, for the purpose of bringing this suit, the same was passed over to the plaintiff; wherefore defendant avers that there has been a total failure of consideration for said note, and the same is null and void, and he prays," etc.

The case was tried by the court, without a jury, the issue found for the plaintiff, and judgment rendered in his favor for the amount of the note and interest. The undisputed facts leading up to the issue as they appear in the record may be briefly stated as follows: On June 30, 1871, John O'Fallon indorsed, for the accommodation of James O'Fallon, two notes, each for the sum of \$22,050. On the twenty-seventh of November, 1871, James O'Fallon was declared a bankrupt. On the fifth of February, 1873, the Second National Bank, the holder, obtained judgment on one of these notes against John O'Fallon for the sum of \$23,152.20. This debt was also proven in bankruptcy against the estate of James O'Fallon, who received his discharge therefrom on the eighth of December, 1874. On the seventh of May, 1873, John O'Fallon executed a deed of trust on his real estate to secure the judgment obtained against him by the bank, and on the ninth of January, 1875, his real estate was sold under the terms of the deed of trust, and A. W. Slayback, attorney for the bank, became the purchaser at a nominal figure, and on the nineteenth of January, 1875, an execution issued on said judgment was levied on all personal property of John O'Fallon, and on the twenty-first of the same month John went to James J., who thereupon executed and delivered to John the note sued on. On the twenty-third of January, 1875, John settled this judgment with means derived from other sources, without using the note of James J. O'Fallon. Beyond these facts, the testimony as to what was the consideration of the note consisted mainly of the evidence of John O'Fallon on the one side, and James J. on the other. The evidence for the plaintiff tending to prove that the note was executed by James J. in pursuance of an agreement then made between him and John that he (James J.) would pay that amount of the judgment against John; and, on the part of the defendant, that it was given to be used in some manner in releasing John's personal property from the levy of the execution on the judgment, and in some way redeeming a certain tract of John's land from the deed of trust for the benefit of the wife of James J.

The defendant asked three instructions, all of which were refused; and the court declared the law of the case as follows: "The court declares the law to be that, if the court, sitting as a jury, believe and find from the evidence in this case that James J. O'Fallon was discharged in bankruptcy in December, 1874, then he was discharged from all legal obligation to pay the note of \$22,050 held by the Second National Bank; but if the court should further find from the evidence that the defendant gave the note in suit to John O'Fallon, on the twenty-first day of January, 1875, to reimburse the latter *pro tanto* for any amount that he might have to pay on the note of \$22,050 as the indorser for defendant, then there was sufficient consideration for the note in suit to support it, and the plaintiff ought to recover; and in that event it makes no difference whether or not John O'Fallon said at the time he received the note that he desired to use it to raise money to obtain a release of his property then under levy by the sheriff on the execution introduced in evidence."

The legal proposition contained in defendant's second instruction, to the extent that it was proper to be given, is included in the declaration of law given by the court. His first and third instructions are as follows:

"(1) If the court, sitting as a jury, believe from the evidence that the note sued on was not given in payment of any indebtedness existing between James

J. O'Fallon and John O'Fallon, for the special purpose of using and employing the same in effecting a settlement of the judgment and execution issued thereon, and releasing the levy thereof, as mentioned and set out in the amended answer in this case, and that said note was never so used or employed, but was retained by said John O'Fallon, then such facts constitute a diversion of said note, and the same became void in the hands of said John O'Fallon."

"(3) Although the court may believe from the evidence that James J. O'Fallon gave the note sued on to be applied in liquidation of his liability on the note of \$22,050, in the event it was used and employed by John O'Fallon in settling the judgment and releasing the levy of the execution mentioned in the answer, yet, if he did not so use and employ said note, then the same became void in the hands of said John O'Fallon."

The vice of defendant's first instruction is that the principle asked to be therein declared would avoid the defendant's absolute and unconditional promise in writing to pay, upon failure by the payee to make the particular use of the note purposed by the parties at the time it was executed. Although the application of the note to the particular purpose, and the accomplishment of the object of that purpose, may not have constituted the consideration for which it was given, and notwithstanding it may have had a valuable consideration other than an existing indebtedness from the maker to the payee, the instruction does not reach the consideration the failure of which was the defense to the action. The failure to apply the note to the particular purpose for which it was given could avoid it, and defeat a recovery thereon, only in case the accomplishment of that purpose was the consideration for which the note was given,—a fact not predicated in the instruction as necessary to its avoidance. The fault of defendant's third instruction is that by it the court is asked to declare that, although the maker had executed and delivered his note in writing, containing an absolute and unconditional promise to pay in any event, founded upon a good and valuable consideration, yet such note may be avoided, and a recovery thereon defeated, by a condition not contained in the note, but dwelling in parol, that such note was to be paid only in a certain event. The statement of this proposition is its sufficient refutation. Such a defense could neither be pleaded nor proven. We find no error in the refusal of the court to give the instructions asked for by the defendant. The correctness of the legal propositions contained in the declaration of law given by the court is not directly complained of here, but it is insisted that the court made a mistake as to the consideration of the note, and that this was a misconception of the law embraced in that declaration. What was the consideration of the note was a question of fact. The court found that consideration to be "the obligation of James J. O'Fallon to reimburse John for any amount of money he might have to pay on the note of \$22,050, which he had indorsed for the accommodation of James," and held that, although he was released by his discharge in bankruptcy from any legal obligation to reimburse John, yet if, recognizing the moral force of that obligation, he by his note expressly promised to do so *pro tanto*, that obligation was revived to the extent of the promise so made, and became a sufficient consideration to support the promise contained in said note. The legal proposition is correct; and, the finding of fact being sustained by the evidence, the judgment is for the right party, and is accordingly affirmed.

(All concur.)

KAES and others v. GROSS and others.

(Supreme Court of Missouri. February 23, 1887.)

1. HOMESTEAD—WIDOW—ABANDONMENT.

Where a widow remarried, and removed with her children and household goods from the homestead which she occupied as widow, to the home of her second husband, in another county, and resided there four years, with no special intention of returning, *held*, she could not afterwards claim the homestead, as, notwithstanding her coverture, the intention not to return affects her right, and her continued absence constitutes an abandonment, just as if she were *sui juris*.¹

2. SAME—HOW LOST—DEVISE.

A devise by a husband to his wife is not to be considered as in lieu of her right to homestead; Rev. St. Mo. § 2693, expressly providing that the power of devise shall not extend to homestead, and section 2199 providing that a devise shall be in lieu of dower, but omitting any such provision as to homestead.

Appeal from circuit court, Franklin county.

Kiskaddon, Gallenkamp & Ryors, for appellant. *T. A. Lowe*, for respondents.

SHERWOOD, J. The object of this suit is the assertion of a homestead and dower right on the part of Emilie Kaes in certain property in Pacific, Franklin county, Missouri, on the corner of St. Louis street and Adelaide avenue, estimated to be worth from \$4,000 to \$6,000. The petition was filed April 25, 1883, and the trial occurred May 30, 1884. On June 23, 1874, Gustavus Hufschmidt, with his family, lived on the property in question as his homestead. On the date last mentioned, Hufschmidt and his first wife executed and delivered to Franklin county their school mortgage, conveying said property, to secure the payment of the sum of about \$1,000. His first wife bore him several children, who, with one exception, are still minors. She died, and on the fourth of August, 1875, Hufschmidt married Emilie, the plaintiff, by whom he had two children, one of whom is yet living. They (the children of the first and second marriages, and Hufschmidt and wife) all continued to live at the homestead till September, 1879, when Hufschmidt died, having shortly theretofore made his will, as follows: "(1) I give and bequeath to my beloved wife, Emilie L. Hufschmidt, the life insurance which I have in the orders of Odd Fellows and Freemasons in the state of Missouri. (2) I give and bequeath to my beloved wife, E. L. Hufschmidt, the use and income of my house and property on the corner of St. Louis street and Adelaide avenue, in the town of Pacific, county of Franklin, and state of Missouri, so long till the youngest of the children of my first wife, Amelia Hufschmidt, deceased, shall become of age, or when the said children of my first wife, deceased, can agree with my beloved wife, Emilie L., to sell the aforesaid property, including the house. (3) After such sale, the whole amount so realized shall be divided into eight equal shares or parts, so that each of the seven children left by my first wife, deceased, viz., Frank, Emma, Otto, Fritz, Augusta, George, and Alice, and Louisa, the only child with my present wife, shall receive one share or part. Should, however, any of these die before such division is made, without leaving any heir or heirs, then the amount shall be divided into so many shares or parts as are left. (4) For the use and income of the aforementioned property, house, and lot on St. Louis street and Adelaide avenue, Pacific, Missouri, my beloved wife shall pay the interest of my debts, and keep the premises in good order, and raise the minor children until they become of age; but for this she shall have also the use of all the furniture. (5) All of my other real estate, consisting of six lots and house in W. C. Ink's addition to Pacific, and a tract of land of 13.25 acres between

¹ As to abandonment of homestead, see *Sanders v. Sheran*, (Tex.) 2 S. W. Rep. 304; *Honaker v. Cecil*, (Ky.) 1 S. W. Rep. 394, and note.

the Missouri Pacific Railroad and Brush creek, in Keathy's addition to the town of Pacific, Missouri, my beloved wife shall sell to the best advantage, to settle and pay my contingent debts. (6) Emilie L. Hufschmidt appointed sole executrix. *Dated July 29, 1879.*"

This will having been probated, Mrs. Hufschmidt, the executrix, declined in writing, in proper manner, to execute the will, whereupon William Meyersick was granted letters testamentary with the will annexed.

From the life insurance policies thus bequeathed her, and rents of the premises, Mrs. Hufschmidt received about \$4,500 in cash, and some \$385 worth of household goods and furniture, as well as enjoyed the house rent free till August 20, 1880; when, wearying of widow's weeds, she married her co-plaintiff, Phillip Kaes, and on the second day afterwards removed with her family of minor children and newly-wedded *conjugue* to his house, in St. Louis county, where she continuously lived up to the time of the trial, having taken with her most of the beds and other furniture, selling a portion of it, and leaving the rest with an adult son of her husband by his first wife, who had occupied the house with her, and who afterwards sent to his stepmother a portion of the goods thus left in his care. The testimony of Mrs. Kaes as to her intention in removing is expressed in this language: "I did not leave any of the goods there for the purpose or with the intention of returning; had no special intention of returning when I left. I still live in St. Louis county with my husband; do not wish to occupy this property with my husband, and live in it. I can't say that I do intend to return to it, and don't say that I do not. Can't say that I would occupy the property, should Mr. Gross give me the privilege. I would have to see Mr. Kaes first. I don't want rent. I want Mr. Gross to pay me that what I claim as my homestead. I do not know how much it is. I have not made the calculation."

About \$4,000, including the school-mortgage debt, was proved and allowed against the estate of Hufschmidt, after Meyersick took it in charge, and he, after selling some other lands, obtained a general order for the sale of the land in dispute, as well as two other lots, for the payment of debts; and at the first sale, in June, 1881, the property was struck off to Mrs. Kaes for \$1,725, but, this sale being disapproved, the administrator sold the property mentioned for \$3,800, in September, 1881, which sale was approved by the court, and a deed made to defendant Gross, March 10, 1882, who thereupon took possession of the property, and leased portions of the same to his co-defendants. Meyersick, the administrator, having paid off the unsecured debts with the money thus realized, satisfied the school mortgage aforesaid, and had it so entered on the record.

At the close of the evidence the court refused, on the request of plaintiffs, to give a declaration of law in these words: "If the court believes from the evidence that Gustavus Hufschmidt, in his life-time, was a housekeeper and head of a family, and that the plaintiff Emilie Kaes was his wife, and that, together with their children, they occupied and resided upon the premises described in the petition as being at the corner of St. Louis street and Adelaide avenue as their home, and that, while so occupying and residing upon said premises, instantly upon the death of said Hufschmidt, said premises vested in the plaintiff for life, and the court will so find, and the defendants have introduced no evidence in this case tending to defeat said claim." And gave, at the instance of defendants, the following declaration: "Although the court, sitting as a jury, may find from the evidence that Gustavus Hufschmidt was in his life-time a housekeeper and head of the family, and that the plaintiff Emilie Kaes was his wife, and that, together with their children, they occupied and resided upon the premises described in the petition as being on the corner of St. Louis street and Adelaide avenue as their house, and that while so occupying and residing upon said premises the said G. Hufschmidt died, yet, if the court shall further find from the evidence that about the twenty-fifth day

of August, 1880, the plaintiff intermarried with one Phillip Kaes, and immediately removed with her said husband to his homestead in St. Louis county, taking with her all her household goods, beds, bedding, and furniture, and that she left said property and home of her former husband with no intention of returning thereto, and ever since she removed to the homestead of her second husband she has continued to reside thereon with him, and did at the time of the commencement of this suit, and does now, reside with him on said new homestead, then she abandoned said homestead of her first husband, Gustavus Hufschmidt; and if the court shall further believe that William Meyersick became administrator with the will annexed of said Gustavus Hufschmidt after the said abandonment, and sold said old homestead for the payment of debts, and conveyed the same by proper deed of conveyance to the defendant about 1883, and that he went into the possession and now occupies said premises under said sale and purchase, then the judgment should be for the defendant."

1. If the declaration of law which the court gave was correct, it is quite unnecessary to examine any other points in this case, so far, at least, as a homestead right is concerned. It is quite certain that Mrs. Kaes acquired a new homestead at the domicile of her present husband. It is equally certain that she could not lawfully have *two homesteads* at the same time, any more than she could lawfully have *two husbands* at the same time. And it is said that "the intention to return, by which the homestead rights are preserved, must be formed at the time the removal occurs. It can have no influence whatever in restoring the right once lost by actual abandonment, until executed by an actual resumption of occupancy." And a subsequent unexecuted intention to resume possession would not have the effect to restore the right to hold the homestead exempt. If such right be once lost, and possession of the homestead be again resumed, such resumption of possession will only have the effect of giving origin to a new homestead right, bearing date from the new occupancy, and having no retroactive validity on the old right lost by abandonment, and possessing no force against the rights of third persons acquired in the interim between the loss of the old and the acquisition of the new right. And it has been ruled by a court very liberal in the preservation of homestead rights once acquired that the removal of a family from the homestead constitutes a *prima facie* case of abandonment, and raises a presumption against the claim of homestead which must be rebutted before such claim can successfully be asserted; *ex. gr.*, that the removal was only temporary in its nature, for some specific purpose, and with the coincident intention of re-occupancy. And while the law does not intend that the homestead shall be converted into a *prison*, by making the continuous personal occupancy of the premises the absolute basis upon which the homestead right is dependent, yet it cannot be doubted that the length of time that the claimant is absent from his *locus in quo* will constitute an important factor, in connection with other circumstances, in determining whether the aggregate result of all the facts is sufficient to establish that a forfeiture of the acquired right has occurred by reason of abandonment. Prolonged absence from the homestead, like a removal of the family, is sufficient to cast the *onus* of rebutting the presumption of abandonment on the claimant of the homestead. Though the authorities generally agree that abandonment is a question of fact, and that each case rests upon its own peculiar circumstances, yet, for the most part, they agree that actual removal from the homestead, *with no intention to return*, amounts to a forfeiture of the right as against creditors and purchasers, although no new homestead be acquired. There is one act, however, on the part of the claimant, whereby the allegation of abandonment may be conclusively proved, and that is removal, coupled with the acquisition of a new home elsewhere. The positions here taken are abundantly supported by authority. *Thomp. Homest. & Ex.* §§ 259, 265, 267, 272, 279, 285; *Smith v. Bunn*, 75 Mo. 559.

Summarizing the facts in this case, we find a homestead right acquired, and, after such acquisition, the death of the husband; the remarriage of the wife; the almost immediate removal of herself, children, and household goods to the home of her present husband, in another county, where they have continuously resided ever since, a period of nearly four years at the time the trial occurred; and that Mrs. Kaes, when so removing, had no "special intention of returning." If Mrs. Kaes had been *sui juris* at the time the removal from the old homestead occurred, there could be no room to doubt that the usual rule as to the *animus revertendi* at the time of removal should dominate as well in her case as in any other. *Wright v. Dunning*, 46 Ill. 271. I find no authority in point, and this case is one of first impression as to the effect of the removal of a widow who has remarried, and, with her family and household goods, has removed, without intention of returning. But inasmuch as, in regard to a homestead, a widow with a family, as in this case, cannot alienate the homestead; inasmuch as between herself and her children it is indivisible, and must so remain till the youngest child becomes of age; inasmuch as such homestead is not subject to the laws relating to devise, etc.; inasmuch as a widow thus circumstanced could not, if she would, by joining with her second husband, convey the homestead away; and inasmuch, in consequence of all these matters, she is, in so far as concerns her homestead, independent of her recently married husband,—I can discover no sound reason why intention, or lack of intention, on removal, should not count for as much where she remarries as where she remains unmarried. This must be so, or else it must be true that a widow, by remarrying, and thus *creating her own disability*, could remove from her old homestead; and, being incapable of forming any intention in regard to abandonment, could have that question *indefinitely postponed*, and she be at liberty, after a lapse of many years, to resume possession of her old homestead, regardless of whatsoever rights may meanwhile have intervened. It seems to me that the whole reason and policy of the law in regard to homesteads, and in regard to the speedy settlement of estates, forbid any such construction. Such a construction would convert what a benignant law has designed for a *shield* into a *sword*. I am therefore of opinion that a *feme*, situated as was Mrs. Kaes, was as fully competent to form and execute an intention of abandoning her homestead as though she had remained unmarried. Moreover, as her remarriage and removal were almost concurrent acts, it is not an unreasonable inference that she formed the intention of abandonment of her old homestead prior to the time that she became, for the second time, a worshiper at the shrine of Hymen. And, for like reasons as those already given, I do not see why Mrs. Kaes should not be as fully affected by the usual unfavorable presumptions attendant on removal and prolonged absence from her old homestead, and be equally bound to overcome such presumptions, in order to be successful, as would any other person whatsoever. Nor do I see why the effect of her acquisition of a new homestead, at the residence of her second husband, should not be as conclusive upon her as it would be in any other case; for certainly the whole theory of the law is repugnant to the idea of *two* homesteads being in existence at the same time, (*Thomp. Homest. & Ex.* § 279; *Smith v. Bunn, supra*;) and that law apparently makes no distinction, and is no respecter of persons, in this regard, whether laboring under or free from the fetters of coverture. If Mrs. Kaes be not thus concluded by her acquisition of a new homestead, then it would follow, leaving out of consideration the questions of intention and prolonged absence, that, though she has not lost the old, yet she has gained a new, homestead, and is now the fortunate possessor of homestead rights *in duplicate*, which is an impossible supposition. For these reasons I am of the opinion that the trial court correctly refused the declaration of law asked by plaintiffs, and correctly gave that asked by defendants.

I have purposely refrained from discussing the question of the effect of the

will on the homestead, and have made this case turn on the points set forth in the preceding paragraph. My reasons for doing so are these: I am persuaded *that the will has no bearing on this case*. Section 2693, Rev. St., expressly excepts the homestead out of the laws relating to *devises*. This exception is in marked contrast to the provisions respecting *dower* in real estate, for there, when the husband by will passes any real estate to the wife, "such devise shall be in lieu of dower out of the real estate whereof he died seized, * * * unless the testator, by his will, otherwise declared." Rev. St. 2199. And section 2200 required the wife, if she refuses to take under the will, to file her renunciation within 12 months from the probate of the will. There is no such provision respecting renunciation or election as to a homestead; and, as already seen, it is entirely beyond the power of the husband to devise the homestead; as much so as by his sole deed to convey or mortgage the homestead. Rev. St. § 2689.

As the law excepts the homestead out of the law of devises, it is not to be presumed that the husband in this case intended to go counter to express statutory provisions, and, if he did, *his will* must yield to the *will of the legislature*. The very fact, standing alone, that the legislature has made no provision for election or renunciation regarding a homestead, is very strong evidence indeed; but, where this fact is coupled with the other already noted, that the homestead is excepted out of the law of devises, they form, as I think, a conclusive argument against the power of the husband, by his will, to put his wife to her election in regard to her homestead. Reasoning thus, I am of the opinion that the case of *Davidson v. Davis*, 86 Mo. 440, which lays down a rule contrary to the views here expressed, should not be longer followed, as the effect thereof is to nullify the statute. To illustrate this idea in a very pointed way, take the case of a widow left with a family of minor children, and for her benefit provision has been made by will. She accepts the provisions of the will, and still remains with her children in possession of the homestead. Her children, being minors, cannot assent to anything, and cannot be ousted, and so the widow, notwithstanding the case cited, takes both under the will and under the law. This illustration, in my opinion, shows the utter fallacy of the reasoning of the case cited.

3. Touching the question of dower, it is settled adversely to the contention of plaintiffs by the will, by the statute already cited, and by numerous decisions of this court. Rev. St.; *Dougherty v. Barnes*, 64 Mo. 159; *Gant v. Henly*, Id. 162.

The judgment should be affirmed.

As to paragraph 2, NORTON, C. J., expresses no opinion; and he and the other judges concur on all points.

STATE *ex rel.* CRAMER, Pros. Atty., etc., v. JUDGES OF COUNTY COURT OF
CAPE GIRARDEAU Co. and others.

(*Supreme Court of Missouri*. March 21, 1887.)

1. TAXATION—LEVY—COURTS.

Rev. St. Mo. § 8799, provides that, before any tax other than the state tax, the tax necessary to pay the funded or bonded debt of the state, and the tax for current county expenses, and for schools, shall be assessed or collected, an order shall be obtained from the circuit court, directing the county court to have such tax assessed and collected. Judgments having been obtained in the federal court upon the coupons attached to certain bonds issued by the county in aid of a railroad, the federal court awarded a peremptory *mandamus* against the county judges, directing them to levy a tax of 2 per cent. to pay the judgments, which the county judges were proceeding to do without first obtaining the order from the circuit court. *Held*, that an injunction might properly issue against them from the circuit court, at the instance of the prosecuting attorney of the county, to restrain them from proceeding to collect such tax.

2. SAME—INJUNCTION—PARTIES.

The injunction in this case not being asked upon the ground that the tax was illegal but on the ground that the *method* of collection was so, might properly be granted upon the application of the state though the prosecuting attorney of the county against the county officers, without making other parties. There is a distinction between a proceeding which looks to the absolute denial of a right and one which merely seeks to prohibit or restrain the enforcement of that right in an unlawful way.

Appeal from circuit court, Cape Girardeau county.

In 1869 the county court of Cape Girardeau county issued, for and in behalf of Cape Girardeau township, \$150,000 in bonds to the Cape Girardeau & State Line Railroad Company. The bonds were issued under and by authority of an act of the general assembly of Missouri approved March 23, 1868, and entitled "An act to facilitate the construction of railroads in the state of Missouri." To each of the bonds thus issued were attached 20 interest coupons. These bonds were delivered to and sold by the railroad company; and in 1882 the Ninth National Bank of the City of New York, John T. Hill, Valentine Winter, George W. Harshman, and Elisha Foote obtained judgments in the United States circuit court for the Eastern district of Missouri on a number of the said interest coupons detached from said bonds, amounting in the aggregate to about \$15,000. The county court of Cape Girardeau county, refusing to pay these judgments, Harshman, Hill, and the other plaintiffs sued out of the said United States circuit court their several writs of *mandamus* against the county court of said county, commanding it to levy, and cause to be collected from the taxable property in said township, a special tax for the purpose of paying off and discharging the said judgments obtained as aforesaid. Thus commanded, the county court, by its proper order, levied a special tax of 2 per cent.; the county court clerk extended it against the property of the township in a separate column, as required in the act of 1868; and the county collector was collecting this special tax just as he was the taxes for state and county purposes, until restrained by the temporary and permanent decree and order of the Cape Girardeau circuit court.

The ground on which that injunction issued was that the county court did not request the prosecuting attorney of the county to present a petition to the circuit court of said county, nor to the judge thereof in vacation, setting forth the above facts, and the necessity for the levy and collection of this special tax, as is required by section 6799, Rev. St. Mo. 1879. The appeal involves the the question as to whether the injunction was rightfully issued.

Maurice Cramer, for respondent. *Oliver & Limbough* and *R. H. Whitelaw*, for appellant.

SHERWOOD, J. The circuit court granted a temporary injunction restraining the judges of the county court of Cape Girardeau county and others from collecting a certain special tax of 2 per cent. ordered to be levied on all real and personal property in Cape Girardeau township, for the purpose of paying certain judgments rendered in the United States circuit court for the Eastern district of Missouri, which judgments were based on coupons attached to bonds issued under the provisions of the act of March 23, 1868, commonly known as the township aid act. On final hearing, the temporary injunction was made perpetual, and this ruling was based on the express ground that the steps required by section 6799 had not been complied with prior to extending the tax on the tax-books, and levying the same. It has been ruled by this court that taxes of the nature now in question can only be levied and collected in the manner provided in said section, and that, unless the methods prescribed are pursued, the failure to pursue them, when, as here, they are the conditions essential to the exercise of the power, will render the tax invalid. *State v. Railroad Co.*, 87 Mo. 236. Here those methods—those conditions precedent—were not followed; and hence the county court, having no

inherent power to levy a tax, and deriving its only authority from the state, must, of necessity, pursue the course in this regard marked out by the sovereign authority, by its laws. *Id.* Under the former ruling of this court, it is well established that the state may, through its proper officer, maintain a bill to enjoin public or municipal corporations from acting in contravention of the constitution and laws of the state. *State v. Saline Co. Court*, 51 Mo. 350; *State v. Callaway Co. Court*, *Id.* 395; *State v. Sanderson*, 54 Mo. 203; *Ranney v. Bader*, 67 Mo. 476; 2 High, Inj. §§ 1282, 1304.

In the case at bar there was ample ground for the interposition of the prosecuting attorney in his endeavors to keep the judges of the county court and other officers within the confines of their legitimate authority. Nor do I see that the matter being discussed is at all affected because the action of the county court was produced by the mandate of the federal court. If, as already seen, the county court was powerless to act except when acting in conformity to express statutory conditions, it was still the duty of the judges to comply with those conditions, while yielding obedience to the mandate aforesaid; for, outside of those statutory conditions, they were utterly powerless to act. Indeed, under section 6800, they were punishable for a misdemeanor in failing to comply with the provisions of section 6799 before levying the tax. It does not stand to reason that their act could be valid, and still at the same time punishable as a crime. *State v. Garrouette*, 67 Mo. *loc. cit.* 456. If the statutory provisions being discussed were of such a nature as to cut off those who obtained the judgments from enforcing the obligations held by them, then the authorities cited on their behalf might apply. I understand that it is within the power of the state to change the remedy, so long as it does not essentially affect the right embodied in the contract, and that such change, thus made, does not infract the rule that forbids the contract to be impaired.

In this connection the language used by Mr. Justice SWAYNE is opposite to this case: "It is competent for the states to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the time between the alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." *Van Hoffman v. City of Quincy*, 4 Wall. 535. See, also, *Ogden v. Saunders*, 12 Wheat. 213; *Cooley*, Const. Lim. 348, 349, (5th Ed.) *Id.* 710 *et seq.* The point has not been made in this court, nor was it in the court below, as to any defect of parties. I am inclined to the opinion, however, that, as this proceeding did not deny the legality of the tax, but only the mere *method* of its collection, and as it was but a proceeding on the part of the state, through its prosecuting officer, to restrain the county officials within the bounds of their legitimate authority, that other parties were not necessary. I think a distinction may well be taken between a proceeding which looks to the absolute denial of a right and one which merely seeks to prohibit or restrain the enforcement of that right in an unlawful way.

(All concur, except NORTON, C. J., absent.)

STATE *ex rel.* STATE JOURNAL CO. *v.* MCGRATH, Secretary of State, and others.

(Supreme Court of Missouri. March 21, 1886.)

MANDAMUS—COMMISSIONERS OF PUBLIC PRINTING—CONTRACTS.

The duties imposed upon the Missouri commissioners of public printing by Rev. St. 1879, § 6594, in letting contracts for such printing, are not purely ministerial, but involve the exercise of such a degree of discretion as to place them beyond the control of a court by *mandamus* issued at the instance of a party claiming to be the lowest responsible bidder for such work.

Appeal from circuit court, Cole county.

Edwards & Davison and J. C. Fisher, for appellant. D. H. McIntyre and Smith & Krauthoff, for respondents.

RAY, J. This was a petition for *mandamus* to compel the defendants, as *ex officio* commissioners of public printing, to award to the plaintiff a certain contract for public printing, therein mentioned, having two years to run from July 1, 1884. The petition was filed in the Cole circuit court on July 3, 1884, and afterwards, on the same day, an alternative writ was issued by the judge of said court, returnable to the ensuing December term thereof, when the defendants filed a demurrer to the same, which, being heard and considered by the court, was sustained, and the bill dismissed; from which judgment the plaintiff appealed to this court.

The material allegations of the alternative writ are to the effect following: That said commissioners, under section 6594, Rev. St. 1879, proceeded to advertise for "sealed proposals" for executing the state printing for the term of two years from and after July 1, 1884; that the relator, relying upon the good faith of said advertisement, so made, did submit its proposals for the "second class" printing, so advertised, at the price and sum of 29 cents per 1,000 ems for composition, and 24 cents per token for all press-work, which said proposal was accompanied by a satisfactory bond and security, as required by law; that said commissioners thereupon proceeded to open all such proposals by them received, when it appeared that only two proposals had been submitted for the printing of the second class,—one by relator, at the price and sum aforesaid, and the other by the Tribune Printing Company, at the price and sum of 32 cents per 1,000 ems for composition, and 25 cents per token for all press-work; and that relator was then found to be the lowest responsible bidder for all printing of said second class, as provided by law. Relator avers and charges that it was the duty of said commissioners, on careful examination and computation, under section 6595, Rev. St. 1879, to award the contract for said printing to the relator, as such lowest responsible bidder therefor, which the commissioners then and there refused to do, and still refuse so to do. Relator further says that it is advised, believes, and so charges that said commissioners arbitrarily, and in violation of law, have awarded said contract for said printing to the said Tribune Printing Company, which was not the lowest responsible bidder therefor; that great injury will be done relator and the tax-payers of the state if said contract is not awarded to the lowest bidder; that the relator is without other adequate remedy for the wrong so done, unless it be corrected by writ of *mandamus*. Wherefore relator prays that said commissioners be required to vacate, cancel, and annul the award of said contract for said printing to said Tribune Printing Company, and that they forthwith award the same to relator, as in duty bound by law.

It is insisted for relator, among other things—*First*, that the commissioners of public printing are mere ministerial officers, whose duties, under the statute, are fixed and plain, and that they have no discretion in the premises, and that *mandamus* will lie to compel the performance of dues thus imposed; *second*, that relator's bid for the proposed printing, being the lowest responsible bid, in and of itself, by operation of law, vested absolutely in the relator the contract for said printing, and gave it such interest and legal rights as are enforceable by writ of *mandamus*, and that the attempted award of said contract to the Tribune Printing Company was and is absolutely null and void. On the contrary, it is claimed for respondents that they are not mere ministerial officers without discretion, and that *mandamus* will not lie to compel them to award the contract to relator; that the theory of statutes requiring the letting of such public contracts to the lowest bidder is that they are designed rather for the benefit and protection of the public than the bidder, and that such proposals confer upon the bidder no absolute right to enforce by *mandamus* the letting of such public contracts after they have already been awarded to another.

The decided weight of authority on these questions to which we have been cited, and to which we have had access, is to the effect following:

High, Extr. Leg. Rem. § 92, treating of the duties of public officers intrusted with the letting of contracts for public work, uses the language: "The better doctrine, however, as to all cases of this nature, and one which has the support of an almost uniform current of authority, is that the duties of officers intrusted with the letting of contracts for works of public improvements to the lowest bidder are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond control of the courts by *mandamus*."

In the case of *State v. Board Ed.*, 24 Wis. 683, the ruling of the court is to the effect that, "when the law requires a public work to be let to the lowest bidder, such bidder, after his bid has been rejected and the contract awarded to another, has no absolute right to a *mandamus* to compel the execution of a contract with him; and in this the case court refuses to complicate the matter by directing the court below to issue the writ."

In the case of *Com. v. Mitchell*, 82 Pa. St. 343, treating of a statute and proposals on a kindred subject, the ruling of the court is to the following effect: "The word 'responsible' in the sixth section of the act of May 23, 1874, has a broader meaning than is involved in the pecuniary ability to make a good contract by security for its faithful performance; and when the term is applied to contracts requiring for their execution not only pecuniary ability, but also judgment and skill, the statute imposes, not merely a ministerial duty upon the city authorities, but also duties and powers which are deliberate and discretionary, and therefore, when these authorities have exercised a discretion, *mandamus* will not lie to compel them to modify their decision, even though their action was erroneous, in the absence of clear proof of fraud or bad faith."

Numerous authorities elsewhere are to the same effect, among them the following: *People v. Contracting Board*, 27 N. Y. 378; *People v. Croton Aqueduct Board*, 49 Barb. 259; *Free Press Ass'n v. Nichols*, 45 Vt. 7; *People v. Contracting Board*, 33 N. Y. 382; and *People v. Croton Aqueduct Board*, 26 Barb. 240.

Tested by these authorities, and the rules therein stated, it must be held, and we think rightfully, that the circuit court committed no error in its ruling and judgment upon the demurrer. Other questions and authorities have been suggested and cited in briefs of counsel; but, as the above disposes of the case upon its merits, they need not be considered or discussed.

The judgment of the circuit court is therefore affirmed; in which all concur.

DONOHUE v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri. March 21, 1887.)

NEGLIGENCE—CONTRIBUTORY—RAILROAD CROSSING.

Rehearing denied. See 2 S. W. Rep. 424.

On motion for rehearing.

NORTON, C. J. We are asked to grant a rehearing in this case on the sole ground that there was no evidence to show that the accident did not occur "along the river bank, between Arsenal and Elwood streets. It is distinctly alleged in the petition that the place where deceased was killed was not "along the river bank, between Arsenal and Elwood streets," and it is distinctly averred in the answer, and thereby admitted, that deceased "was killed at the time and place in question." Besides this, it sufficiently appears from the evidence of witness Shultz that Dorcas-street crossing, where the injury occurred, is not on the river bank. In view of this, and the fact which is plainly inferable from the whole record, that the trial proceeded on an apparently admitted theory that the place of the injury was not on the bank of the river, between Arsenal and Elwood streets, the motion is overruled.

STATE *ex rel.* SNYDER v. ALDERMEN OF PIERCE CITY.

(Supreme Court of Missouri. March 21, 1887.)

OFFICE—QUALIFICATION—ELECTIONS—MANDAMUS.

The aldermen of a city, whose duty it was to canvass the election returns to determine who had been chosen to the various offices, and to direct the clerk to issue certificates of election to the persons elected, determined that the relator had been elected mayor, but declined to direct the clerk to issue the certificate of election, basing their refusal upon the fact that relator was not an inhabitant of the city as required by law. *Held*, that the election of a person to an office who does not possess the requisite qualifications gives him no right to hold the office or to claim a certificate of election. And as he could not show a clear right to a writ of *mandamus* against the aldermen, his application for it must be refused.

Mandamus.

Henry Brumback and Smith, Silver & Brown, for relator. D. H. McIntyre, for respondent.

BLACK, J. The relator was a candidate for mayor of Pierce City at the April election, 1886. The respondents are the aldermen of that city. An ordinance of the city makes it the duty of the aldermen, on a designated day after each election, to canvass the returns to determine who has been elected to the various offices, and to direct the clerk to issue certificates of election to the persons declared elected. In this case the aldermen determined that relator had received the highest number of votes, but declined to direct the clerk to issue a certificate of election, and he now seeks by the writ of *mandamus* to compel them to do so.

The law (Acts 1881, p. 38) in express terms declares that no person shall be mayor of these cities of the fourth class unless he be an inhabitant of the city for one year next before his election. On the pleadings as they stand it is admitted that the relator did not possess this qualification. A peremptory writ of *mandamus* will not be issued unless the relator shows a clear right to the remedy which he asks. *State v. Albin*, 44 Mo. 348. The election of a person to an office who does not possess the requisite qualifications gives him no right to hold the office. Dill. Mun. Corp. (3d Ed.) § 196. As, by reason of his qualifications, the relator was not entitled to hold the office, surely he has no right at the hand of the court to be armed with a certificate of election,—evidence of title to that to which he has no right.

We have treated the motion for a peremptory writ on the return as a demurrer, for that it is in effect. It is not only shown by the return that the relator did not possess the requisite qualifications, but the writ, after stating that he had been an inhabitant of the city for one year before the election, proceeds to say: "And if, perchance, construed not to have been an inhabitant of said city for one year, yet," etc. This evasive statement must be regarded as an admission by the relator's own pleading that he has not been an inhabitant of the city for the necessary period of time. There is, therefore, no need of holding the case over for further pleading. The motion is overruled, and judgment will be entered on the pleadings for the respondents, with costs against the relator.

(All concur.)

MARTIEN v. NORRIS.

(Supreme Court of Missouri. March 21, 1887.)

1. DOWER—JOINTURE—ELECTION.

Rev. St. Mo. §§ 2201, 2202, provide that, when land is conveyed to a wife as jointure, she shall not claim dower in the residue of the husband's land, unless she renounce the lands so conveyed as jointure. *Held*, that a conveyance of land to the wife absolutely in fee, the deed containing no provision that it is to be in discharge of her dower in other lands, does not have the effect of putting her to her election

under the statute, between that and dower, notwithstanding that the husband subsequently in making his will recited the conveyance as having been made in lieu of dower.

2. SAME—DEVISE IN LIEU OF DOWER—PERSONALTY.

Rev. St. Mo. §§ 2199, 2200, provide that a devise of land by the husband to the wife shall be in lieu of dower, unless she renounces the devise. *Held*, that these sections do not apply where the husband devises personalty unconditionally to the wife, but devises no land; and in such case she is not bound to renounce the provision of the will, or make an election, in order to be endowed of the husband's real estate.

3. ESTOPPEL—BY CONDUCT—DOWER—DEED.

Upon the sale of land belonging to the estate of her deceased husband, the widow, and the agent employed to make the sale, stated to the purchaser that the title to the land was perfect. It appeared that the statement was made in good faith, the widow believing at the time that the provision of her husband's will excluding her dower right was enforceable. It also appeared that the will was of record, accessible to the purchaser. He bought the land, and took the deed, without requiring her to relinquish dower. "being convinced in his own mind," as he stated, "that she had no dower." *Held*, that the widow was not estopped from subsequently claiming dower.

4. SAME—SALE OF INTEREST AND TITLE OF HUSBAND IN LAND—NO BAR TO CLAIM TO DOWER.

Another tract belonging to the husband's estate was put up for sale by the administrators, of whom the widow was one, and the auctioneer stated that a warranty deed and perfect title would be given, but the administrator present corrected him by saying that nothing would be sold except the title and interest of the decedent. The defendant, however, was not present when this statement was made. He purchased the land, and took an administrator's deed to it. The widow made no representations, and did not appear at all in the transaction. *Held*, that she was not estopped from afterwards claiming dower in the land.

Appeal from circuit court, Pike county.

Bruere & Hinman, for appellant. *Macfarlane & Trimble*, for respondent.

BRACE, J. In the year 1872, James M. Martien died testate, seized of the following real estate situate in Audrain county, Missouri, to-wit: E. $\frac{1}{4}$ of section 4, township 57, range 8 W., and the S. W. $\frac{1}{4}$ of section 34, township 52, range 8 W., leaving the plaintiff his widow. The testator by his will bequeathed to the plaintiff certain personal property and \$100 in money, and made the following further provision, and no other, for his widow: "Sec. 3. Having purchased for my said wife the house and lot in the city and county of St. Charles with my own means, and caused the same to be conveyed to her and her heirs as evidenced by deed from James P. McKinney and wife, dated May 17, 1865, and recorded," etc., "to be held by her in lieu and discharge of her dower in my real estate, and the same having been accepted by her as such, I do in this my last will and testament make no further provision for her out of my real estate." The testator devised portions of his real estate to his children,—separate tracts to each for life, remainder to their heirs. All the residue he devised to plaintiff and one Reid, executors named in his will, in trust to pay debts, and for other purposes, and gave them express power to sell and convey. The said S. W. $\frac{1}{4}$ of section 34 he devised to two of his daughters, and the said E. $\frac{1}{4}$ of section 4 was a part of the residue.

Plaintiff and Reid qualified as executors, and took charge of the estate. The executors resided in St. Charles county, and employed John P. Clark, a real-estate agent living in Audrain county, to negotiate sales of land devised to them. For that purpose, in 1874 or 1875, Clark negotiated the sale to defendant of the said E. $\frac{1}{4}$ of section 4, and on March 13, 1876, the executors executed and delivered to defendant a deed for said half section. Afterwards the estate passed into the hands of the public administrator of St. Charles county, who, on the seventeenth day of November, 1877, in pursuance of an order of the probate court, sold the said S. W. $\frac{1}{4}$ for the payment of debts of said testator at public sale to the defendant, and on the seventh day of March, 1878, executed to him a deed therefor. This action by the plaintiff, widow of said

testator, for assignment of dower in said real estate, and for mesne profits, was commenced in the circuit court of Audrain county, December 27, 1882. As a bar to plaintiff's recovery, the defendant interposed three pleas: (1) The acceptance of a jointure in lieu of dower; (2) the acceptance of the provisions of testator's will in lieu of dower; (3) estoppel *in pais*.

The case was removed by change of venue to the circuit court of Pike county, and was tried by the court without a jury, and all the issues found for the plaintiff, except the issue on the plea of estoppel, which was found for defendant, and judgment rendered in his favor, from which he appeals to this court. The only question before us on the record is the action of the circuit court in finding for the defendant on the plea of estoppel; but, as the question of the plaintiff's right of dower in the land has been presented in the briefs and argument of counsel on each side, and this case will have to be remanded for further proceedings, we deem it not improper, having considered the matter, to express an opinion upon that right before passing to the consideration of the error complained of in the action of the circuit court, and which alone is directly presented by the record for review in this court. In regard to that right, it is only necessary to say that the deed from McKinney and wife to the plaintiff, being an absolute conveyance in fee of the real estate therein described to the plaintiff, containing no expression that it was to be in discharge of her dower in the real estate of her husband, did not have the effect of creating an estate of jointure, which she was by law required to renounce in order to have her right of dower in such real estate. Rev. St. 1879, §§ 2201, 2202; *Perry v. Perryman*, 19 Mo. 469; *Dudley v. Davenport*, 85 Mo. 463. That the testator by his will, having made no devise of real estate to his wife, and the bequest of personalty therein contained being voluntary and unconditional, she was not required to renounce the provisions of the will, or make an election in order to be endowed of the real estate whereof her husband died seized. Rev. St. 1879, §§ 2199, 2200; *Halbert v. Halbert*, 19 Mo. 453; *Pemberton v. Pemberton*, 29 Mo. 408; *Bryant v. McCune*, 49 Mo. 546. The recital in the will was no evidence by which plaintiff's absolute title in fee-simple in the real estate, conveyed to her by the deed of a stranger, could be converted into an estate of jointure; and the deed and will together, or separately, evidenced no such provision made for the wife out of the estate of the husband as required a renunciation of the provisions of the will of her husband in order that she might enjoy her right of dower in the real estate of which he died seized; and the circuit court in this case correctly held that plaintiff had right of dower in the real estate purchased by the defendant.

The testimony bearing upon the question of estoppel as to the 320-acre tract is substantially as follows:

John P. Clark, agent of the executors, testified: "I saw Reid and Mrs. Martien several times about the sale of lands belonging to the Martien estate, being employed by them to negotiate sales. I conversed with them about the title, as there were rumors to the effect that the title of deceased to the lands was defective. Both plaintiff and Reid authorized me to say to purchasers that the title was perfect. I continued to negotiate sales until the public administrator took charge of the estate. I negotiated the sale of the tract sold by the executors to defendant. It was the land he first purchased. I think it contained 320 acres. Defendant talked with me about the title, and I told him Mrs. Martien and Mr. Reid had authorized me to say the title was unquestionable. Mrs. Martien had told me that the will provided for the sale of that land, and the deed from the executors would convey a good title. At that time land was selling low, and I think the price paid by defendant was a fair one. I had several conversations about the land with Mrs. Martien, but many more with Reid. Some doubt about the title to the land arose from a sale for back taxes, and the Howell claim. In my conversation with defendant the will of Dr. Martien was referred to in relation to the provision

for the sale of the land, and whether a sale by the executors as trustees would confer a good title. Mrs. Martien and Reid, the executors, were then acting as trustees under the will. Nothing was ever said to me by either of them about her dower, in so many words. The sale I negotiated with defendant was made in 1874 or 1875. I never heard the term 'dower' used by Mrs. Martien in connection with the sale of the land. She said a perfect title would be given."

The defendant, E. B. Norris, testified: "I am the defendant in this action, and own the lands described in plaintiff's petition. I negotiated with Judge Clark the purchase of 320 acres sold me by the executors of James M. Martien. He said the title to the Martien lands was perfect. He said the will provided for dower. I never talked with plaintiff or Mr. Reid about dower. There was no reason why I should have done so, as I was satisfied in my own mind that plaintiff had no dower in the land. The deed was executed by Mr. Reid and Mrs. Martien, March 14, 1876. I took possession on the second of that month, and commenced improving it. I paid one-third down, and received the deed. Mrs. Martien came to my house before the deferred payment was due, when I was setting out shade trees, but she did not say anything about dower then. I first received notice of her claim about the time this suit was brought. I paid full value for the 320-acre tract. I never saw Mrs. Martien until after my purchase of the 320-acre tract. In my conversation with Judge Clark he represented that Mr. Reid and Mrs. Martien were selling under the provision of the will, which made provision for Mrs. Martien. I received the deed from Judge Clark, and it was in conformity with our contract as I understood it. I never made any objections to the declarations in the deed, as I supposed the widow had no dower in the land. I negotiated the purchase of the 320-acre tract with Judge Clark. Don't think I saw Reid before the purchase."

"*Recalled.* I never asked him [Judge Clark] about Mrs. Martien's dower, as I thought she had no interest in the land."

Mrs. Martien testified to the effect that she took no active part in the settlement of her husband's estate,—signed papers as requested by her co-executor, who negotiated the sales of the real estate, and transacted the other business; that the question of her dower was never alluded to in any conversation between her and Judge Clark, and that she never did or said anything as executrix, trustee, or in her private capacity contemplating a relinquishment of her dower rights in her husband's estate.

The other testimony tended to show sales of real estate made to other parties by the executors, and that plaintiff made no claim of dower until a short time before this suit was brought.

The deed from the executors was an ordinary executors' deed, reciting the power conferred upon them to sell by the will, and the order of the probate court, and conveying the right, title, and interest of the decedent in said tract of land to the defendant, without any covenants for title, and was signed and acknowledged by them in their official capacity as executors, and nothing therein contained could operate as an estoppel. Nor have we been able to discover in the facts proven in this case the elements necessary to constitute an estoppel *in pais*. We have found from an examination of the provisions of the will of plaintiff's deceased husband, the statute law, and the authorities that, at the death of her husband, she became entitled to have her dower in the real estate purchased by defendant assigned her. She has never received any compensation for that right, has never formally relinquished it, and she ought not to be deprived of it, unless she has been guilty of such practices as induced the purchaser to take the estate under the belief that she waived her right of dower. And it may be as well to premise the consideration of that question by the remark that, in view of the fact that the existence of the right seems to have been questioned by many, some of them

learned in the law, that it would be no stretch of charity to suppose that the plaintiff may have had such doubts of her right as to make her loath to submit it, to legal arbitrament, and hence we ought not to attach too much importance to the fact that she has been tardy in asserting what may have been hitherto to her only a supposed right.

The tract of land with reference to which we are now considering plaintiff's conduct was sold to the defendant by the agent of the executors, (Clark,) and, waiving the discussion of the question whether his employment by the executors to sell the lands of their testator clothed him with apparent authority to deal in any manner with plaintiff's right of dower in those lands, let it, for the purposes of this argument, be conceded that he had such apparent authority, and that his declarations *quoad* the land and the title thereto are to be taken as her declarations, the question then arises, did he undertake to deal with that dower interest in negotiating the sale of the land to defendant, or did he make any declarations by which defendant could have been induced to believe that, if he made the purchase, he would acquire that dower interest, or by such purchase he would acquire the land discharged of such dower interest? It must be conceded from the evidence that the agent did not undertake to sell to defendant the dower interest, or that he made any declaration by which defendant could have been induced to believe that he would by his purchase acquire such interest; and if any declarations made by the agent could be construed as having the effect of inducing the defendant to believe that he would by his purchase, and by virtue thereof, acquire the land discharged of dower, it is contained in the declarations "that the title was perfect or unquestionable." Can that declaration be thus construed? We think not, for two reasons.

First, from the connection in which the expression is used, it must have referred to the title of the decedent, as that was the only title which was discussed between the agent and the defendant, and the power of the executors to convey it under the will. But waiving this, it could not have been understood as including the dower interest; for the declaration of the agent in regard to that interest necessarily excludes the idea that the defendant would, by virtue of the purchase, acquire the land discharged of the dower, since it distinctly informed him that "the will provided for dower." The declarations of the agent could not have been understood by the defendant to mean that, if he would make the purchase, the plaintiff would waive her dower, or that by the purchase he would acquire her dower, or that, by virtue thereof, he would acquire the land discharged of her dower. The most that can be claimed for it is that by the purchase he would acquire the land in which there was no dower interest, because the "will provided for dower."

The next question to be considered is, can the defendant be heard to complain, if the declaration that "the will provided for dower" turns out to be untrue? It cannot be contended that the will did not provide for dower according to the understanding of the parties at the time. It certainly purported in some way to do so; and the defendant had insisted from the beginning that it did so provide; and that view of its provisions has been earnestly and ably pressed upon our consideration in this case by his learned counsel; and if there was falsity in this declaration, it was not in the fact stated, but in the opinion expressed or implied, which, though erroneous, yet, being the mere inference of a non-expert, affords no ground for equitable estoppel. This plea can ordinarily be only invoked when there has been a misrepresentation of a material fact. No fact was misrepresented or concealed by his declaration. On the contrary, it pointed out and advised the defendant of the source from which the conclusion was inferred,—the will of the testator,—which was spread upon the public records, and was equally as accessible to the defendant as it was to the plaintiff, and which she was under no greater obligation to correctly construe than was the defendant. But even

if any or all of the declarations of the agent were sufficient to estop the plaintiff from claiming her dower, they could not have that effect, unless the defendant relied upon such declarations, and upon the faith of them made the purchases. His own evidence shows conclusively that this was not the fact, for he in his evidence says: "I was satisfied in my own mind that the plaintiff had no dower," and gave this as the reason why he did not talk to Mrs. Martien or Reid about her dower. In another connection he gave the same reason why he made no objections to the declarations in the deed of the executors, which he says "was in conformity with the contract as I understood it;" and in yet another connection, he gave the same reason why he did not talk with Judge Clark about her interest in the land; so that, whatever possible construction ingenuity may be able to place upon any or all of the declarations of plaintiff's agent in the sale of this land as affecting her dower right, the defendant relied upon none of them for that purpose, and there was no estoppel in the case so far as the 320-acre tract is concerned. And as to the 160-acre tract, the plea has, if possible, less to rest upon.

The 160-acre tract was sold at public sale by the public administrator, after the estate had passed out of the hands of the executors. The evidence tended to show that the plaintiff was present at the sale; that the auctioneer, in stating the terms of the sale, said that a warranty deed and a perfect title would be given; that he was immediately corrected by the administrator, who, in the hearing of all present, announced that nothing would be sold except the right, title, and interest of the decedent, and that only an administrator's deed would be given; that the defendant was not present when the sale commenced; that the land was knocked off to some bidder whose name does not appear; that the administrator and the bidders repaired to Judge Clark's office, to make payments and sign the necessary papers; that the bidder for this land objected to consummating his purchase, and the defendant, being present, was, by the consent of the administrator, substituted for the original bidder, complied with the terms of the sale, was reported by the administrator as the purchaser, and afterwards received an administrator's deed therefor. There was nothing done or said in this whole transaction by plaintiff or anybody that could prejudice the plaintiff's right in the premises. The incidents of the occasion emphasized the fact to every bidder that he was to purchase nothing but the interest of the decedent.

The conclusion, from all the evidence in this case, is irresistible that the defendant bought the land described in plaintiff's petition, not upon the faith of any representation made by plaintiff or her agent as to her dower interest, or upon the faith of her conduct in respect thereto, but upon the faith of his own conviction, from his knowledge of the provisions of the testator's will, that she had no right of dower in the land. The consequences of his erroneous conclusion in that matter he cannot be permitted to evade by a plea of estoppel in which there is no merit.

The circuit court erred in giving instructions 5 and 6 for defendant, and in holding that plaintiff is estopped from asserting her right of dower in the real estate described in plaintiff's petition; for which error the judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

(All concur, except NORTON, C. J., absent.)

COCHRAN v. BARTLE.

(*Supreme Court of Missouri. March 21, 1887.*)

1. ARBITRATION AND AWARD—OATH—WAIVER.

If the parties to an arbitration waive the swearing of arbitrators and witnesses, the award cannot afterwards be assailed on the ground they were not sworn; and such waiver may be either express, or inferred from surrounding circumstances.

2. **SAME—IGNORANCE OF LAW.**

In case of such waiver, it is immaterial that the party making waiver did not know that the statute required an oath, it not appearing that his action would have been otherwise had he known of the statutory requirement.

3. **SAME—AWARD—PARTNERSHIP.**

An award need not state in words and figures the precise amount to be paid. It is sufficient if nothing remains to be done in order to render it certain and final but mere mathematical calculations. So, where the accounts of partners were referred to arbitrators to determine the amount due each partner, and to settle whether plaintiff, one of the partners, should be charged with any part of the losses of the firm, and the award made by the arbitrators does not specify any sum to be paid, but decides merely that plaintiff is not to be charged with any part of the losses, and that, with that exception, the accounts are to stand as they stood on the partnership books at the time of the award, *held*, that the award was sufficiently definite and enforceable.

4. **SAME—PRESUMPTION.**

An award will not be set aside for any mistake of law or fact not appearing on its face; so, while a communion of profits between partners implies a communion of losses, yet, as partners may agree between themselves that one of them shall not be charged with losses, it will be presumed that the above award, relieving the plaintiff from liability for losses, was made upon the evidence of such an agreement.

Appeal from St. Louis circuit court.

Broadhead & Haeussler, for respondent. *Smith & Harrison*, for appellant.

NORTON, C. J. Plaintiff and defendant, who were partners in business, upon the dissolution of the partnership disagreed as to how the partnership should be settled as between themselves, entered into the following agreement:

"An agreement made this sixth day of June, A. D. 1883, by and between William G. Bartle and Frederick G. Cochran, both of the city of St. Louis and state of Missouri, witnesseth that whereas, a controversy exists between said parties in relation to the adjustment and settlement of the accounts between them as partners in business under the firm name of Bartle & Cochran, and, desiring to avoid litigation, said parties respectively hereby mutually agree to submit said controversy, and all matters between them growing out of said partnership business, to the decision of Archibald N. Craig, E. O. Stanard, and Michael McEnnis, all business men residing in the city of St. Louis, aforesaid, whose decision shall be binding upon the respective parties hereto, and judgment of the circuit court of the city of St. Louis may be rendered upon the award upon the subject-matter designated in this submission, made by said arbitrators in writing. Executed in duplicate.

[Signed]

"FREDERICK G. COCHRAN.

"WILLIAM G. BARTLE."

In pursuance of this agreement, all the arbitrators met, and, as the result of their investigation, two of them made the following award:

"The undersigned, arbitrators in the question at issue between William G. Bartle and Frederick G. Cochran, find, in the absence of any written agreement between the parties aforesaid during the first four years' business, and the vague expression in the written agreement signed by both of the aforesaid parties for the last year's business, ending November 1, 1882, to-wit: 'The interest of F. G. Cochran is changed from one-eighth of the profits to one-fourth in the future, as heretofore.' As there is nothing said in this agreement as to the liability of the said F. G. Cochran in case of loss, and as the statements made by the said W. G. Bartle and F. G. Cochran do not agree with regard to the question of loss, we therefore find that we must either give up the case with regard to facts, or decide equitably from the best judgment we can bring to bear. With this in view we decide as follows, viz.: (1) F. G.

Cochran is entitled to one-eighth of the profits in the years that profits were made during the first four years, and one-fourth of the profits of the year ending November, 1882. (2) F. G. Cochran is to neither receive any money for his services, nor pay any of the losses in the years that showed no profits. (3) The accounts on the books of Bartle & Cochran are to stand as they are, with the above exceptions.

[Signed]

"MICHAEL MCENNIS.

"E. O. STANARD.

"September 10, 1883.

"Michael McEnnis and E. O. Stanard acknowledged to me, in the presence of each other, that these were their respective signatures, and asked me to witness same.

[Signed]

"GEORGE H. MORGAN."

This suit is brought to enforce the above award.

The defendant in his answer resists its enforcement on the ground that neither the arbitrators nor witnesses were sworn, that the award is not specific enough to be enforced, and did not embrace all matters referred for arbitrament.

On a trial had before the court sitting as a jury, judgment was rendered for the plaintiff, from which the defendant has appealed, and assigns, among other grounds of error, the action of the court in giving and refusing instructions. The court tried the case upon the theory, as shown by the instructions given, that, if the parties to the arbitration waived the swearing of the arbitrators and witnesses, the award could not be assailed on the ground that they were not sworn. If this theory is correct, and if there is evidence in the case tending to show such waiver, the court did not err in giving the instructions complained of. That the theory adopted by the trial court was the correct one is established by the case of *Tucker v. Allen*, 47 Mo. 491, where it is held that notwithstanding the statute requiring arbitrators to be sworn, that the parties might waive the taking of the oath, and that the failure of the arbitrators to take the oath in case of such waiver would not invalidate their award; and the doctrine of the New York courts was approvingly referred to, where it is held that such waiver might either be express, or inferred from surrounding circumstances, as where the parties proceed to a hearing without objection. The same principle is announced in the following authorities: *Howard v. Sexton*, 1 Denio, 440; *Newcomb v. Woods*, 97 U. S. 581.

In the case last cited it is said: "The objection that the arbitrators were not sworn is waived by the plaintiff in error by appearing and going to trial without requiring an oath to be administered. If the witnesses had not been sworn, the waiver of that defect, under the same circumstances, would have been equally conclusive."

Counsel have cited us to the case of *Toler v. Hayden*, 18 Mo. 400; *Bridgman v. Bridgman*, 23 Mo. 272; *Walt v. Huse*, 38 Mo. 210; *Fassett v. Fassett*, 41 Mo. 516; and *Frissell v. Fickes*, 27 Mo. 557,—as being opposed to the case of *Tucker v. Allen*, *supra*. This point, we think, is not well taken, as an examination of the cases shows the question of waiver was not before the court in any of them, nor in any manner referred to, and that they only decide that every submission to arbitration which is in writing is to be regarded as a submission under the statute, which requires that the arbitrators should be sworn.

Under the authorities, the court was fully justified in submitting the question as to waiver, provided there was evidence in the case tending to prove the fact, and that there was such evidence we think is clear; for the plaintiff testified to the following effect: That, at the first meeting, the arbitrators, plaintiff, and defendant being all present, Mr. Stanard, one of the arbitra-

tors, said: "Well, none of us have been put under oath, so I suppose all formalities are waived, and that we are not to be tied down to the order of procedure in courts;" that, before taking any testimony, plaintiff said: "There is one point I want to be informed about before I go on. My understanding is the omission of all legal formalities, and the swearing of all witnesses in this case, has been by consent of parties. As I spoke, I looked over towards the arbitrators, and they looked around. There was some little talk, and finally that was agreed to." It is true that there was conflicting evidence on this point, but that does not affect the question under consideration, which is not whether the weight of evidence as to waiver was on this or that side, but whether there was any evidence tending to establish that fact; and we think there was sufficient evidence to justify the court in submitting, as it did in the instructions, the question of waiver.

It is also insisted that the court erred in refusing instructions asked by defendant to the effect that although the court might believe that defendant waived the taking of the oath by the arbitrators, that, unless the court further believed that, at the time of such waiver, defendant did not know that the statute required the arbitrators to be sworn, that in law there was no waiver. It is a well recognized maxim that every one is presumed to know the law, and that ignorance of the law does not excuse. While the defendant testified that he did not know that it was necessary for the arbitrators to be sworn, he does not testify that his action would have been otherwise than it was had he known it, or that he would have required them to have taken the oath. In the case of *Grafton Co. v. McCully*, 7 Mo. App. 580, that the administration of the oath to arbitrators may be waived, and that, if this is done, it is immaterial that the parties did not know that the statute prescribed an oath.

It is also insisted that the award is void for uncertainty and indefiniteness, and because it does not embrace all the matters submitted. This contention, we think, is not well founded. In case of *Tucker v. Allen*, *supra*, it is said "that courts have always been disposed to encourage the settlement of difficulties by arbitration. The proceedings in such are regarded with favor, and construed with liberality;" and it is held in the following cases that an award which is certain to a common intent is all that is necessary: *Bush v. Davis*, 34 Mich. 190; 6 Wait, Act. & Def. 545; *Akely v. Akely*, 16 Vt. 456; *Wright v. Smith*, 19 Vt. 110. Arbitrations are regarded favorably, and, if they settle the rights of the parties, and their award can be rendered certain by reference to accounts or other documentary evidence, they will be sustained, and, when an award leaves nothing to be done to dispose of the matter except mere ministerial acts, it is sufficient. *Burrows v. Guthrie*, 61 Ill. 70; *Owen v. Barum*, 23 Barb. 196; *Backus v. Fobes*, 20 N. Y. 204. It is not indispensable that an award should state in words and figures the precise amount to be paid, if nothing remains to be done in order to render it certain and final but ministerial acts or mathematical calculation. *Waite v. Barry*, 12 Wend. 380.

The real controversy referred to the arbitrators in this case was whether plaintiff should be charged with any part of the losses of the firm. While the award does not specify any sum to be paid, it does decide that plaintiff was not to suffer or be charged with any part thereof, and that the accounts, with that exception, as they stood on the books of Bartle & Co., are to stand as they were at the time of the award. Here is a definite finding as to the real matter in dispute, leaving nothing to be done to ascertain the amount to be paid except a mere arithmetical calculation, and this, under the authorities, we think is sufficient.

It is also insisted that the arbitrators mistook the law in their award, in charging the whole of the losses in the years in which no profits were made, to defendant. In case of *Valle v. North M. Ry. Co.*, 37 Mo. 450, it is held that an award will not be set aside for any mistake of law or fact not appearing on the face of the award; and while it is said in the case of *Whitehill v.*

Shickle, 48 Mo. 537, that a communion of profits implies a communion of losses, it is nevertheless perfectly competent for partners to agree between themselves that one of them shall not be charged with losses, and, for aught that appears on the face of the award, the arbitrators based their finding on such agreement, and the dealings of the partners with each other.

Judgment affirmed, in which all concur.

STATE v. HUNT.

(*Supreme Court of Missouri*. March 21, 1887.)

1. CRIMINAL PRACTICE—APPEAL—CHANGE OF VENUE.

The ruling of the trial court upon the application of a prisoner for change of venue on the ground of the prejudice against him of the inhabitants of the county where he was being tried, is conclusive, and cannot be reviewed upon appeal, unless it appear that palpable injustice has been done him, or that there has been an abuse of judicial discretion.

2. LARCENY—EVIDENCE—NEW TRIAL—APPEAL.

Defendant was indicted for larceny and burglary, found guilty, and sentenced to the penitentiary for five years. His motion for a new trial was overruled. *Held*, on appeal, that this was error; it appearing that the evidence was wholly insufficient to support the verdict.

Appeal from circuit court, St. Francois county.

The Attorney General, for respondent. Carter, Wilson & Weber, for appellant.

BRACE, J. The defendant was indicted in the circuit of St. Francois county for burglary and larceny, was found guilty, and sentenced to the penitentiary for five years. His motion for a new trial having been overruled, he appeals to this court. Before going to trial he made application for a change of venue on the ground of the prejudice of the inhabitants of said county against him, and, after evidence was introduced *pro* and *con* on that issue, his application was overruled. The finding of the court on that issue was conclusive, unless it appear that palpable injustice has been done, or there has been an abuse of judicial discretion in refusing the application, which does not appear in this case. *State v. Guy*, 69 Mo. 431; *State v. Whittton*, 68 Mo. 91; *State v. Wilson*, 85 Mo. 134.

Several exceptions were saved on the trial of the cause, only one of which do we find well taken, and that was the refusal of the court to grant defendant a new trial on the ground that the verdict was wholly unsupported by the evidence. For this error the judgment is reversed, and defendant discharged.

(All concur, except NORTON, C. J., absent.)

FOURTH NAT. BANK OF ST. LOUIS v. ALTHEIMER.

(*Supreme Court of Missouri*. February 23, 1887.)

1. NEGOTIABLE PAPER—DEMAND AND NOTICE—PARTNERSHIP.

When it is sought to charge a partnership as indorsers of a note subsequently dishonored, the requirements of the law as to notice of its dishonor are fulfilled when such notice is left either at the place of business of such firm with some one in charge, or at the domicile or residence of one of the partners.

2. PARTNERSHIP—PARTICIPATION IN PROFITS—EVIDENCE.

Participation in the profits of a firm is *prima facie* evidence of partnership, and it becomes conclusive, as to third persons, when not rebutted by evidence showing such participation to be in place of compensation for services.

3. TRIAL—INSTRUCTIONS.

Instructions are properly refused, though containing correct declarations of law, if covered by those already given, or if antagonistic to those given.

Appeal from St. Louis circuit court.

Finkelnberg & Rassier, for respondent. *Broadhead & Haussler*, for appellant.

NORTON, C. J. The petition in this case alleges that Gerson L. and Solomon B. Altheimer were copartners under the firm name of G. L. & S. B. Altheimer, and that S. B. Altheimer and defendant Gustavus Altheimer were partners under the name of Altheimer & Co.; that G. L. & S. B. Altheimer on the thirteenth August, 1879, made their promissory note to the order of Altheimer & Co., in which they promised to pay, 80 days after date, the sum of \$2,750; that Altheimer & Co. transferred by indorsement said note to plaintiff for value; that said note was not paid at maturity, but was protested, due notice of which was given. Defendant Gustavus Altheimer filed his separate answer, in which he denies that he indorsed said note, and also denied that he was a member of the firm of Altheimer & Co. at the time of the alleged indorsement and negotiation of the note to plaintiff. On the trial, judgment was rendered for the plaintiff, from which defendant Gustavus Altheimer has appealed, and assigns for error the action of the court in giving and refusing instructions.

The instructions given for the plaintiff and excepted to are as follows:

"(2) If the jury believes from the evidence that upon the fourth day of November, 1879, the plaintiff caused the note sued on to be presented at the Fourth National Bank, and payment of the same to be there demanded, and that such payment was not made, and that thereupon, on the fifth day of November, a written notice of such presentment, demand, and non-payment was left either at the place of business of Altheimer & Co., or left at the place of residence of a member of said firm of Altheimer & Co., with a person in charge thereof, then the jury are instructed that said firm had notice of such demand and non-payment of said note, and no presentment to either G. L. or S. B. Altheimer in person was necessary.

"(8) The jury are instructed that if they believe from the evidence that Gustavus Altheimer was interested, or represented himself to plaintiff to be interested, in the profits of the sale of the damaged goods sold at the 'fire store' at or about the time of the making and negotiation to plaintiff of the note sued on, then they must find that he was a partner in the firm of Altheimer & Co. at that time."

In the first instruction given for plaintiff the right to recover as against appellant was predicated on the fact that he was, at the time the note was indorsed by Altheimer & Co., a member of said firm; that the note was indorsed to plaintiff before maturity for value; that at maturity it was protested for non-payment; that notice of such protest as prescribed in the second instruction was given to Altheimer & Co.

The second instruction is objected to on the ground that the notice was not left at the place of business of Altheimer & Co. Conceding that the evidence tended to show and did show this, the instruction cannot be condemned on that ground, inasmuch as the certificate of the notary stated that he not only left the notice at the place of business of Altheimer & Co., but also that it was left at the place of residence of a member of the firm. We understand it to be settled that when, as in this case, it is sought to charge a partnership as indorsers of a note subsequently dishonored, the requirements of the law as to notice of its dishonor are fulfilled when such notice is left either at the place of business of such firm with some one in charge, or at the domicile or residence of one of the partners. Notice given in either one of these ways is sufficient to charge the members of the firm as indorsers. Story, Prom. Notes, § 312. In the case of *Bouldin v. Page*, 24 Mo. 594, it is held that notice of the dishonor of a bill given one member of a partnership is notice to all; and in case of *Fourth Nat. Bank v. Heuschen*, 52 Mo. 207-210 it is held that a partnership, though dissolved, must be treated as still in existence so far as

the question of demand, protest, and notice is concerned, and the acts of one partner in such cases must be considered as binding on all. The same principle enunciated in these cases is announced in 1 Pars. Notes & B. 502, and in 2 Daniel, Neg. Inst. § 999, and in 1 Daniel, Neg. Inst. § 592, where it is said that, although a partnership is dissolved, "it continues as to all antecedent transactions until they are closed."

The third instruction is objected to on the ground that it made participation in the profits of the firm conclusive evidence of partnership. Under the facts in evidence it is not necessary to determine whether, as between the parties, participation in the profits of the firm is the test by which to try the question as to whether such participation constitutes them partners *inter sese*; for the question arising on the record is, does participation in the profits of a firm constitute those participating partners as to third persons?

We understand the rule announced in the cases of *Phillips v. Samuel*, 76 Mo. 658; *Campbell v. Dent*, 54 Mo. 325; and *Gill v. Ferris*, 82 Mo. 156,—to be that participation in the profits, as such, of a firm, is *prima facie* evidence of partnership, and that such *prima facie* case may be rebutted or overcome by showing that the profits were not received as such, but simply by way of compensation for services, etc., and not an interest in the profits as such. When such *prima facie* case is made, and it is not rebutted by any evidence tending to show that the participant in such profits only received them as compensation for services rendered, then it becomes conclusive, and in such case it is proper for the court to so instruct the jury, as it, in effect, did in the third instruction. That defendant had an interest in the profits of the firm of Altheimer & Co., in what is called by the witness the "fire store," and that he so represented to plaintiff, is abundantly shown by the evidence of the cashier, teller, book-keeper, and president of plaintiff's bank.

Defendant at the trial made no attempt to show that he had not an interest in the firm or its profits, but denied that he had ever represented to plaintiff that he had, and testified that he was a creditor of the firm, and therefore interested in its success so that it might be able to pay his claim, and that all the statements made by him to plaintiff were only to the effect that as a creditor he felt interested in the success of the firm. As applied to the facts of the case, we think the instruction complained of is unobjectionable.

The two instructions given by the court on behalf of defendant, to the effect that, if the jury believed defendant was not, at the date of the note and the negotiation thereof, a member of the firm of Altheimer & Co., the indorsers of the note, and plaintiff knew that fact, and knew that he had retired from the firm, they should find for defendant, presented his side of the case fairly. Without referring in detail to the refused instructions, we may say of them that, in so far as they contained correct declarations of law, they were covered by those already given, and the other referred to were antagonistic to those given, and properly refused on that ground.

We perceive no error in the record justifying a disturbance of the judgment, and it is hereby affirmed with the concurrence of the other judges.

VALLE v. PICTON.

(Supreme Court of Missouri. February 23, 1887.)

1. APPEAL—HARMLESS ERROR—INSTRUCTION.

Rev. St. Mo., § 3775, provides, in substance, that the supreme court shall not reverse the judgment of any court unless it shall believe that error was committed by such court against the appellant or plaintiff in error, materially affecting the merits of the action. *Held*, under this section, that an erroneous instruction in relation to the consideration of an alleged agreement did not affect the merits of the action, where there was no evidence tending to establish such agreement, and such error was not, therefore, ground for reversal.

2. ATTORNEY AND CLIENT—PRESUMPTION OF AUTHORITY—DISMISSAL.

A motion to dismiss on the ground that the suit has been instituted by an attorney at law "without the knowledge, sanction, or authority of the plaintiff, and against her wishes," cannot be sustained when the presumption arising from the professional obligation of the attorney is opposed only by the affidavit, on mere belief, of the defendant, and when such affidavit fails to state specific facts from which the court itself might be induced to doubt the authority of the attorney.¹

3. CONTINUANCE—DISCRETION OF TRIAL COURT.

The refusal to grant a continuance rests in the discretion of the trial judge, and neglect to take the deposition of an absent witness, who had previously been accessible for many months, is sufficient ground for denying a motion for a continuance in order to procure the testimony of the absentee.

Appeal from St. Louis court of appeals.

McKeighan & Jones, for appellant. *B. A. B. Garesche* and *J. M. Holmes*, for respondent.

NORTON, C. J. This suit was instituted in the circuit court of the city of St. Louis on the eighteenth March, 1882. The petition contains three counts, the first two of which are based on promissory notes of the defendant, and the third is for the recovery of money paid by plaintiff for defendant's use. On the twenty-eighth November, 1882, defendant filed an amended answer, admitting the execution and delivery of each of the notes set up in the petition, and the payment by plaintiff, at defendant's request, of the note mentioned in the third count. The answer, as a defense to the several causes of action sued on, set up that one Zoe Valle Picton, daughter of plaintiff, and formerly wife of the respondent, at the June term, 1881, of the circuit court of St. Louis, instituted a divorce suit against the respondent; that respondent filed an answer to the plaintiff for divorce, and also a cross-bill; that during the pendency of the suit the respondent and appellant entered into an agreement by which the appellant agreed to cancel and surrender up to respondent the notes described, and to release him from all liability on account of the same, and, in addition, to pay to the respondent the sum of \$8,500 in cash, upon the execution of a conveyance by respondent to said Zoe Valle Picton, at the termination of said suit, whether the decree rendered in said divorce suit should be in favor of respondent or of his said wife, of all of his marital rights, claims, and demands, of all his rights, claims, and demands of any kind whatsoever in and to the property of said Zoe Valle Picton; that, in consideration of said promises on the part of the appellant, the respondent agreed to execute and deliver said conveyance whenever said suit should be terminated. At the termination of said suit, in accordance with the terms of said agreement, he executed and delivered a conveyance by which he did convey to said Zoe Valle Picton all of the rights, claims, and demands, of every kind and nature, which he had in said property; that the appellant, in pursuance of said agreement, paid to the respondent said sum of \$8,500, but through accident, mistake, or oversight failed to cancel and surrender up said notes as required by the terms of said agreement. Replication was filed to this answer, and on the trial of the case in November, 1883, judgment was rendered for plaintiff, which, on defendant's appeal to the St. Louis court of appeals, was reversed, and the cause remanded, on the sole ground of an error committed by the court in giving an instruction of its own motion.² The case is before us on plaintiff's appeal from said judgment of reversal.

¹See note at end of case.

²"The court instructs the jury that the deeds read in evidence, and admitted to have been executed and delivered by the defendant to a trustee for his wife before the commencement of proceedings for divorce, passed out of the defendant all interest which he had in his wife's estate, and barred him from asserting thereafter, in virtue of his marriage, any interest in any estate which his wife might thereafter acquire. To authorize a finding [under defendant's instruction No. 2 given by the court] that the deed executed and delivered by the defendant after the determination of the divorce suit fur-

While it may be conceded that the said instruction is erroneous in so far as it comes in conflict with the rule that a promise conditioned upon the conveyance to the promisor of a possible interest which he believes the promisee has, but which the latter does not claim, is supported by a sufficient consideration, we are nevertheless of the opinion, owing to a total failure of evidence on the part of defendant to establish so much of his answer as set up the defense that plaintiff agreed to deliver up and cancel the notes sued upon at the termination of the divorce suit, that the judgment of the circuit court should not be disturbed for error committed in giving the instruction condemned by the court of appeals. The evidence offered to sustain the alleged agreement is as follows: The defendant testified in his own behalf that, during the pendency of the divorce suit between himself and wife, he had no conversation with the plaintiff, Mrs. Valle, but that he did have a conversation at his office in May, 1881, with Judge Clover, who was the attorney of his wife in the divorce suit which she had brought against him, in which "Judge Clover spoke to me about his client's friends helping me financially if I would withdraw certain allegations in the pleadings that my attorneys had proceeded to make. I spoke up, and told him that I would prefer to leave these matters to my attorney, Mr. A. J. P. Garesche, who had all these matters in charge; that I would not speak or enter into any agreement without Mr. Garesche's consent, or without his knowledge. He tried to get me to fix an amount,—commit myself to some amount. I told him I did not want to make any money out of it, but simply wanted to pay some obligations I had contracted during the marriage, and to be released from all connection with the family whatever. He then stated that I owed Mrs. Valle a large sum of money, and the agreement would wipe out all that, and that I could have something to start with, and the whole thing would be settled quietly. There was a proposal to make a cash payment. I refused to consider anything of that kind, but referred him to my attorney, and told him my attorney would settle all matters. Judge Clover stated that whatever arrangement was made, that I would be expected to sign a deed releasing all my right, title, and interest in my wife's estate, I told him I referred him, in all these matters, to my attorney, without committing myself to any line of action;" that he had no other conversation with Clover till after the decree of divorce was rendered, when he approached me, and said when I signed the deed the money would be paid. On cross-examination, witness stated that "I referred Judge Clover to my attorney all through the conversation. I told him I was not at liberty to enter into any agreement with him without consulting my attorney; that he had the matter in charge." He further stated: "I refused then and there to name the terms, amount, or anything else. I thought my attorney was the proper person to settle the matter."

Mr. A. J. P. Garesche, who was defendant's attorney in the divorce, testified to the effect that Mr. Picton wanted to set up a defense in the divorce suit which he opposed being made, and obtained permission to confer with Judge

nished a sufficient consideration to support the alleged agreement for the surrender by the plaintiff of the notes and causes of action sued upon, the evidence should satisfy the jury that, notwithstanding the prior deeds hereinbefore mentioned, the defendant asserted, and the plaintiff conceded, that the defendant, upon the termination of the divorce suit, might have some interest in his wife's property then in possession, or thereafter to be acquired, which the deed to be delivered under the agreement would deprive him of. The evidence must satisfy you that this assertion and concession were in good faith to give an actual and not a colorable consideration for the agreement; and if you believe from all the evidence and circumstances given in evidence that such consideration was only pretended, and that the real consideration for such agreement (if you find the same was made by the plaintiff's agent for her, and with her authority) was that the defendant would withhold an answer in the suit for divorce, which, if filed and pressed, would have defeated her application for divorce, or would have shown that she was not an innocent and injured party, then such agreement was utterly and wholly void, and you should find against defendant."

Clover to stop it, and see if we could not make an arrangement which, while it would not be collusive, would sweep away from the public the scandalous matter, and bring the parties to a quiet settlement; that he urged upon Clover that it was proper to arrange it, and avoid the scandal; that Clover told him the money part would have to be arranged by Mrs. Valle, the mother of Mrs. Picton; that he suggested to Clover that the estate was a large one; that Picton was in straightened circumstances; that he was surrendering his interest in his wife's estate which was reputed to be very large; that it was but right to allow him something, and settle the matter; that he offered to take \$10,000, and \$8,500 was finally agreed upon, and the amount deposited in the hands of Mr. Finkelnburg to be paid over to Picton on the termination of the divorce suit, and upon the execution by him of a deed releasing all interest in the present or future estate of Mrs. Picton; that the divorce suit terminated in a decree divorcing Mrs. Picton; that, upon the execution of the release, the money was paid over to Picton by Finkelnburg in the presence of Clover and witness." It does not appear that at the time this money was paid over, that any demand was made for the delivery and cancellation of the notes in suit, or that anything was said concerning them, or of any indebtedness of Picton to Mrs. Valle. Mr. Garesche further testified that he could not tell exactly what passed; that the money to be paid was to be put in such shape that, if the divorce was carried through avoiding this scandal, then the money should be paid right over, without any trouble of creditors interfering. It was not put in as against Mrs. Valle's debt, for there was no mention that the debt was ever to be enforced,—certainly Judge Clover did not mention that debt, never told me it was represented by notes, or I know what I should have done.

On the part of defendant, Judge Clover testified that he was Mrs. Picton's attorney in the divorce suit; that Mr. Garesche, a few days before the return-term, came to him with an answer sworn to by Picton which he had prepared, setting up as a defense that Mrs. Picton had refused to perform the duties of a wife; that Garesche said Mrs. Valle, the mother, is able to pay, and she ought to pay to avoid the filing of any such answer, and the disgrace which would follow, and which answer Garesche said could be fully substantiated; that witness then asked Garesche how much money Picton wanted to withhold the answer, to which he replied: "Mrs. Valle is a lady of ample means; Mr. Picton has been unfortunate; and, if his wife insists on having a divorce from her husband, they ought to pay. Mr. Picton needs \$10,000 to pay off his debts." That Garesche then said: "I will not file the answer till I hear from you. If we can make the arrangement, I will withhold the answer, and the parties can get a divorce upon another ground. I will file a cross-bill for Picton, and allege that Mrs. Picton had abandoned and deserted him for a period of more than two years without just cause. It makes no difference which party gets the divorce, as long as they are divorced." Witness further testified that the next day he saw Picton at his office, and asked him how much money he wanted, to which Picton did not respond directly, but spoke of his condition, and referred him to Mr. Garesche, his attorney; that he had but one conversation with Picton at his office, and neither in that conversation, nor in any other, did he say anything about the notes in suit, or the surrender or cancellation of them, nor did he at any time say anything about any indebtedness from him to Mrs. Valle; that, after this conversation with Picton, Mr. Garesche agreed to withhold the answer, and that witness, in the mean time wrote to Mrs. Valle, then in Europe, who replied authorizing the payment of \$10,000, on receipt of which he sent for Garesche, and the sum of \$8,500 was agreed upon as the sum to be paid to save the scandal and newspaper publication; that nothing was ever said by either Mr. Garesche, or himself of the notes in suit, or any other indebtedness, or their surrender or discharge of any indebtedness; that, on the contrary, after this suit was brought,

Mr. Garesche said if he had known of the existence of these notes he would have required their surrender. Witness further testified that he never had any authority of any kind to surrender or cancel the notes, or any other indebtedness of Picton to Mrs. Valle.

There is nothing in this evidence showing, or tending to show, the agreement set up in the answer that the notes in question were to be delivered up and canceled. It is clear that no such agreement was made with Picton; for he swears that he refused to enter into an agreement, or commit himself to any terms, but referred Clover to Garesche, his attorney. We think it equally clear that no such agreement was made with Garesche, for he swears that he knew nothing of the existence of the notes till after suit brought, and Clover not only swears that no such agreement was made, but that he had no authority whatever to make any such.

Applying to this case section 3775, Rev. St., which provides that the supreme court shall not reverse the judgment of any court unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action, we hold that, while the instruction given by the court of its own motion is subject to the criticism made by the court of appeals, the error committed did not, in our judgment, affect the merits of the action. It may also be said, in view of the evidence of Mr. Garesche, that, "if the matter avoided by the agreement had been set up and established" would have been a good and perfect defense to the divorce suit, the question might well arise, which it is not necessary to answer, in the view we have taken of the case, whether the court, had the agreement been established, would not have been justified in refusing to lend its aid to enforce it.

It also appears that defendant filed a motion to dismiss the cause on the ground that the suit was instituted without the authority of plaintiff. This motion was accompanied by the affidavit of defendant, stating that "he had good reason to believe, and does believe, and does so aver, that the cause has been begun by H. A. Clover without the knowledge, sanction, or authority of plaintiff, and against her wishes, and he does believe and aver that, if advised thereof, she would not sanction the same." The motion was overruled on the day it was filed. It was held, and we think properly, by the court of appeals (16 Mo. App. 178) that no error was committed in this, because "the affidavit, which only stated the belief of affiant, did not tend to overcome the presumption arising from the professional obligation of the attorney, and might be summarily disposed of, and that such affidavit did not fall within the principle of the case of *Keith v. Wilson*, 6 Mo. 439, because it stated no specific facts from which the court itself might be induced to doubt the attorney's authority to appear for the party. In the case above referred to there was a complete showing of such facts."

The action of the court in overruling defendant's application for a continuance which was asked for in order to procure the evidence of Mrs. Valle, who was then in Europe, and had been for some months, is also questioned. She resided in St. Louis, and her deposition could have been taken before her departure, and no reason is given why it was not done, nor is it stated that defendant did not know or have any information of her intention to leave St. Louis. The suit was brought in March, 1882, and was tried in November, 1883. We have repeatedly held that the discretion of the circuit judge in refusing to grant a continuance will not be interfered with unless it appears that it has been manifestly abused. *Leabo v. Goode*, 67 Mo. 126; *State v. Burns*, 54 Mo. 274.

The judgment of the court of appeals is hereby reversed, and that of the circuit court affirmed, and the cause remanded to the St. Louis court of appeals, with instructions to enter up judgment in conformity with this opinion. (All concur.)

NOTE.

ATTORNEY—PRESUMPTION OF AUTHORITY. The authority of an attorney to appear in an action will be presumed until the contrary is shown. *Norberg v. Heineman*, (Mich.) 26 N. W. Rep. 481; *Schlitz v. Meyer*, (Wis.) 21 N. W. Rep. 243; *Fressley v. Lamb*, (Ind.) 4 N. E. Rep. 682; *Boston Tunnel Co. v. McKenzie*, (Cal.) 8 Pac. Rep. 22; *Reynolds v. Fleming*, (Kan.) 1 Pac. Rep. 61. Until the want of authority is shown, the defendant will not be permitted to have a dismissal by showing that plaintiff does not desire to maintain the action. *Boston Tunnel Co. v. McKenzie*, (Cal.) 8 Pac. Rep. 22. The burden of showing lack of authority is upon the party seeking the dismissal. *Schlitz v. Meyer*, (Wis.) 21 N. W. Rep. 243; *Reynolds v. Fleming*, (Kan.) 1 Pac. Rep. 61.

CARUTH-BYRNES HARDWARE CO. v. WOLTER and another.

(*Supreme Court of Missouri*. March 21, 1887.)

1. REFERENCE—ACTION AT LAW—PRACTICE.

The court has no right to review the findings of a referee upon the evidence reported by him, and make its own findings, except in suits in equity, where the reference is made by consent of all parties, or in cases arising under Rev. St. Mo. § 3606, which authorizes the court, upon the application of either party, to refer the case where it involves an account or the settlement of an issue not arising on the pleadings. In actions at law not within section 3606 the parties are entitled to a jury as matter of right, and the findings of the referee stand as a special verdict, and must be treated as such. Reference in such cases can be had only by consent of parties, and consent to it gives the court no power to revise the issues of fact.

2. SAME—FINDINGS—FORM.

If the parties to a reference desire special findings, they should so stipulate in the order of reference. In the absence of any statute requiring specific findings, a general finding will be sufficient, unless the order of reference directs otherwise.

3. REFEREE'S FINDING STANDS AS A VERDICT—MAY BE SET ASIDE WHEN AGAINST WEIGHT OF EVIDENCE.

The rule that the trial court is invested with a large discretion in awarding a new trial, where the verdict is against the weight of the evidence, applies also to the finding of a referee in an action at law. The action of the trial court in this respect cannot be reviewed on appeal.

4. ACTION—LAW AND EQUITY—INTERPLEADER—ATTACHMENT.

A creditor levied an attachment upon the goods of his debtor, and another creditor interpleaded, claiming the goods under a chattel mortgage executed by the debtor. The attaching creditor, in answer to the interplea, set up that the mortgage was executed by the debtor to defraud and hinder his other creditors. *Held*, that this defense being a legal one, the issue was properly triable by a jury, and did not require a transfer of the case to equity.

Error to circuit court, Laclede county.

Hough, Overall & Judson, for defendant in error. *J. P. Nixon and Smith & Krauthoff*, for plaintiff in error.

BLACK, J. This suit was commenced by attachment, and under the writ the sheriff levied upon a stock of goods, consisting of hardware, etc., as the property of the defendant C. S. Wolter. J. S. Lee, who had possession of the property at the date of the attachment, filed an interplea, claiming the property by virtue of two chattel mortgages made by Wolter to him to secure two notes of \$2,000 each. To this interplea the plaintiff made answer, and the issues thus joined were by consent of the parties referred to three designated persons "to hear and determine the same, and make a finding on all of the issues involved in the case." The referees heard the evidence and made a report, which is a general finding of the issues for the interpleader, and that he is entitled to the property claimed in the interplea. They also reported all of the evidence. To the report the plaintiff filed 16 exceptions, one of which is that the referees erred "because their finding is not supported by the evidence." The other exceptions worthy of notice are that the referees failed to make specific findings upon a number of alleged issues. The court sustained the exceptions as a whole, and, without again referring

the matter, made its own finding on the reported evidence, and entered judgment for plaintiff, and this action of the court presents the first question for consideration.

1. Under the present statute, the constant practice, in this class of cases, is for the courts to review the findings of the referees upon the evidence reported by him, and to correct the findings when erroneous. When the evidence is preserved, these findings may be reviewed and corrected on an appeal to this court. *Fly v. Ownby*, 59 Mo. 438; *O'Neill v. Capelle*, 62 Mo. 208; *Smith v. Paris*, 70 Mo. 616. But an examination of these cases will show that they either involved an examination of a large account, or were suits in equity. The right of the court to correct the findings of fact made by the referee on the evidence reported must be confined to those cases where the court may, under section 3606, Rev. St., direct a reference without the consent of the parties, and to suits in equity where there is a reference by consent of all the parties. Even in the cases last enumerated, it will often be found advisable, upon exceptions being allowed, to again refer some or all of the issues with or without instructions, as the case may require. But in actions at law, not involving the examination of a long account, and not coming within the terms of section 3606, the practice must in the very nature of things be different. In such cases the parties are entitled to a jury as a matter of right, and the findings of the referee stand as a special verdict, and must be treated as such. The reference in such cases can only be had by the consent of the parties, and that consent goes no further than the express terms of the stipulation. Consent to refer such an action to a particular referee gives the court no power to appoint other or different referees, nor does it give the court any right to hear and determine the issues of fact. It may be asked, why, then, are the referees required to report the evidence? The answer is twofold: *First*, that the court may see that there is some evidence to support the findings; *second*, that the rulings of the referee upon evidence offered may be reviewed. If, for any reason, the agreed reference fails, then the cause stands for trial as if no reference had been made. *Pres-ton v. Morrow*, 66 N. Y. 452.

2. The claim made by the respondent that the answer to the interplea presents an equitable defense cannot be sustained. The interpleader simply intervened in the attachment suit, set up the mortgages, and claimed the property by virtue of them. The substance of the answer is that these mortgages were made to hinder, delay, and defraud the creditors of Wolter, and were therefore void. The issues thus made were properly triable by a jury. *Earl v. Hart*, 1 S. W. Rep. 238. The fact that the answer details much evidence does not change the character of the defense. It was purely a legal one. It follows from what has been said that the court erred in making findings of its own, and in entering a judgment thereon.

3. If the parties desired specific findings by the referees, they should have so stipulated in the order of reference. In the absence of any statute requiring specific findings, a general finding will be sufficient, unless the order of reference directs otherwise. *Odd Fellows v. Morrison*, 42 Mich. 521, 4 N. W. Rep. 739. As there were no such directions in the order, and our statute does not require the referees to make specific findings, it follows that all of the exceptions, lest it be the one that the finding was not supported by the evidence, should have been overruled.

4. As to this exception it is sufficient to recall the principle that the report stands as a verdict. While this court cannot interfere with a verdict where there is evidence to support it, the trial court is vested with a large discretion in that behalf, and may award new trials on the ground that the verdict is against the weight of the evidence. The same rule applies to the report of referees in these actions at law. *Daly v. Timon*, 47 Mo. 516. It was doubtless upon this ground that the exceptions were sustained; and, while

we may differ with the trial court as to the weight of the evidence, still its action in this respect is not error of law which we can review.

The judgment is reversed, and the cause remanded for new trial by the court and a jury, unless a jury is waived or new referees agreed upon.

(All concur.)

STATE *ex rel.* ATTORNEY GENERAL v. M'GOVNEY.

(*Supreme Court of Missouri. March 21, 1887.*)

1. OFFICE AND OFFICER—TENURE—HOLDING OVER—CONSTITUTIONALITY.

The act allowing county treasurers to hold over until April 1st, after the election of their successors, in counties adopting township organization, (Acts Mo. 1885, p. 108, amending Rev. St. § 5362,) is not in conflict with Const. Mo. art. 14, § 8, providing that the term of office of no officer shall be extended to a longer period than that for which such officer was elected or appointed.

2. SAME—COUNTY TREASURER—EXPIRATION OF TERM—TOWNSHIP ORGANIZATION.

In counties which have adopted township organization, the term of office of county treasurer terminates on the first day of April next after the election of his successor, even though township organization is first adopted at the election at which such successor is elected. Acts Mo. 1885, p. 108, § 5362.

Quo warranto.

The Attorney General, for relator. Chas. G. Burton, for respondent.

BLACK, J. This is an information in the nature of a *quo warranto*. The respondent was elected treasurer of Vernon county at the November election, 1884. By the law then in force (section 5362, Rev. St.) the treasurer held his office for two years, and until his successor should be elected and qualified. This section was amended in 1885 (Acts 1885, p. 108) by adding thereto the proviso "that in counties having adopted, or which may hereafter adopt, township organization, the terms of office of said treasurer shall be extended to first day of April next after the election of his successor." At the November election, 1886, Mr. Prewitt was elected treasurer, and before the January following qualified by giving bond, etc. At this same election the county voted for and adopted township organization, and that law took effect and went into operation on first Tuesday of April succeeding the election. Section 7432, Rev. St. The question is whether the respondent has a right to hold over until the first April, 1887. That the amendatory act of 1885 undertakes to give him this right there can be no doubt. But it is said the amendment is in conflict with section 8, art. 14, of the constitution, which provides that the term of no officer shall be extended for a longer period than that for which such officer was elected or appointed. In *State v. Ranson*, 73 Mo. 89, it was ruled that it was the purpose of this section of the constitution to prevent the practice of passing special laws extending the terms of special offices for the benefit of the then incumbents, but that it was not intended to and did not prevent the legislature from making reasonable changes in the times for electing public officers. In view of the peculiar character of the township organization law, it was deemed best that the office of county treasurer should begin and end in April next after the election, and the fact that the amendment has the effect incidentally to extend the time of the then incumbent does not render it unconstitutional. Mr. Prewitt's term does not begin until April, and by express provision of the constitution and the statute McGovney holds until that time.

The information is dismissed.

(All concur.)

STATE v. HUNT.

(Supreme Court of Missouri. March 21, 1887.)

CRIMINAL PRACTICE—WITNESS—COMPETENCY—JOINT INDICTMENT.

Where one of two jointly indicted defendants pleads guilty, or is separately tried and convicted, or acquitted, in either case, he becomes a competent witness for the other.

Appeal from circuit court, St. Francois county.

The Attorney General, for respondent. *W. & W. Carter*, for appellant.

BLACK, J. Peter Hunt, Moses Hunt, and one Yeargin were jointly indicted for burglary and larceny. The state dismissed as to Yeargin, and, for the purpose of a trial, there was a severance as to the other defendants. On the trial of Peter Hunt, he called Moses as a witness. The state objected on the ground that the proposed witness was jointly indicted with Peter Hunt for the same offense, and had been convicted, which objection was sustained, and the witness excluded. Before our present statute, permitting defendants in criminal cases to testify, one of two or more persons jointly indicted could not be a witness for the other, even on a separate trial. *State v. Roberts*, 15 Mo. 29; *State v. Edwards*, 19 Mo. 675. Though two were jointly indicted, if one, on a separate trial, was convicted or acquitted, he could be a witness for the other. *State v. Stotts*, 26 Mo. 307. Where the cause as to one defendant is disposed of by a plea of guilty, or a verdict of conviction or acquittal, then he may be a witness for the other. *Bish. Crim. Proc.* § 1020; *Whart. Crim. Ev.* § 445. Moses Hunt was, then, a competent witness without regard to section 1918, Rev. St.

The record shows that other exceptions were taken on the trial, but they are without merit.

Judgment reversed, and cause remanded.

(All concur.)

STATE v. JOHNSON.

(Supreme Court of Missouri. March 21, 1887.)

1. CRIMINAL PRACTICE—RAPE—INSTRUCTION—ALIBI.

On the trial of a prosecution for rape, the court gave the following instruction as to the defense of *alibi*, relied on by the accused: "If the jury believe, and find from the evidence, that the defendant was not present at the place and time the alleged rape is stated to have been committed by the prosecuting witness, K. F., but that the defendant, at the time of the alleged rape, was elsewhere, at another and different place than where the alleged rape is stated to have taken place by said K. F., then you should acquit the defendant." *Held* proper, as against the objection that the language of the instruction was calculated to convey to the minds of the jury the idea that an *alibi* is a substantive affirmative defense, which must be made out by a preponderance of evidence; and that such error was not cured by an appropriate instruction as to reasonable doubt in its application to the whole case.

2. SAME—INSTRUCTION—ALIBI.

Evidence of *alibi* is ordinary evidence, to be treated in the instructions to the jury as is other evidence of like sort.

3. RAPE—INSTRUCTIONS—DEGREES OF CRIME.

The rule requiring the court to instruct as to the law relating to a lesser degree of the crime charged, where the evidence is not conclusive as to defendant's guilt of the higher degree, (*State v. Branstetter*, 85 Mo. 149,) does not apply, in a case of rape, of which crime there are no degrees.

4. CRIMINAL PRACTICE—INSTRUCTION—CREDIBILITY OF WITNESS.

An instruction correctly embodying the rule arising from the maxim, *falsus in uno, falsus in omnibus*, is proper, where the defense is an *alibi*, and the testimony of the witnesses directly conflicts.

Appeal from St. Louis court of appeals.

Indictment for rape.

The Attorney General, for the State. C. P. Johnson, for defendant.

NORTON, J. The defendant was indicted and tried in the criminal court of the city of St. Louis, and convicted of the crime of rape. From this judgment of conviction he appealed to the St. Louis court of appeals, where the judgment of the criminal court was reversed, and from this judgment of reversal the state has appealed to this court. The defense relied upon at the trial was an *alibi*; and in reference thereto, and reasonable doubt, the court gave the following instructions:

"*Fourth.* If the jury believe and find from the evidence that the defendant was not present at the place and time the alleged rape is stated to have been committed by the prosecuting witness, Kate Farrell, but that the defendant, at the time of the alleged rape, was elsewhere, at another and different place than where the alleged rape is stated to have taken place by said Kate Farrell, then you should acquit the defendant."

"*Seventh.* The jury are the sole and exclusive judges of the credibility of the witnesses. With that the court has nothing to do; and, if you believe and find from the evidence, that any witness or witnesses have willfully testified falsely to any material fact in the cause, you are at liberty to disregard the whole, or any portion, of such witness' or witnesses' testimony."

"*Eighth.* The law presumes the defendant to be innocent, and this presumption continues until his guilt has been established by the evidence in the case, to your satisfaction, and beyond a reasonable doubt. By the words or terms, 'beyond a reasonable doubt,' is meant convinced to a moral certainty. If you are thus convinced of his guilt, it is your duty to convict; if not, it is your duty to acquit."

The court of appeals reversed the judgment of the circuit court, as stated in the opinion, "because [in the fourth instruction] the jury were directed to the defense of an *alibi* in language which would be likely to convey to their minds the idea that it was a substantive affirmative defense, which must be made out by a preponderance of evidence, an error which was not cured by the giving an appropriate instruction as to reasonable doubt, in its application to the whole case."

The precise question involved in the above ruling was ruled otherwise by this court in the cases of the *State v. Jennings*, 81 Mo. 185, and *State v. Rockett*, 87 Mo. 666. In the case last cited it is said, through SHERWOOD, J.: "I find no fault with the instructions. One was given in respect to the *alibi* of defendant, and then a general instruction as to reasonable doubt. This last covered the whole case, and in terms applied to all the evidence in it. It was not necessary, and it would be without parallel in criminal practice, to link, *seriatim*, the idea of reasonable doubt to every atom of evidence in the case. Evidence of an *alibi* is only ordinary evidence; and is to be treated in the instructions as is other evidence of like sort. For these reasons *State v. Lewis*, 69 Mo. 92, does not apply here; for there no instruction as to *alibi* was given."

So, where insanity is relied upon as a defense, it is held in the following cases that the "burden of proving such insanity rests upon the defendant, and he is not entitled to the benefit of a reasonable doubt whether he was or not insane." *State v. Huttig*, 21 Mo. 464; *State v. McCoy*, 34 Mo. 531; and *State v. Klinger*, 43 Mo. 127. We have examined the cases cited by counsel to establish a different doctrine, and, while they show that perhaps in Indiana and Tennessee a different rule from the one above announced obtains as to an *alibi*, we are not disposed to depart from one so long established in this state, believing it to be in accord with sound reason and correct principle.

It is also insisted the evidence of the medical experts, as to whether or not, from the physical condition of the person outraged, the hymen was ruptured, or actual penetration had taken place, required the court to give an in-

struction as if only an attempt to perpetrate the crime had been proven; and to sustain this contention we have been cited to the case of *State v. Branstetter*, 65 Mo. 149, and others of which it is a representative. What is there said applies to that class of offenses of which there are different degrees, and has no application to a case where the crime of rape is charged, of which there are no degrees. In case of *State v. Berning*, 2 S. W. Rep. 588, it is held that sections 1654, 1655, 1927, Rev. St., apply only to that class of offenses of which there are different degrees.

It is also insisted that the case did not call for the seventh instruction. We think otherwise. There was direct conflict between the evidence of the witnesses as to the *alibi*, and other matters in evidence not necessary to specify.

Without entering into detail of the evidence, it is sufficient to say of it that it shows the commission of the crime by some one, and that the victim, a girl about 15 years of age, immediately after her assailant left her, aroused the household, and made complaint; that her neck, which was swollen with an abrasure of the skin, showed the imprint as of four fingers and thumb of a hand, indicating that she had been so severely choked as to cause her eyes to be bloodshot, and to stand out from their sockets; that, upon the arrival of the police and physicians, she gave a description of her assailant as to his color, his mustache, his overcoat, hat, and pants, so minute as to impress the policeman, who knew the defendant, that he was the guilty party. She also stated that, while her assailant was choking her, in resisting him, she scratched his hand. It also shows that, when defendant was arrested, and brought into her presence a few hours afterwards, she at once recognized him as the perpetrator of the outrage, and, as the officers were taking him away, she procured a pistol, pointed it at defendant, and was prevented from shooting by the officers taking the same from her. It also appears that defendant's hands were examined, and one or two fresh scratches were found on one of them. On the other hand, the evidence of defendant himself, and two other witnesses who lived in the lower room of the house where defendant lived, he occupying one upper room with his wife, tended to show that defendant was at his home at the time the outrage was perpetrated. On this subject there was conflict of evidence, which was for the jury to pass upon, who, having the witnesses before them, were in a better position than we are to determine what weight should be given to their evidence.

I have carefully examined the whole record, and find nothing in it to justify an interference with the judgment of the criminal court, and the judgment of the St. Louis court of appeals is hereby reversed, and that of the St. Louis criminal court affirmed.

(All concur.)

STATE v. WILSON.

(Supreme Court of Missouri. March 21, 1887.)

RAPE—FAILURE TO MAKE COMPLAINT—INSTRUCTION.

Upon the trial of defendant for rape, it appeared that the female, a girl 17 years old, did not disclose the offense to her parents, and took no steps against the defendant, though he continued in her father's employ for several days, and lived in the neighborhood for five months after the alleged outrage. *Held*, these facts entitled the defendant to have the jury instructed that the fact that the girl "made no complaint at the time, or within a reasonable time thereafter, and that pregnancy followed a single sexual connection," are legitimate subjects of inquiry in determining the question of force or consent; and for the court to add, "in connection with the other testimony," was calculated to mislead the jury, and deprive defendant of the full benefit of the facts alluded to.

Appeal from circuit court, St. Louis county.

The Attorney General, for respondent. Alex. McElhinney, for appellant.

NORTON, C. J. Defendant was indicted, tried, and convicted of the crime of rape in the circuit court of St. Louis county. From the judgment of conviction he appeals to this court, and for reversal of the judgment relies upon the ground that the verdict is against the weight of evidence, and that the court refused proper instructions asked by the defendant. Cora Leis, a girl about 16 or 17 years old, upon whom it is alleged the outrage was perpetrated, testified substantially as follows: That on the twenty-fifth of July, 1885, she was living with her father, who, with her mother, had on that day gone to the city of St. Louis; that her younger sister was at home with her younger brother, somewhere about the place; that, while she was in the front bedroom, and her sister in the kitchen, she saw defendant in the only door leading from the room she was in, and said to him, "What are you doing here?" to which he made no reply, and, as she tried to pass him, he caught her in his arms; that she cried out, and he said if she made any noise he would kill her; that he threw her on the bed, and, when she again tried to cry out, he put his hand on her mouth, and said he would kill her; that he put his legs between hers, and had connection with her; that she tried to prevent him, but could not; that a child was born of that connection on the eighteenth of April, 1886; that defendant after this remained for three or four days working on her father's place, as he had done for two or three months, and was then discharged; that her father and mother came home that evening, and she said nothing to either of them about what had happened, or to any one, till about five months afterwards, when her father forced her to tell, and she then told him it was the defendant, and the time; that during these five months defendant worked at Mr. Pearce's, their nearest neighbor, and who lived, according to other evidence, about 125 yards from her father's; that during this time she saw him frequently, but was afraid to tell, thinking that defendant was watching for her, and would kill her, as he had threatened.

Defendant in his evidence admitted that he had had connection with the prosecuting witness four times, but stated that she was always willing, and fully consenting thereto.

The defendant asked the following instruction, which was refused: "Although the jury may believe, from the evidence, that the defendant had intercourse with Cora Leis, yet, unless that intercourse was forcible on the part of the defendant, and against the consent of Cora Leis, the jury will find the defendant not guilty; and, in arriving at a conclusion as to the question of force and consent, the facts that the said Cora Leis made no complaint at the time, or within a reasonable time thereafter, and that pregnancy followed a single sexual connection, are legitimate subjects of inquiry in determining whether there was force on the part of the said defendant, or consent to the intercourse by the said Cora Leis."

The court gave this instruction in a modified form, by adding, after the word "connection," when it last occurs in the instruction asked, the words, "in connection with the other testimony."

In view of the fact that the charge of rape is "an accusation easily made, hard to prove, and still harder to be defended by one ever so innocent," and the fact that, after the occurrence, defendant worked, as usual, on the place for several days, and for several months at a near neighbor's; making no complaint for about five months; afterwards, when her pregnancy, no longer to be concealed, manifested itself, and bearing in this respect the same relation to this case as the "tell-tale crack in the door" did in the case of *State v. Burgdorf*, 53 Mo. 65,—in view of these facts, and the further fact that it is scarcely to be believed that a girl nearly 17 years of age, upon whom such an outrage as rape has been perpetrated, on being restored to the protecting care of father and mother a few hours after the occurrence, and thus relieved from the threats of the accused, would not at once have thrown herself with her sad story on their protection, and demanded the arrest and punishment of the

offender, we are of the opinion that the instruction, as asked, should have been given, and that, under the circumstances of this case, we can reasonably infer that the jury were misled by the modification made by the court, and that it tended to deprive defendant of the full benefit of the probative force of the facts above alluded to, and to the full benefit of which he was entitled under all the authorities. 3 Greenl. Ev. § 212; Roscoe, Crim. Ev. (7th Ed.) 879.

The judgment is reversed, and cause remanded, in which all concur.

KRAXBERGER v. ROITER.

(Supreme Court of Missouri. March 21, 1887.)

1. BREACH OF PROMISE OF MARRIAGE—RELEASE—RETURN OF RING.

In an action to recover damages for breach of promise of marriage, defendant admitted the engagement to marry, and the breach on his part, but relied upon the act of plaintiff in returning to him the engagement ring when he told her he no longer loved her, and would not marry her. Held, that such act did not constitute a waiver or release on plaintiff's part of her right of action for the breach, and the jury should have been peremptorily instructed to find for plaintiff.

2. APPEAL—RULING UPON EVIDENCE—RECORD.

The ruling of the trial court, in refusing to allow a witness to answer questions put to him, cannot be reviewed, on appeal, where the record does not disclose that the answer expected of the witness would have been material to the issue in the case.

Appeal from circuit court, Morgan county.

D. F. Wray, for defendant in error. *A. W. Anthony*, for plaintiff in error.

BRACE, J. Action for damages for breach of promise to marry. Defendant admitted the engagement, and pleaded a release. The jury found a verdict for the plaintiff for \$3,000. The following is all the evidence in the case that it will be necessary to consider in passing upon the errors complained of:

Plaintiff testified: "We were engaged about three months, when he commenced to break off the engagement by letters. At first I could not believe that he meant what he wrote, and wrote him for an explanation. When I learned he was in earnest, it almost made me crazy. I could not eat or sleep. I came to Missouri. Went to Uncle Mike's. Stayed all night. Next morning went to see the defendant. He treated me very cool; would scarcely speak to me. He said it was time to break off the engagement. He said his feelings were changed, and that he could not marry me; that he loved another woman; that he loved her before he met me. I took off the ring he had given me, and gave it up to him; and told him he did not talk that way when he courted me, and won my love; and told him the way he had treated me had broke my heart. I did not know what I was doing when I gave him the ring. He said he had written to me, and told me what the reason was. He then hung his head down, and would not talk to me any more. I then left the room, and told him I would see him again. I went to see him because I could not believe what he had written in his last letters, as it was so different from what he had said and written before. I have his letters." (The letters were read to the jury, but not embraced in the bill of exceptions.)

On cross-examination, the witness was asked the following questions: "*Question.* Since this conversation had with defendant, and after you had given up the ring and presents to defendant, did you have any conversation with Preacher Kleckner? [Objected to by plaintiff, and objection sustained.] Did Preacher Kleckner tell you that a marriage engagement could not be canceled, and it was your religious duty to enforce it, or words to that effect? [Objected to by plaintiff, and objection sustained.]"

Defendant, in his own behalf, testified: "I wrote the letters read in evi-

dence. I referred to another lady in one of those letters. I was engaged to her before I was engaged to plaintiff. I thought I had got over my love to her, and told plaintiff so before we were engaged, but found I had not, and changed my mind about marrying plaintiff, and wrote to plaintiff immediately. She came to my father's house to see me. I told her how it was; that I could not marry her with a clear conscience; and she offered me the ring,—our engagement ring,—and some other presents I had made her. I did not take them, but told her she could keep them. She laid them on the bureau, and left them. When she left she said she would see me again about it. We had no more conversation."

On cross-examination he said: "I conveyed the impression to her that it would be wrong for me to marry her. I told her that I had become convinced I could not marry her while I loved this other lady. This was before she handed me the ring. I told plaintiff's uncle the day we had the talk that I would not marry the plaintiff."

Miss Roiter, sister of defendant, testified in his behalf: "I saw the plaintiff when she came out of the room after the conversation with defendant at my father's house. She told me that defendant did not love her any more, and that if he did not love her she did not want him. She was crying at the time, and went away from our house crying."

The exception to the ruling of the court refusing to allow plaintiff to answer the questions set out in the evidence is not well taken. The questions do not disclose the fact that any answer the witness might make, responsive thereto, would be material evidence in the case, and the purpose for which they were asked is in no way disclosed except by the questions themselves. *Aull Sav. Bank v. Aull*, 80 Mo. 199; *State v. Leland*, 82 Mo. 260; *Jackson v. Hardin*, 83 Mo. 176.

We deem it unnecessary to set out the instructions given and refused in this case, for the reason that, as we view the evidence, there was but one question to be submitted to the jury, and that was the amount of the damages, and the instruction given by the court on that subject was unobjectionable. The contract of the defendant, and his refusal to perform it, was admitted; and there was no evidence tending to show that the contract was rescinded by agreement of the plaintiff, or that she ever released her action thereon for damages for its breach. On the contrary, the uncontradicted evidence of both parties,—and there is no conflicting evidence in the case,—was to the effect that the defendant, during the pendency of the engagement, having transferred his affection, the sole basis upon which such a contract should rest, to another, without in any manner consulting the feelings or wishes of the plaintiff, informed her first by letter that he had changed his mind about marrying her; that he loved another; and afterwards, when, scarce crediting the fact which had thus been communicated, she comes from Illinois to Missouri, and seeks an interview with him, in order that she might learn certainly what his disposition and intentions towards her, he again informs her that he loves another, and that he will not marry her. Fully realizing then that she had indeed lost the love that he had once assured her was hers, and upon the faith of which she had engaged herself to him, and that his determination not to marry her was final and conclusive, she takes from her finger the engagement ring once given her as a token of his sincerity and fidelity, now a memento only of his fickleness and treachery, and, in her express words, "gave it up to him," and went crying from his presence. This, forsooth, is claimed to be evidence that the plaintiff agreed to rescind the contract, and release the defendant from the obligations thereof. The giving up by plaintiff of her engagement ring, thus wrung from her by the action of the defendant, is to be tortured into an agreement to rescind a contract which the defendant had already refused to perform, and to the performance of which he had interposed an insuperable barrier in the mind of the plaintiff, as it would be in the

mind of every true woman, into an agreement to rescind a contract that she was never asked or afforded an opportunity to rescind.

The defendant, by his own action, had left her no choice in the matter; nothing that she could do but accept the situation he made for her, abandon all hope of the marriage, give up the symbol of that hope, and seek such compensation in damages as the law could give her for the injury she had suffered, without fault on her part, at the hands of the defendant; and this, the only remedy left her, she seeks in this case, her damages having been assessed, under proper instructions, by a jury, whose verdict there is nothing in the record even to suggest was in any way affected by passion or prejudice.

There was no error in the refusal of the court to give any of the instructions asked for by the defendant, and those given presented the case to the jury even more favorably to the defendant than he could have asked upon the evidence, upon which the court might have well instructed the jury that there was no evidence tending to prove a release as pleaded.

The judgment of the circuit court is affirmed.

(All concur, except NORTON, C. J., absent.)

SKELTON and others v. SACKET.

(Supreme Court of Missouri. March 21, 1887.)

1. WRITS—SERVICE BY PUBLICATION—MISNOMER OF PARTY.

When a party is sued by a wrong name, and service of summons is actually made on the person intended, and he does not appear and plead in abatement, the judgment rendered in such case is not void; for the service informs him of the pendency of the action, and, if he would take advantage of the misnomer, he must plead it in abatement; but, when the suit is against a non-resident, the use of a wrong name in the order of publication gives him no notice, and the judgment is void, unless he enters his appearance.

2. SAME.

In an action against a non-resident, the order of publication of summons gave his name as "Q. Noland," instead of "Quinces R. Noland." He did not actually appear in the case. Held, such publication conferred no jurisdiction on the court.

Appeal from circuit court, De Kalb county.

Haynes & Haynes, for respondents. *J. T. Harwood* and *Ramey & Brown*, for appellant.

NORTON, C. J. This is a suit in ejectment by the widow and heirs of Charles W. Skelton to recover possession of the W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 5, township 27, range 30, in De Kalb county. In support of their title, plaintiffs put in evidence an exemplification, duly authenticated, of letters patent of the United States, dated in 1856, granting the above described land to one Quinces R. Noland. They also put in evidence a tax deed reciting, in substance, that on the eleventh of October, 1878, judgment was rendered in the De Kalb county circuit court in favor of the state, at the relation of the collector of said county, and against Q. R. Noland and Joseph A. Woodward, for the sum of \$12.75, delinquent taxes on the said land for the year 1876, and costs taxed at \$20.55, which judgment was declared to be a lien on said land; and that, in pursuance of an execution issued on said judgment, the land was sold to Charles W. Skelton for the sum of \$1.45. This deed was admitted in evidence without objections. Evidence was introduced by plaintiffs showing that said Charles Skelton died intestate, and that plaintiffs were his heirs.

Defendant introduced in evidence the record and proceedings in the tax suit, from which it appeared that the suit was brought against Q. R. Noland and Joseph A. Woodward; that it was alleged in the petition that they were non-residents of the state; that defendants were notified by publication in a newspaper of the pendency of the suit, and not otherwise; that defendants did not

appear in said suit; and that, in all the proceedings in said suit, the name of said Noland appeared as Q. R. Noland, and not otherwise. The defendant offered to prove that all the taxes on said land for the year 1876 had been paid prior to the bringing of said suit, which the court, on objection of plaintiffs, refused to receive.

On this state of the case the court instructed the jury that plaintiffs were entitled to recover, and judgment was rendered accordingly, from which defendant has appealed, and contends that the circuit court, in virtue of the tax suit against Q. R. Noland and Joseph A. Woodward, and the order of publication of notice made therein, did not acquire jurisdiction of Quinces R. Noland; that no presumption in law is to be indulged that "Q." stands for Quinces; and that an order of publication against a defendant which gives the initial letter of a Christian name, where there is no appearance under such publication, does not give the court jurisdiction.

We are of the opinion that the above points are well taken. While it has been held by this court that the middle name of a person is no part of his name, this rule has never been extended to the Christian name; but, on the contrary, the law presumes that every person has a Christian as well as a surname; and in the case of *Martin v. Barron*, 37 Mo. 301, where the main point relied upon by the defense was that defendant, being described in the writ by the initial of his Christian name, and the officers' return of service being in the same defective manner, that there was nothing to show on the record that he was ever served with process, or that the court acquired jurisdiction over him, and that the proceeding and judgment are void, it is said: "The Christian and surname of both plaintiff and defendant should be set forth with accuracy; for since names are the only marks and *indicia* which human kind can understand each other by, if the name be omitted or mistaken, there is a complaint against nobody. But, when the service has been read by a wrong name, the misnomer or want of a name is pleadable in abatement."

It is very clear from the above case that, when a party is sued by a wrong name, and service of the writ is actually made on the person intended, and he does not appear and plead in abatement, that the judgment rendered in such case is not void. But a distinction exists between such a case and a case where the suit is against a non-resident, where the only notice is by publication of notice, and no appearance is made. In the former case, where there is a mistake in the name, and the writ is served on the right party, he is thereby informed that he is the person meant; and, to take advantage of the misnomer, he must appear and plead the misnomer in abatement.

In the latter case, when a wrong name is used in an order of publication, the party really intended receives no such notice that he is the party intended as one who is personally served with a writ, which service designates him as the person meant to be sued. While the service of the writ in the former case is a demonstration that the person upon whom it is served is the person intended to be sued, in the latter case notice by publication is a proceeding against the name, and, to give such notice as the service of a writ imparts, it should be correctly set forth, and, if it is not so set forth, it is ineffectual as a notice. It would seem that an order of publication of notice against J. Smith would impart the same notice to James, Joseph, John, Jonathan, or Jackson Smith, but it would not impart to any one of them notice of the fact that he was the J. Smith intended by the notice, while the service of a writ upon any one of them would inform him that he was the Smith intended.

These views seem to be supported by the cases of *Gardner v. State*, 4 Ind. 632; *Entrekin v. Chambers*, 11 Kan. 368; *Bray v. McClury*, 55 Mo. 128.

The judgment is reversed, and the cause remanded, in which all the judges concur except the writer of this opinion.

ROSE v. FIRST NAT. BANK OF SPRINGFIELD.

(Supreme Court of Missouri. March 21, 1887.)

EVIDENCE—HANDWRITING—COMPARISON—FALSE SIGNATURES.

In an action by a depositor against a bank to recover the amount of a check paid by the bank, and charged to him, the issue was as to the genuineness of the signature to the check. The cashier testified that the signature was genuine. Upon cross-examination, plaintiff showed him a number of signatures of his (plaintiff's) name. Witness stated they were all genuine. Plaintiff, in rebuttal, proved by another witness that plaintiff had not written them. *Held*, the signatures were inadmissible, either to test the witness as an expert, or his knowledge of plaintiff's handwriting.

Appeal from circuit court, Greene county.

Massey & McAfee, for respondent. *U. R. Vaughan*, for appellant.

BLACK, J. This was an action to recover a balance of \$200 claimed to be due on plaintiff's deposit account. The bank had paid and charged to his account a check for a like amount, purporting to be signed by the plaintiff. Whether this check was genuine or a forgery was the issue tried. For the defense, the cashier testified that he knew the plaintiff's handwriting. He examined the disputed check, and several other checks then in evidence, for other purposes, and conceded to be genuine, and stated that the signatures to all of the checks were in the handwriting of the plaintiff; that they were all alike. On cross-examination, counsel for plaintiff placed before the witness the name of W. P. Rose, written upon two blank checks, concealing from his view the other portions of the checks, and asked him in whose handwriting these signatures were. Witness answered that if checks signed as these were, were presented to the bank, he would pay them as Rose's checks.

Plaintiff, in rebuttal, called another person, who stated that he wrote the name of W. P. Rose on the blank checks during the progress of the trial. Objections were made to the above cross-examination, and examination in rebuttal.

Where there are other writings in the case conceded to be genuine, they may be used as standards of comparison, and the comparison may be made by the jury with or without the aid of experts. 1 Greenl. Ev. § 578; *State v. Scott*, 45 Mo. 802; *State v. Tompkins*, 71 Mo. 614. But with us such papers can only be used when no collateral issue can be raised concerning them. 1 Greenl. Ev. § 581; *State v. Clinton*, 67 Mo. 380. The signatures upon the blank checks were designed to and did present a collateral issue, and, under the rule before stated, the witness should not have been questioned as to them, unless the rule is to be relaxed in favor of a cross-examination.

In *Griffiths v. Ivery*, 11 Adol. & E. 322, the defendant produced witnesses who testified that they were acquainted with his handwriting, and believed the acceptance was not his. Plaintiff then offered to lay a paper, purporting to be signed by the defendant, before each witness on cross-examination, and asked them in turn whether they believed the signature to be that of the defendant, for the purpose of testing their knowledge of his writing. It was ruled that the paper could not be shown to the witness, and, with respect to this ruling, COLERIDGE, J., said: "We must not allow papers which are not evidence in the cause to be let in for any purpose whatever. It is said that this was offered merely for the purpose of trying the knowledge of the witness, but the inquiry would not stop there."

In *Doe v. Newton*, 5 Adol. & E. 514, where the issue was as to the genuineness of a signature to a will produced by the defendant, the plaintiff's counsel, on cross-examination of one of defendant's witnesses, put into his hand some letters which witness said he believed to be of the testator's writing. On behalf of the plaintiff, it was proposed to submit the letters to the jury, that they might compare them with the disputed signature, and thereby

judge both of its genuineness and of the credit due to the witness. The letters were not in evidence for any other purpose, and were excluded, and this ruling was affirmed. See, also, *Doe v. Suokermore*, 5 Adol. & E. 703.

In *Massey v. Farmers' Nat. Bank*, 104 Ill. 327, the bank sued Massey on a note. For the bank a witness testified that some years before he had seen Massey write, and that it was his impression that the signature of the name of Massey to the note was in his handwriting. On cross-examination, defendant's counsel handed the witness a paper having written on it the name "H. E. Massey" 16 times, and asked the witness to point out the genuine signatures, if any there were. It was then contended that the evidence was proper on cross-examination, but the court held that the evidence was properly excluded.

Extrinsic signatures, offered to be used on cross-examination, were held to have been properly excluded in *First Nat. Bank v. Robert*, 41 Mich. 710, 3 N. W. Rep. 199.

The rule which excludes extrinsic papers and signatures is substantially the same in the direct and cross-examination, as will be seen from the foregoing authorities. Papers not a part of the case, and not relevant as evidence to the other issues, are excluded mainly on the ground that to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other party, who would not know what documents were to be produced, and hence could not be prepared to meet them. The reason of the rule applies to the cross-examination with as much force as to the direct examination. The signatures should have been excluded, whether used to test the witness as an expert, or to test his knowledge of the handwriting of the plaintiff.

We cannot say the evidence did no harm. The error was in the reception of evidence on the only disputed fact in the case, and the judgment must be reversed, and the cause remanded. It is so ordered.

NORTON, C. J., and SHERWOOD, J., absent.
(The other judges concur.)

BERRY v. EWING and others.

(*Supreme Court of Missouri*. March 21, 1887.)

EXECUTION—HOMESTEAD—GUARDIAN'S BOND—SURETY.

B., as guardian and curator of I., gave bond, with E. as surety, in 1860. B. acquired land in 1855 and 1859, which he claimed as his homestead, but the deeds were not recorded until 1871. In 1882, I. obtained a judgment against B. on the bond, and E. was compelled to pay \$1,000, to recover which he sued B., obtained judgment, and levied on the alleged homestead. Held, that when E. signed the bond, this created an existing cause of action contingent upon B.'s default, and that the payment by E. related to the date of the bond, which, being anterior to the acquisition of the homestead, rendered the land liable to the execution, under the provisions of Rev. St. Mo. 1879, § 2885, providing that a homestead shall be subject to execution on all causes of action existing at the time of acquiring it.¹

Appeal from circuit court, Moniteau county.

Wood & Edwards, for respondent. *Moore & Williams*, for appellants.

SHERWOOD, J. The plaintiff obtained a temporary injunction against Ewing and the sheriff, restraining them from selling under *fi. fa.* a certain 80 acres of land owned by plaintiff. On final hearing the injunction was made perpetual. The facts on which the action of the trial court is bottomed, as shown by the agreed statement, are as follows: Berry was the guardian and

¹ As to what debts will render the homestead subject to execution, see *Butler v. Nelson*, (Iowa,) 32 N. W. Rep. 399; *Roberts v. Riggs*, (Ky.) 1 S. W. Rep. 431; *Holcomb v. Hood*, Id. 401.

curator of his nephew, L. O. Isom; gave bond as such, in 1860, with Ewing as surety. In 1882, Isom having obtained judgment against Berry and Ewing on the curator's bond, the latter was compelled to pay the sum of \$1,000, and thereupon brought suit, and recovered judgment, and caused execution to be levied on the land in question, on which Berry has resided since 1857, and now claims to be exempt as a homestead; and on this theory the injunction was made perpetual. The deeds under which Berry claims were made in 1855 and 1859, but were not put on record till 1871.

The only question presented by the record is whether the claim of Ewing, as surety, antedated the claim of Berry to the land as a homestead; for, if it did, then the former claim must prevail.

At the time Ewing became a surety on Berry's bond there was no homestead law in force in this state, nor was there such a law for several years thereafter; and, when Ewing signed the bond, this act of his created an existing cause of action contingent upon Berry's default. An implied contract was then raised by the law between Berry, the principal, and Ewing, the surety, that the former should indemnify the latter; and this implied contract took effect from the date of the surety's signing the bond, and not merely from the time he paid the money; the payment in such case relating to the inception of the implied liability. Thus, where such a liability was created by reason of a surety's signing as aforesaid, and afterwards a homestead act was passed, and the surety, after the passage of the act, paid the debt, it was ruled that the demand of the surety was superior to the claim of homestead exemption. *Thomp. Homest. & Ex. § 315; Rice v. Southgate*, 16 Gray, 142; *Appleton v. Basom*, 3 Metc. 169. And when Ewing, as surety, signed Berry's bond, the implied contract of indemnity took immediate effect, and became a vested right, arising on a contract which subsequent legislation could not divest, even if so intended; for this would amount to impairing the obligation of a contract,—a contract implied by the law. *Thomp. Homest. & Ex. §§ 10, 15; Gunn v. Barry*, 15 Wall. 610.

By the terms of the constitution in force when the implied contract with the surety was made, the legislature was forbidden to pass any law impairing the obligation of contracts, etc. The homestead exemption of Berry, therefore, could not prevail, even if authorized by the legislature; for this would have been in contravention of both the state and of the federal constitutions. *Harvey v. Wickham*, 23 Mo. 112. But, under the terms of the statute, the homestead is subject to levy of execution on all causes of action existing at the time of acquiring such homestead. *Rev. St. 1879, § 2695.*

As already seen, the cause of action in this case existed long anterior to Berry's acquisition of the homestead. Consequently Ewing had the right to levy upon it, just as he would upon any other land; his remedy at law being adequate and ample, so that no manner of necessity existed for him to go into a court of equity in order to assert his right.

For these reasons the judgment should be reversed, and the petition be dismissed.

(All concur.)

BUTLER and others v. HENRY.

(*Supreme Court of Arkansas. March 26, 1887.*)

PARTNERSHIP—EVIDENCE.

Evidence that A. was a partner in a certain company in September, and, as such, signed contracts reciting a contract made by the company in March, is not competent in order to charge him upon a debt contracted by the company in July.

Appeal from circuit court, Miller county.

O. D. Scott, for appellants. U. M. & G. B. Rose, for appellee.

SMOOTE, Special Judge. The appellants, Butler, Gibb & Co., sued Frank M. Henry and others as partners under the firm name of the Carolina Building Company on an account for shingles, of the date of July 24, 1878, for the sum of \$141.63. The issues were disposed of, as to the other defendants, without contest, but Henry answered, denying, in substance, that he was a member of said company at the time of the making of the contract sued on, and his liability on the same. The verdict and judgment were for Henry, and Butler, Gibb & Co. have brought the case here by appeal. The only question before us is upon the exclusion of certain evidence offered in the court below by appellants.

Gibb, on the part of appellants, testified that Sewell, one of the defendants, bought the goods for the Carolina Building Company, and that they were shipped, according to Sewell's instructions, to Sherman, Texas, the nearest depot to defendants at that time; and he further testified that he did not know who composed said company. In connection with Gibb's evidence, the appellants offered the depositions of G. B. F. Maxwell, with exhibits, and the deposition of C. E. Mitchell, as tending to prove that Henry was a member of the company at the time the contract sued on was made, and as such liable thereon. The substance of Maxwell's deposition is that he became acquainted with the company in September, 1878, through business transactions with it, which continued up to 1879, and that, while these transactions were pending, Henry was held out to him as a member of the company; that during that time a number of written contracts were entered into between witness and the company, in which Henry joined as a member. These contracts were made exhibits to Maxwell's deposition. The substance of Mitchell's deposition is this: He prepared the contract (Exhibit A to Maxwell's deposition) of the date of September 9, 1878. At the time of preparing said contract, or a few days before, he saw Henry in Hope, Arkansas, in company with Sewell and Treadway, or one of them, and in the course of conversation learned that Henry was a member of said company, and interested with it in a contract to build a court-house in Cook county, Texas. Witness learned this from Henry, or from his conversation with others in the presence of witness. Certain recitals contained in Exhibits C and B to Maxwell's deposition are also relied on by appellants. They are in substance as follows: Exhibit C, which was executed on the eighteenth day of October, 1878, by Sewell, and was ratified by Henry and others as members of the company, recites substantially that Sewell, on the twenty-fifth of March, 1878, made a contract with Cook county, Texas, to build a court-house, etc. And Exhibit B, which was executed on the third day of May, 1879, by Henry and others, as members of the company, recites as follows: "That whereas, on the eighteenth day of October, 1878, Jesse P. Sewell, as a member of the Carolina Building Association, for himself and said association, entered into a contract in writing with Granville B. F. Maxwell, whereby the said Sewell granted, bargained, sold, and assigned, aliened and conveyed, unto said Maxwell all the right, title, claim, interest, and equity which said Sewell himself, and the said building association, had in and to a certain contract, before that time entered into by said building association with the county of Cook, in the state of Texas, for the erection of a county court-house in said county and state," etc. And further on, in the same instrument, the parties executing the same (Henry, among others) styled themselves, "We, the members of the Carolina Building Association," etc. These depositions of Maxwell and Mitchell and the exhibits were excluded by the court below, and the point before this court is as to whether they were properly excluded.

The legal proposition urged by the appellant is that, when the existence of a personal relationship or state of things is once established by proof, the law presumes the same to continue until the contrary is shown, or a different presumption is raised by the nature of the subject in question; and that the

existence of a partnership, having been once proved at a particular time, will be presumed to continue until a dissolution is proved. This position is conceded by appellee, and is well supported by authority. 1 Greenl. Ev. §§ 41, 42; *Irby v. Brigham*, 9 Humph. 750; *Eames v. Eames*, 41 N. H. 177; *Montgomery, etc., Plank-road v. Webb*, 27 Ala. 618; *Sullivan v. Goldman*, 19 La. Ann. 12; *Mullen v. Pryor*, 12 Mo. 307; *Leport v. Todd*, 32 N. J. Law, 124; *People v. McLeod*, 1 Hill, 377; *Hood v. Hood*, 2 Grant, Cas. 229; *Prather v. Palmer*, 4 Ark. 456. And the appellant insists that the evidence excluded tended to prove that Henry was a partner in the said building company on the twenty-fifth of March, 1878, and that, under the legal rule stated above, it ought to have been admitted. On the other hand, the appellee insists that, while it is true that a relation once shown to exist is presumed to continue, the presumption is entirely prospective,—relates to time subsequent to that at which the relation has been shown to exist, and does not refer to any period anterior thereto. This, according to the authorities, is also the law. *Murdock v. State*, 68 Ala. 569; *Barelli v. Lytle*, 4 La. Ann. 557; *Erskine v. Davis*, 25 Ill. 256. And, as a general rule of law, a new partner, coming into a firm already existing, is not liable upon its previous contracts. He must in some way other than by merely becoming a partner undertake to become thus liable before he can be so held. *Lindl. Partn.* 390 *et seq.*

The evidence rejected shows, *prima facie*, that Henry was a partner as early as about the first of September, 1878, and that a partnership existed under the firm name of the Carolina Building Company as early as March 25, 1878, and that on that date Sewell, for said company, contracted with Cook county, Texas, to build a court-house, and that said contract was made before the purchase of the shingles; and, if the mere existence of the partnership, before the purchase, were the question at issue, it is probable that the evidence ought not to have been rejected. That, however, is not the issue. The issue is this: Did the partnership exist at the time of the contract sued on, with Henry as a partner in it? He does not deny that the partnership existed at the time the goods were bought, but that he was a member of it at that time. And we have been able to find nothing in the rejected evidence tending to show that Henry was a member of the partnership on the twenty-fifth of March, 1878, or had anything to do with the making of the contract of that date for building the court-house, or that he was a member of the partnership at the time of the purchase of the goods sued for. Henry's execution of the instruments made exhibits to Maxwell's deposition, which was subsequent to the purchase of the shingles, only tends to show that he was, at the time he executed them, a member of the firm, and, as such, had then acquired an interest in the contract for building the court-house, and not that he was a member, or had acquired such interest, in March or July previous; nor does it tend to show that Henry had in any way agreed to become liable for the partnership debts made prior to his coming in to it. We are therefore of opinion that the rejected evidence was not pertinent to the issue, and that the court below followed the law in refusing to admit it.

The judgment is affirmed.

BATTLE, J., did not sit in this case.

STATE v. CHURCHILL.

(Supreme Court of Arkansas. March 26, 1887.)

1. PRINCIPAL AND SURETY—OFFICIAL BOND—SUCCEEDING TERMS.

A state treasurer was delinquent in his accounts at the end of his second term of office, and upon entering on his third term, instead of paying up the deficit, he merely charged it against himself. *Held*, this did not have the effect to release the sureties on his bond for the second term from liability for such deficit, and impose the liability on the sureties for his third term.

2. STATES AND STATE OFFICERS—TREASURER—ACCOUNTS—APPORTIONMENT OF CREDITS.

In settling the treasurer's accounts, there being nothing before the court to show to which of the two terms a particular credit should be applied, or in what proportion it should be divided between the two terms, the amount will be equitably distributed between the two accounts.

Appeal from chancery court, Pulaski county.

Supplemental opinion on motion for modification of the decree.

This was an action by the state against the state treasurer, Thomas J. Churchill, and the sureties upon his official bond, charging him with negligence and mismanagement in keeping his accounts, and asking that a correct account be stated between him and the state. Judgment for defendants. The state appealed. For original opinion, see 3 S. W. Rep. 352.

SMOOTE, Special Judge. The motion to modify the decree in this case is based upon two grounds: *First*, because the court found that the sum of \$9,589.04, for which Treasurer Churchill erroneously took credit on sinking fund account for auditors' warrants redeemed in currency in the latter part of his second term, and with which he again charged himself in his third and last term, was a defalcation in and chargeable upon him and his sureties for his second term; and, *second*, because the court made an equitable appropriation of the \$145,000 burned scrip, for which he is allowed credit, on Loughborough bond account, between the shortage appearing on that account in his first and second terms, instead of following the report of the master, and appropriating enough of it to entirely discharge that account for the second term before appropriating any of it to the shortage in the first term.

1. It is urged, on behalf of the sureties on the second bond, that the erroneous credit of \$9,589.04, taken in the second term, was rectified by the charge of the same amount in the third term, and that the charge and credit set off each other, so that both became as though they never had been made, in the end neither increasing nor diminishing Treasurer Churchill's liability in any way; and that, as the master in his report paid no further attention to this matter than to note the facts, this court ought not to have taken it into consideration in making up its decree. We cannot agree with this view, taking all the facts into consideration, so far as the liability of sureties is concerned. Of course, we have considered no fact not developed by the record, but it is thereby developed, whether the master presents it in statement of Treasurer Churchill's accounts or not, that he did take the erroneous credit in his second term. It is evident that, if Churchill's account had been made up by the master in full for the second term, he would have been charged in that account with the sum in dispute; and it is equally evident, and plainly appears from the record in the case, that Treasurer Churchill did, as shown by his own books, at the termination of his second term, owe that amount to the state as its treasurer by reason of the said erroneous credit taken in that term. Therefore there was at that time a clear breach of his bond, upon which he and his sureties for the second term were liable, and that liability continues unless the deficit has been made good. It cannot, by mere book entries, be transferred to another set of sureties. Treasurer Churchill had the right, and it was his duty, to rectify this error, even in his third term, by charging himself again with the amount, and restoring the money to the treasury if not there at the time he so charged himself. But he could not do so by simply recharging himself with it, so as to release the sureties on the second bond from the breach thereof, and impose that liability on the sureties upon the third bond. If Treasurer Churchill had charged himself in his third term with the other erroneous credits he took in his second term, in the German Bank transaction, we presume that, so far as the liabilities of sureties are concerned, it would not be contended that these entries would have become myths, not to be taken into consideration. All these credits stand upon the same footing;

the only difference between them being that in the one case the treasurer did not recharge himself, and in the other he did. It appears to us that such a course of transferring liabilities on the part of bonded officers ought not to be tolerated. If it were to be, such officers might go on from year to year, taking improper credits in one term, and charging themselves again with them in a subsequent term, thereby bringing detriment to the public service, and upon final default throwing the whole burden upon the last set of sureties. If it can be helped, justice ought not to be permitted to be strangled by such book-keeping. As an illustration of the point we are endeavoring to bring out, take the case of an administrator. He has filed a settlement in which he has taken credits to which he is not entitled. Afterwards he is required to give new bond, which he does, and his sureties on the old one are discharged. In a subsequent settlement he again charges himself with the amount of the erroneous credits, but never makes the deficit good by actually bringing back that amount, and administering it as part of the estate. In such a case the liability would surely rest upon the sureties on the first bond, in whose time, as such sureties, the delict occurred. And so it is here, if there is a delict in this case which has not been actually made good. We have hereinbefore shown that, as to the matter in question, there was an actual breach of the bond for the second term; and it is clear, also, from the record, that the treasurer's account for his third and last term is burdened by charging therein this erroneous credit of \$9,589.04, which constituted this breach of his bond for his second term; and, upon examination of summary 3 of the master's report, we find that the treasurer, so far from making that breach good, is, upon final settlement of his third term account, still due the state the sum of \$13,407.86 in currency.

2. We do not think there is anything in the objections taken in argument to the exceptions of the state below, as to the matters to be considered under the second proposition. It appears to us that these exceptions are amply sufficient to let in that matter for our consideration. But it is further urged, on behalf of the sureties on the second bond, that the court was not justified by the evidence in departing from the conclusions of the master in this respect, by making an equitable distribution of the \$145,000 burned scrip, credited to the Loughborough bond account. The state showed that the treasurer took in scrip on his Loughborough bond account, during his first term, to the amount of \$165,000, of which \$6,000 were burned in that term, leaving a balance of \$159,000, and that he took in, on the same account, during his second term, scrip to the amount of \$45,000, making, together with the \$159,000 above mentioned, the sum of \$204,000. It was then further shown that in December, 1877, \$145,000 of scrip was burned, and credited on Loughborough bond account, leaving \$159,000 unaccounted for. This is certainly sufficient to entitle the state to recover. But the trouble arises in determining how much of the burned scrip shall be credited to the first term, and how much to the second. We have nothing before us to show how much of it was taken in during the first or the second term,—in fact, we have nothing to indicate to us, with any degree of clearness, that any of this scrip was taken in on account of Loughborough bonds. We have just as much ground, under the facts before us, for appropriating the whole of the \$145,000 as a credit to the first term as we have for appropriating a sufficient amount of it to fully discharge the account for the second before appropriating any of it to the first term. Such appropriation, in either case, would be arbitrary. Now, this matter could not be permitted to hang in eternal suspense, and it was the duty of the court to find some way out of the difficulty, if it could, in accordance with recognized principles, rather than to dispose of it in an arbitrary manner. We adopted the recognized principle of equitable distribution, which we regard as just to all parties, and the only proper way to solve the legal problem before us in this matter. The authorities which we regard as sustaining these

views are fully cited in the original opinion in this case, and we deem it unnecessary to repeat them here.

The motion to modify the decree is overruled.

SCOTT v. MEYER.

(*Supreme Court of Arkansas.* April 2, 1887.)

APPEALS—TIME—MOTION FOR NEW TRIAL.

Where an appeal is taken from the judgment of a justice of the peace to the circuit court, Mansf. Dig. Ark. § 4135 provides that it must be "within 30 days after the judgment was rendered, and not thereafter." *Held*, that the statute is peremptory. The pendency of a motion for a new trial does not enlarge the time.

Appeal from circuit court, Chicot county.

D. H. Reynolds, for appellant.

SMITH, J. A case was tried on May 11, 1884, before a justice of the peace, without a jury, and judgment was rendered for the defendant. On May 11th the defeated party filed a motion for a new trial, which was overruled June 9th. An appeal was granted July 8th. This appeal the circuit court dismissed, as not being taken within the time prescribed by law. Section 4135 of Mansfield's Digest provides that "the appeal must be taken within thirty days after the judgment was rendered, and not thereafter." The statute is peremptory. The pendency of a motion for a new trial does not enlarge the time. *Smith v. State*, 48 Ark. —, 6 S. W. Rep. 661.

Affirmed.

EX PARTE MILLER.

(*Supreme Court of Arkansas.* April 2, 1887.)

SIGNATURE—BY MARK—PROOF OF SIGNING.

A petition for the prohibition of the sale of intoxicating liquors was presented to the county court, containing some signatures by mark, *not attested by any witness*. The petitioners tendered evidence that these signatures were genuine, and that the persons who wrote the names of the signers by mark were authorized to do so. *Held* that, under Mansf. Dig. Ark. § 6344, which defines a signature or subscription to "include a mark, when the person cannot write; his name being written near it, and witnessed by a person who writes his own name as a witness," the evidence was competent; the statute intending a signature by mark not to be taken as *prima facie* genuine without other proof of signing, and not that such proof should be excluded.

Appeal from circuit court, Desha county.

X. J. Pindall and James Murphy, for appellant.

SMITH, J. A petition for the prohibition of the sale of intoxicating liquors within three miles of a certain church in Desha county was presented to the county court. Some of the signatures thereto were by mark, not attested by any witness. On the hearing in the circuit court the petitioners tendered evidence to prove that these signatures were genuine, and that the persons who wrote the names of the signers by mark were thereunto properly authorized. But the court refused to permit such testimony. The petitioners also offered to show that, if the signers by mark were counted, the petition contained a majority of the adult inhabitants residing within the territory mentioned. The court denied the prayer of the petition. The proposed evidence was competent. The Code of Civil Practice, in laying down the rules for its construction, defines signature or subscription to "include mark, when the person cannot write; his name being written near it, and witnessed by a person who writes his own name as a witness." Mansf. Dig. § 6344. In *Watson v. Billings*, 88 Ark. 278, it is said by Mr. Justice EAKIN that, since the

adoption of the Code, the mark of one who cannot write is not to be considered a signature or subscription unless the person writing his name writes his own name as a witness. This only means that such a signature is not to be taken *prima facie* as genuine, without other proof of signing. It was not intended to exclude such proof.

Reversed, and remanded for further proceedings.

CATCHINGS and others v. HARCROW and others.

(Supreme Court of Arkansas. April 2, 1887.)

1. ACTION—FORM—LAW AND EQUITY.

An error in bringing a suit in equity, when the proper remedy is ejectment, is not cause for dismissal of the suit, but only for transferring it to the law docket; and in case of a suit for relief against fraud, if no motion is made at the outset to correct the error, the court may transfer the cause of its own motion, or may proceed to trial upon the merits.

2. FRAUDULENT CONVEYANCE—EVIDENCE.

Defendant engaged in a mercantile business, sold out his stock, and had no property in sight except the house and lot in which he carried on business, and an iron safe. He conveyed that property to his brother for an alleged debt due him. Held, upon the evidence that the conveyance was fraudulent, and might be set aside at the instance of a creditor; it appearing, among other things, that the brother could give no clear account of the debt alleged to be due him, and that the debtor, in justifying as surety on a bond after he had executed the deed, swore that he owned the property conveyed.

Appeal from circuit court, Drew county.

McCain & Crawford, for appellants.

SMITH, J. J. C. Harcrow opened a mercantile business in the town of Monticello in the spring of 1880. In August and the fall of the same year he bought goods in Memphis, Louisville, and St. Louis, to the amount of several thousand dollars, upon a credit. These goods he sold for cash, chiefly in large lots, to other merchants in the same town, and at prices corresponding to the original cost. He paid no debts, and in January, 1881, when he had sold out his stock, had no property in sight, having shortly before sold and conveyed his iron safe, and the house and lot in which he carried on business, to his brother Elbert for an alleged debt due him. Catchings & Co., one of his creditors, sued J. C. Harcrow before a justice of the peace, and swore out an attachment, which was levied upon the safe, and also upon the house and lot. The attachment was sustained, and the attached property was condemned to be sold. Elbert brought an action of replevin against the purchasers of the safe, but after a contest before the justice, which was fought over again in the circuit court, he was finally defeated. The proceeds of the sale of the safe being insufficient to satisfy their debt, Catchings & Co. filed a transcript of their judgment in the office of the clerk of the circuit court, and, upon execution issued thereon, purchased the real estate which had been attached for the residue of their debt, \$180.80. This sale was made for cash, contrary to the statute; and, the same not being redeemed from within the time prescribed by law, the sheriff conveyed the premises to them by deed. Entertaining some doubt as to the validity of the sale, and no one being in actual possession, Catchings & Co. now exhibited their bill, assailing the previous conveyance to Elbert Harcrow as a fraudulent contrivance to defeat the creditors of J. C. Harcrow, and alleging that the demand, in satisfaction of which it purported to have been made, was simulated. The two brothers filed a joint answer, claiming that the debt of J. C. to Elbert was just and honest, and that the whole transaction amounted only to a preference of one creditor over another. Proofs were taken, and at the hearing the bill was dismissed.

It is suggested in the brief for appellants that the ground of dismissal was

the supposed unconstitutionality of the act of January 23, 1875, allowing attachments issued by a justice of the peace to be levied upon lands. Mansf. Dig. § 4125 *et seq.* But this question was set at rest in *Bush v. Visant*, 40 Ark. 124. However, the decree will not be disturbed if it can be sustained on any ground. It may also have been thought that the plaintiffs having proceeded to a sale, and having obtained the sheriff's deed, their rights were purely legal, and their remedy an action of ejectment. But an error of this sort was no good cause for dismissal, but only for a transfer of the cause to the proper docket. Mansf. Dig. 4925 *et seq.*; *Talbot v. Wilkins*, 31 Ark. 411; *Moss v. Adams*, 32 Ark. 562; *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 164; *Conger v. Cotton*, Id. 286. Courts of equity and of law have jurisdiction to relieve against frauds upon creditors; and, where no motion is made to correct an error in the adoption of proceedings, the court may either transfer upon its own motion, or may proceed to a trial upon the merits.

The testimony leaves no room to doubt that the pretended failure in business of J. C. Harcrow, and everything connected therewith, including the disposal of his property, was a deliberate scheme to avoid the payment of his debts. This, however would not affect Elbert Harcrow unless he was privy to the design, or assisted in its execution; in other words, unless he participated in the fraud. *Christian v. Greenwood*, 23 Ark. 258. The brothers were unmarried men, occupying the same apartment in the store where the business was conducted. They had been previously associated in business,—sometimes as partners, and sometimes as employer and clerk. Elbert was now sole clerk to J. C., and probably as well acquainted with the details of the business as J. C. himself. They sold their goods for cash, keeping few or no books of account. Elbert was aware that J. C. had purchased his stock of goods in the fall of 1880 on a credit, and that the same had never been paid for. He claimed, however, that he had \$1,800 of his own money when he came to Monticello, which he deposited in the safe, and which J. C. used in the course of his business, and that the deed was received in payment of \$1,000, part of said sum. In the replevin suit for the safe, he had given a different account of the origin of this debt. He had then sworn that he had lent J. C. \$1,000 in the summer of 1879, before he ever came to Monticello; and one of his witnesses in that suit, another brother, had stated that the debt had originated in 1878, when the witness and Elbert had sold their mercantile business to J. C., and J. C. made his note for \$1,000 in payment of Elbert's share. The deed was executed on the twelfth of November, 1880. One suspicious circumstance was that it was prepared, executed, and acknowledged outside of the grantor's own county. On the nineteenth of November, 1880, J. C. Harcrow had occasion to justify as surety on a bond. He then swore that he was worth \$2,600 over and above his debts, liabilities, and exemptions. When questioned as to what his property consisted of, he mentioned the house and lot in controversy, which he valued at \$1,000, and his stock of goods, which he valued at \$5,000, but upon which he owed \$2,500. The deed to Elbert was not then upon record, nor was it filed for that purpose until January 6, 1881,—about the time of J. C.'s suspension. Elbert had then offered to compromise with J. C.'s creditors at 20 cents on the dollar, and had settled one small claim on that basis. After this the brothers retired to an adjoining county, where Elbert set up in business for himself, and J. C. in turn became his clerk.

Our conclusion is that the indebtedness of J. C. to Elbert Harcrow was a sham, and that, in taking the conveyance, he was merely assisting his brother to put his property beyond the reach of his creditors. It cannot, therefore, be permitted to stand against complaining creditors. The plaintiffs have offered to submit to a resale, in consideration that the property was irregularly sold for cash, and at a price greatly below its value. The decree below is reversed, and cause remanded, with directions, unless the defendants, or one of

them, shall immediately pay to the plaintiffs their debt, interest, and costs, together with taxes, if they have paid any, to enter a decree setting aside the deed of J. C. Harcrow to Elbert Harcrow as fraudulent against the plaintiffs; also to cancel the sheriff's deed to the plaintiffs for the same property, and to order another sale, to be conducted by a commissioner appointed for that purpose, and for further proceedings.

GRIFFITH and another v. SEBASTIAN Co.

(Supreme Court of Arkansas. April 2, 1887.)

1. COUNTIES—ACTIONS—EQUITABLE RELIEF.

The Arkansas act of February 27, 1879, expressly repealing all laws declaring counties to be corporations, and prohibiting suits against them elsewhere than in the county courts, does not apply to a cause of action in equity which had already accrued; and, as the county court has no equity jurisdiction, such a suit may be brought in the circuit court of the county sued.

2. EQUITY—MISTAKE—DEED—COUNTY-SEAT.

A., owning land in Fort Smith, Sebastian county, Arkansas, to which place, as was supposed, the county-seat had been legally removed, conveyed, for the nominal consideration of one dollar, certain lots in the town to the county, for the erection of a court-house, the anticipated enhancement of his other property thereby being the real consideration for the deed. On appeal to the supreme court, it was held that the proceedings to remove the county-seat were void, and subsequently A. filed a bill in the circuit court of Sebastian county to rescind the contract, and put the title in her again. *Held*, that the deed was founded on the assumption that the county-seat had been removed to Fort Smith, which was a mutual mistake that could be relieved against in equity, as the parties could be placed in their original position by requiring A. to refund to the county what it had expended for improvements, and to pay the taxes for the years during which the land had been held exempt as county property.¹

Appeal from circuit court, Sebastian county.

Sol. F. Clark & Son, for appellants. *Clendenning & Sandels and Rogers & Reed*, for appellee.

SMITH, J. The bill, filed by Griffith and wife, was as follows: The plaintiffs for their cause of action state that, for several years prior to the fifth day of March, A. D. 1870, the said Elizabeth was the owner in her own right, and seized in fee, of a tract of land lying partly in and adjacent to the city of Fort Smith, part of which has been surveyed in blocks and lots, and laid off as an addition to said city, with streets and alleys, so as to conform to the plat and plan thereof; that, in the year 1868, the citizens of the county of Sebastian aforesaid petitioned the county court thereof for an election to be ordered to remove the county-seat of said county from Greenwood to Fort Smith, and, the said court being satisfied that said petition was signed by one-third of the qualified electors, ordered an election under the statute in such case made and provided, to take place on the twenty-sixth day of December, A. D. 1868; that said election was accordingly held, and the county court declared, on the twelfth day of January, 1869, that the proposition to remove the county-seat did not receive a majority of the qualified electors of said county, and it was therefore lost. But the said county court afterwards, on the tenth day of January, 1870, declared the order aforesaid null and void, and also declared that, under and by virtue of said election, the county-seat was removed from Greenwood to Fort Smith, and proceeded to appoint commissioners to select a site upon which to erect a court-house within said city of Fort Smith; that, being desirous of enhancing the market value of their unsold town lots and adjacent land, the plaintiffs were induced to offer cer-

¹Equity will relieve against a mutual mistake in regard to something material to the transaction. *Muhlenberg v. Herrning*, (Pa.) 8 Atl. Rep. —; *Fritzier v. Robinson*, (Iowa,) 31 N. W. Rep. 61, and note.

tain lots and parcels of land for a site upon which to build said court-house, provided the same should be selected for that purpose; that the commissioners appointed by said county court finally selected said lots for the court-house, and the plaintiffs, on the fifth day of March, A. D. 1870, conveyed to the county of Sebastian, for the nominal consideration of one dollar, which in fact was never paid to them, a block of ground, describing it, and exhibiting the deed.

The plaintiffs, at the time of making said deed, were influenced by the assurance that the county-seat of said county had been lawfully removed to Fort Smith, and, by the representation of defendant's agents and commissioners, that the defendant would erect upon said land a costly and commodious court-house, and occupy the same. The plaintiffs believed, if the defendant should erect said building, and locate thereon the county-seat of said county, that they would be fully compensated for said lots in the enhanced value of their other town lots and lands aforesaid; that this was the sole inducement and consideration for said conveyance; that defendant county began the erection of a large court-house on said lots, and laid the foundation therefor, but proceeded no further, because it was held by the supreme court of this state that all the orders declaring that the county-seat had been removed from Greenwood to Fort Smith, and proceedings subsequent thereto, were null and void.

The plaintiffs further state the county-seat was always at Greenwood, and all of the acts of the defendant's court and the said commissioners were nullities, as the selection of said land for the site of a court-house was unauthorized and contrary to law, and defendant acquired no title to said land under said deed; that the county-seat of said county has never been located at Fort Smith, and the defendant has never had lawful power or authority to erect and occupy a court-house upon said lots, and said county has no right or power to acquire and hold real estate, except for purposes expressly authorized by law, and necessary for carrying on its business, and the conveyance aforesaid from these plaintiffs passed no title to the defendant county; that said lots have never been nor ever can be used for the site of a court-house for said defendant under the constitution of the state of Arkansas; for by said constitution, adopted in 1874, the defendant county is permanently divided into two districts, each exercising all the powers, privileges, and immunities of separate and distinct counties; that the said conveyance by the plaintiffs to the defendant is null and void, because the plaintiffs were induced to execute the same by the false and fraudulent representations of defendant and her agents and officers, upon which they relied; because it was well understood that the sole purpose for which said conveyance was made was for a site upon which to erect a court-house for the defendant county, which the defendant could not then, or at any subsequent time, lawfully do; and they further allege that said deed is a nullity because the defendant had no power, under the constitution and laws of the state of Arkansas, to accept said deed, or to acquire title to real estate, except as before stated.

The plaintiffs say that they have frequently asked the defendant to surrender said property to them, and to reconvey the same as in equity and good conscience ought to be done, and the defendant, through her officers, has refused to accede to such reasonable request; that B. J. H. Gaines, as judge of the county court of said county, has advertised said property for sale at public auction on first Monday in September, 1885, and has said property in his possession, claiming to hold and dispose of the same for the use and benefit of said county of Sebastian; that the acts and conduct of said defendant, B. J. H. Gaines, in claiming said property, and attempting to sell the same as aforesaid, tend to manifest injury to the plaintiff; that under the act of February 27, 1879, all laws declaring counties to be corporations, and authorizing them to be sued, were repealed, and said defendant Gaines, as the judge of

the county court of said defendant, and as the agent, is intermeddling with said property, claiming to hold the same, and the right to dispose thereof as aforesaid under said deed, and by no other right or authority,—he claiming the said deed conveyed to said defendant county a good and valid title; and if, under the provisions of the act aforesaid, the defendant cannot be sued in this action in this court, then the plaintiff is entirely without remedy, because there is no county court of Sebastian county which has jurisdiction to act in these premises as contemplated by said act.

Whereupon the plaintiffs pray judgment (1) that said deed of conveyance from plaintiffs to the defendant be declared null and void, and the same be canceled, and the title to said property be declared to be in the plaintiff Elizabeth P., the same as if no such deed had ever been executed; (2) that the defendant, its agents, attorneys, and officers, be forever enjoined and restrained from selling, or attempting to sell, or in anywise interfering with, said property, and that they have such other relief as they are entitled to on the premises.

The defendants demurred for the following causes: (1) Because the court has no jurisdiction of the persons of the defendants, or either of them, or the subject-matter of the action; (2) because the complaint does not state facts sufficient to constitute a cause of action; (3) because, under the laws of this state, no authority is conferred whereby a county may sue or be sued as such.

The court sustained the second ground of demurrer, and dismissed the bill.

The act of February 27, 1879, expressly repealed all laws declaring counties to be corporations, and prohibited suits against them elsewhere than in the county court. As, however, the county court has no equity jurisdiction, the act cannot apply to causes of action like this, which had already accrued; for this would deprive the parties of all remedy. This being, in effect, a suit for the recovery of lands, Mrs. Griffith is not barred by the statute of limitations, because she has all the time been a married woman. *Hershy v. Latham*, 42 Ark. 305. The allegations of fraudulent representations by the agents and officers of the county may be safely dismissed. The county acted in good faith, as is manifested by its proceeding to erect the court-house on the donated site, until it was decided in *Patterson v. Temple*, 27 Ark. 202, that the county-seat still remained at Greenwood. The conveyance was made under a misapprehension, common to both parties, that Fort Smith was now the county-seat. Mrs. Griffith has parted with her property without receiving any equivalent, and without the possibility of receiving any. Her object was to enhance the value of her adjacent lands by securing the location of the public buildings of the county on this block. This object, without any fault imputable to either of the parties, was then and has ever since remained impossible of accomplishment. The deed was founded on the assumption that the county-seat had been removed to Fort Smith. The result is the same as if the deed had been expressly conditioned on the existence of the supposed state of facts. The deed is thus nullified in its inception, by the non-existence of a material fact which constituted at once its inducement and the basis of their negotiations. The mistake was such as to exclude real consent, and so the minds of the parties never met. *Wade*, Pol. Cont. (2d Amer. Ed.) 405, 412, 441; *Bish. Cont.* (Enlarged Ed.) §§ 70, 587, 693, 698; *Kerr*, *Fraud & M.* (Amer. Ed.) 416; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Hitchcock v. Giddings*, 4 Price, 135; *Irick v. Fulton's Ex'rs*, 8 Grat. 193; *Ketchum v. Catlin*, 21 Vt. 191.

But it is contended that the mistake was a mistake of law, involving the construction of an act of the legislature, which had undertaken to make valid the election under which the removal had been had, and the validity of certain orders of the county court declaring the result and effect of that election. In Smith's Principles of Equity, 180, it is said: "It is quite conceivable that the two parties to an agreement may both be laboring under a false impression

as to a matter of law, the effect of which would be to make the agreement something entirely different from that which they intended. In such a case there is indeed no contract at all, the mutual agreement being different in substance from that which legally springs from their acts. It can scarcely be supposed that the law would in these circumstances enforce an agreement which was in truth never made by the parties at all. The question here is not whether a mistake of law will avoid a contract, but whether there ever was a contract."

But we do not regard the location of a county-seat of a county as a question of law. At least, there is such a blending or combination of law and fact as to take it out of the rule denying relief against legal mistakes. A fact is not less a fact, though it be the offspring of the law. Bish. Cont. § 465. Thus in *Craig v. Grant*, 6 Mich. 447, the organization of a certain county, which depended on the result of a popular election, was held, even in collateral proceedings, to be a question of fact. So, also, in *Indianapolis v. McAvoy*, 86 Ind. 587, where the question was whether certain lots were within the limits of a city, and this turned upon the validity or invalidity of an ordinance proposing to annex them. In *Gibson v. Pelkie*, 87 Mich. 380, a contract had been made for the collection of a supposed judgment, which proved to be so defective as to be void. The judgment was, of course, a matter of record, yet the court decided that there was no subject-matter upon which the contract could operate. Again, in *Heacock v. Fly*, 14 Pa. St. 549, a conveyance was made to a trustee for the sole and separate use of a married woman, and she executed a bond and mortgage for the purchase money. As the bond and mortgage were void at law, a court of equity rescinded the agreement. Here the conveyance was founded in a mistake of law as to the capacity of a married woman to bind herself. So in *Gross v. Leber*, 47 Pa. St. 520, a *feme sole*, as guardian, had trust funds in possession, and afterwards conveyed her real estate to a trustee to manage for her use and benefit, paying over to her the net proceeds. The trustee, after accepting the conveyance, died, and his sons, the administrators, in mistake of their duty as such, executed their bond to the ward for the amount due him by his guardian. The bond was relieved against in equity. Compare, also, *Miles v. Stevens*, 3 Pa. St. 21. In *King v. Doolittle*, 1 Head. 77, the plaintiffs had made their promissory notes for the purchase of a banking institution. The bank charter contained the reservation of a right to repeal it at the pleasure of the legislature. Both vendors and purchasers were ignorant of this provision, but the power was exercised a few months after the sale. It was decided that the plaintiffs were entitled to rescission, the mutual mistake going to the essence of the contract. In *Harrell v. De Normandie*, 26 Tex. 120, upon a sale and transfer of government securities, the parties contracted on the basis of a certain percentage to be discounted from the estimated value of the securities; but, in estimating their value, the seller, by mistake, omitted to include interest that had already accrued, and the buyer took the seller's estimate. This was held to be such a case of mutual error and surprise as was relievable in equity.

These cases suffice to show that a court of equity will relieve against a mistake of fact, superinduced by a mistake of law; and they are in line with *State v. Paup*, 13 Ark. 129. The circumstances of that case were that congress had granted to Arkansas two townships of land, for the use of a seminary of learning, to be located in tracts of not less than an entire section. In 1840, a few sections of this grant remaining still unlocated, the legislature authorized the governor to sell and dispose of the same, in legal subdivisions of not less than one-half quarter section, to be selected and located by the purchasers. The governor so advertised, and Paup purchased the right to locate 520 acres, for which he made his bonds. Paup selected his lands in unconnected tracts of 80 acres, but the general land-office refused to confirm his

locations. Being sued upon the bonds, Paup obtained a perpetual injunction of the proceedings, upon the ground that the contract, when entered into, was intended to effect a particular object, which, owing to a misapprehension of the law, had failed. In that case, Mr. Justice WALKER appears to recognize a distinction between mistake of the existence of a law and mistake of its legal effect. We think this savor of hair-splitting, but we approve the decision on its merits. Paup, in reality, took nothing by his purchase, and the state had lost nothing. The land could not be located in tracts smaller than 640 acres, contrary to the supposition of the parties. The state, having no right itself to select the grant in detached parcels, could not, of course, give its vendee that privilege. Hence there was no consideration for Paup's bonds, and the parties could be placed *in statu quo*.

In *Allen v. Hammond*, 11 Pet. 71, the supreme court of the United States uses this language, which is applicable to the case in judgment: "The contract was entered into through the mistake of both parties. It imposes great hardship and injustice on the appellee, and it is without consideration. These grounds, either of which in ordinary cases is held sufficient for relief in equity, unite in favor of the appellee."

Rogers v. Sebastian Co., 21 Ark. 440, has been thought to be decisive of the present case, but it is clearly distinguishable. The facts in that case were that, in the year 1852, the county-seat had been lawfully removed to Fort Smith, and the county commissioners had selected a site for the court-house. Rogers, the owner, thereupon conveyed the land to the commissioners for a nominal consideration by a deed absolute, the statute forbidding any conditions or reservations in a conveyance for the use of a county. It was expected that Fort Smith would be the permanent county-seat, and the county proceeded to build a court-house. But three years later, and before the court-house was finished, the county-seat was relocated at a distance of 18 miles from Fort Smith. Rogers now sought a cancellation of this deed, and a reinvestment of the title in himself; but relief was denied. But the county-seat was actually at Fort Smith when the donation was made; there was no misapprehension going to the root of the matter. The county was not, of course, bound to maintain its seat at one place. The parties must have known it was liable to removal, and that, upon removal, there could be no reverter or resulting trust in favor of the donor. In this aspect the case was similar to *Gilmore v. Hayworth*, 26 Tex. 89.

But here there has been a total failure of the purposes of the conveyance. The parties have dealt with each other under an illusion. The county had no general power to acquire and hold real estate, as for speculation or profit, but only for purposes germane to the object of its creation. Dill. Mun. Corp. § 563; *Hayward v. Davidson*, 41 Ind. 215.

One obstacle in the way of granting relief in this class of cases is the difficulty, and sometimes the impossibility, of restoring the parties to their original situation. That obstacle is not insurmountable in the present case. If the county has expended money in making improvements, compensation may be allowed therefor. 1 Perry, Trusts, § 165a. And, if the land has escaped taxation by reason of the legal title being in the county, it may be placed on the tax-books, and assessed for past years. If the allegations of the bill are true, the county has, under a mistake common to it and Mrs. Griffith, obtained an advantage which it is unconscientious to retain.

The decree is reversed, and the cause remanded, with directions to overrule the demurrer, and require the defendants to answer.

MURPHY v. SMITH, Collector.

(Supreme Court of Arkansas. April 2, 1887.)

TAXATION—REDEMPTION—REPAYMENT OF MONEYS—LEGAL TENDER CURRENCY.

Under the provisions of Mansf. Dig. Ark. § 5775, governing the redemption of lands sold for taxes, the money paid to the county treasurer for such redemption must be in coin or treasury notes of the United States, made a legal tender by the acts of congress; and, where a county treasurer refuses to pay to the purchaser at the tax sale in such money the full amount received by him for redemption, but tenders instead the amount due in part in money and in part in county scrip or warrants, he may, by *mandamus*, be compelled to make full payment in money.

Appeal from circuit court, Desha county.

At a sale of lands for non-payment of taxes due thereon for the year 1883, made by the collector of Desha county on the twenty-eighth day of April, 1884, appellant, James Murphy, purchased certain lands, for which he paid \$11.50, and, upon paying the further sum of 25 cents collector's fee, he received a certificate of purchase, particularly describing the several tracts of land so purchased, and specifying the amount of taxes, penalty, and costs severally due upon each tract. Afterwards, on the twenty-first day of January, 1885, he paid the state, county, district, school, and other taxes assessed upon said lands for the year 1884, amounting to the sum of \$3.80, and received the receipt of the sheriff and collector of said county for said sum. On third June, 1885, Messrs. Fillar and Stanley, for benefit of proper owner, redeemed said lands from said appellee as such county treasurer, and received from him, as such treasurer, a receipt therefor; which receipt, on said third day of June, 1885, was filed in the office of the county clerk of said county, and said county clerk thereupon canceled on the record, on sales of land for delinquent taxes, the sale so made to appellant. Upon learning that said lands had been redeemed, appellant presented to appellee his said certificate of purchase, and said tax receipt for taxes so paid for the year 1884, and demanded of and from said appellee, as such county treasurer, an amount of money equal to the taxes for which said several tracts of land had been sold, together with penalty and costs, and said taxes so subsequently paid thereon, with interest thereon at 10 per cent. per annum on whole amount so paid, up to said third day of June, 1885, the date of said redemption, amounting to the sum of \$22.13. On said demand being made, said appellee, as such treasurer, tendered to appellant the sum of \$15.54 in money, and the sum of \$6.59 in scrip or warrants of said Desha county, which said tender of \$6.59 in Desha county scrip or warrants appellant refused to receive. At the trial in the court below, the appellee appeared in person; filed no answer or demurrer; made no defense; controverted none of the allegations of the petition, thereby admitting the truth of each and every allegation; but the court below, upon examination of the petition and exhibits, found that the petition did not state facts sufficient to entitle appellant to the relief claimed, to-wit, that a writ of *mandamus* should issue commanding said appellee to pay to appellant an amount of money equal to the taxes for which said several tracts of land were sold, together with the penalty and costs thereon, and taxes subsequently paid thereon, with interest at 10 per cent. per annum on the whole amount so paid from date of said several payments up to said third day of June, 1885, the date of redemption, or any relief, and dismissed the petition.

James Murphy, for appellant.

BATTLE, J. Section 5775 of Mansfield's Digest, which governed the redemption of the land purchased at tax sale by appellant, reads as follows: "Any owner, or his agent, or any other person for the owner, desiring to redeem any land, town, or city lot, or part thereof, sold for taxes under or by virtue of any law of the state, may, within the time limited by law for such

redemption, deposit with the county treasurer, upon the certificate of the clerk of the county court particularly describing such land or town or city lot, an amount of *money* equal to the taxes for which said land or town or city lot was sold, together with penalty, cost, and taxes subsequently paid thereon by such purchaser, or those claiming under him, with interest at the rate of ten per cent. per annum on the whole amount so paid."

Under this section, land sold for taxes can only be redeemed by the payment of money. In the absence of other words in the context controlling the meaning of the word "money," or showing in what sense it is used, we understand it to mean that which is legal tender for the payment of debts. *Graham v. Adams*, 5 Ark. 261; *Wilburn v. Greer*, 6 Ark. 255; *Burton v. Brooks*, 25 Ark. 215; *Hanauer v. Gray*, Id. 350; *Wells v. Cole*, 27 Ark. 603; *Block v. State*, 44 Tex. 620; *Butler v. Horwitz*, 7 Wall. 258; Bish. St. Crimes, § 346, and authorities cited. The amount paid to the county treasurer to redeem the land purchased at the tax sale by appellant should have been in the coin or treasury notes of the United States, made legal tender by acts of congress.

The presumption being that an officer has done his duty until the contrary is shown, it is presumed that the land was redeemed in the manner indicated. Appellant's petition for *mandamus* should have been granted. High, Extr. Rem. §§ 115, 116a, and authorities cited.

The judgment of the court below is therefore reversed, and this cause is remanded for proceedings not inconsistent with this opinion.

FORDYCE, Receiver, v. KOSMINSKI and another.

(Supreme Court of Arkansas. April 2, 1887.)

ALTERATION OF INSTRUMENTS—NEGOTIABLE PAPER—BONA FIDE HOLDER.

An alteration in negotiable paper, after it has been signed and delivered as a complete legal instrument, by increasing the amount for which it was made, by the insertion of words and figures in blank places left in the instrument, in such a manner as to leave no mark or indication of alteration, avoids the paper as to the maker, not consenting thereto, even in the hands of a *bona fide* holder for a valuable consideration.¹

Appeal from circuit court, Miller county.

B. W. Johnson, for appellant. *Scott & Jones*, for appellees.

BATTLE, J. This action is founded on a check drawn by the officers of the Texas & St. Louis Railway Company on the Commercial Bank of St. Louis, payable to Peter Vaught or bearer. As originally signed and prepared, it was a check for \$8.40, and was so drawn as to leave space between the figures "8" and "40," in one corner thereof, sufficient for the insertion of a cipher without crowding, and in the body of the check, where the amount was written, sufficient space was left after the word "eight" and the word following for adding to the word "eight" the letter "y," without giving it the appearance of being added after the check was written. After the execution and delivery of the check, without the authority, consent, or knowledge of the drawer, a cipher was inserted between the figures "8" and "40," and the letter "y" was added to the word "eight," and the amount of the check was thereby fraudulently changed from \$8.40 to \$80.40; and in that form, and with no mark or indication of alteration observable by a man of ordinary prudence, was negotiated to appellees, before maturity, for a valuable consideration, in due course of trade, and without notice of the forgery.

It is contended by appellees that appellant is liable to them upon the check for the full amount of the same as altered. This contention is sustained by many authorities, which lay it down, as a general principle of the law—mer-

¹See *Hood's Appeal*, (Pa.) 7 Atl. Rep. 137, and note.

chant, "that, when the drawer of a bill or the maker of a note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it, or exciting the suspicion of a careful man, and the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it, he will be liable upon it as altered to *any bona fide* holder without notice. But upon this proposition there is an irreconcilable conflict of authority, and the authorities which sustain the doctrine are not agreed as to its basis. In casting about for some principle on which it could be based, several have been suggested, which we will notice:

1. It is said by some that the true principle upon which this doctrine rests is "that the party who puts his paper in circulation invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none." It is true, as between the maker of negotiable paper, which he has voluntarily and intentionally executed and placed in circulation, and an innocent party acting upon the faith of the paper, the maker, as a general rule, would be precluded from showing that the paper was not intended to have the effect its face indicated; for it is upon the representation he has made by his paper he has authorized and induced the innocent party to act. But this reason only applies to paper as made and issued by him, or as authorized by him to be made or issued. When the paper is a complete legal instrument, as issued, he does not thereby make any representation that he will be bound by any alteration made without his authority. To hold him bound by the contract, as altered by such forgery, involves the idea that the person committing the forgery was his agent in committing it, (a ludicrous absurdity,) or, at least, he had authorized innocent third parties so to treat him.

2. Some authorities, sustaining the doctrine contended for by appellees, say it is based on the ground that the maker is estopped to allege that the paper has been altered. This idea originated in a misconception of *Young v. Grote*, 4 Bing. 253, "that was the case of a check drawn by a customer upon his bankers. The plaintiff, Young, having occasion to be absent, left with his wife certain printed checks upon the bankers, signed by him in blank, to be filled up by her, and drawn as his business might require. She delivered one of these checks, so signed, to the plaintiff's clerk, to be filled up by him with the sum of fifty pounds and some shillings and pence. The clerk filled out the check, beginning the words 'fifty' with a small letter, and in the middle of the blank line left for the same, and showed it to the plaintiff's wife, who directed him to draw the cash. Before presenting it to the bankers, this clerk altered the check by inserting before the word 'fifty' the words 'three hundred and,' thus making it a check of three hundred and fifty, instead of fifty, pounds, all in the same handwriting, and then himself presented the check to the bankers, and drew the whole larger sum. The action against the bankers was not, of course, brought by Young upon the check, but for the money which he claimed had been paid out by the bankers without authority. Under the circumstances stated, the court held the plaintiff was not entitled to recover."

In commenting upon that case in *Swan v. North British Australasian Co.*, 2 Hurl. & C. 175, Chief Justice COCKBURN said: "The case of *Young v. Grote*, on which so much reliance has been placed, and which is supposed to have established this doctrine of estoppel by reason of negligence, when it comes to be more closely examined, turns out to have been decided without reference to estoppel at all. Neither the counsel in arguing that case, nor the judges in deciding it, refer once to the doctrine of estoppel. The question arose on a disputed item in an account between a banker and his customer, which had been referred to arbitration; and the question raised by the arbi-

trator was on whom the loss which had arisen from payment of a check, in which, by the carelessness of the customer, an opportunity had been afforded for increasing the amount, should fall. It was held, not that the customer was estopped from denying that the check was a forgery, but that as the loss, which would otherwise fall on the banker, who had paid on a bad check, had been brought about by the negligence of the customer, the latter must sustain the loss. As the question arose on an account submitted to arbitration, the matter was decided without reference to any technicality; but I am disposed to think that, technically looked at, the matter would stand thus: The customer would be entitled to recover from the banker the amount paid on such a check, the banker having no voucher to justify the payment. The banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter. Possibly, to prevent circuity of action, the right of the banker to immunity in respect of the loss so brought about would afford him a defense in an action by the customer to recover the amount." And in *Halifax Union v. Wheelwright*, L. R. 10 Exch. 188, 192, which was very similar in its facts to *Young v. Grote*, and in which the alteration of certain drafts was made by a clerk intrusted with the duty of filling them up, the court of exchequer, after advisement, expressed the opinion that the ground assigned by Chief Justice COCKBURN, of avoiding circuity of action, was certainly the most exact ground.

3. The doctrine contended for is sometimes based on the principle that, "where one of two innocent parties must suffer by the fault of a third, he shall sustain the loss who put it in the power of the third to occasion it;" or, as expressed in *Isnard v. Torres*, 10 La. Ann. 103, "where one of two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who, by his own act, has occasioned the confidence and consequent injury of the other." In investigating the nature and extent of this principle, by tracing it through many cases in which it has been applied, Chief Justice RICHARDSON, speaking for the court in *Goodman v. Eastman*, 4 N. H. 457,—a case like this, the question involved and decided being the same,—said: "We are inclined to think that the true rule to be extracted from all the cases is that, where one man reposes in another a special confidence, and a loss arises from an abuse of that confidence, if the question, who shall bear the loss, arises between an innocent third person, and him who reposed the confidence, the law will throw the loss upon the latter." The same conclusion was reached in *Wade v. Withington*, 1 Allen, 562. It being correct, it will necessarily follow that the principle that, where one of two innocent parties is to bear a loss, it must fall on him who put it in the power of the third to occasion it, can have no application to negotiable paper which has been fraudulently altered in material particulars by third persons, as in this case, holding no relation of agency to the maker, and after it has been executed and delivered as a binding contract.

4. Another reason assigned is: "It is the duty of the maker of commercial paper to guard, not only himself, but the public, against frauds and alterations by refusing to sign negotiable paper made in such form as to admit of fraudulent practices upon them with ease, and without ready detection." The idea is, the failure to discharge this duty is negligence on the part of the maker, and that he should be held liable for losses suffered by innocent holders on account thereof. The effect of such a doctrine, if carried into practice, would be to require the maker to anticipate and provide against the many ways through or by which forgery is committed, and to compel him to perform a contract he never made because some one has committed a forgery by altering a contract he did make. If this be a correct principle, then the owner of goods stolen through his negligence should not have the right to recover them after they have passed into the hands of a *bona fide* purchaser.

In reply to an argument like this, in *Holmes v. Trumper*, 22 Mich. 427,

which was an action on a promissory note which consisted of a printed blank, with the amount and the time and place of payment filled in with writing, and was altered without the knowledge or consent of the maker, by adding after the printed words "with interest at," at the end of the note, the words "ten per cent.," Mr. Justice CHRISTIANCY, speaking for the court, said: "The argument amounts simply to this: that, by the maker's awkwardness or negligence, his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word 'at,' and draw a line through the blank which followed it; and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way. But how such a crime, whether committed in this or some other way, could create a contract on the part of the maker, we confess ourselves unable to comprehend; nor are we satisfied that a forgery committed in this way would be any less liable to detection than if committed in many other ways. The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; or as if an instrument were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper; or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word. * * * Whenever a party, in good faith, signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery, in whatever mode it may be accomplished; and, unless perhaps when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they received it, and of the intermediate holders. If promissory notes were only given by first-class business men, who are skilled in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument of the plaintiff in error would require. But for the great mass of the people, who are not thus skillful, nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper."

5. It has been said the free interchange of negotiable paper requires the establishment of the rule insisted on by appellees. But we do not understand the law in giving peculiar sanction to negotiable paper in order to secure its free circulation, and to protect *bona fide* holders for value before maturity, to go to the extent of holding the maker liable on a contract into which he never entered, or gave his assent. On the contrary, the well-settled doctrine is that a material alteration in a negotiable instrument, after its execution and delivery to the payee as a complete contract, avoids it, except as against parties consenting to the alteration. This doctrine rests on the principle that parties are only liable on their contracts as made and entered into by them. If the contract has been changed by a material alteration, without the privity of the party liable upon it, it ceases to be his contract, and he can no longer be held by it. *Overton v. Matthews*, 35 Ark. 154; *Wade v. Withington*, 1 Allen, 562; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 198.

The authorities upon the question involved in this case were reviewed at

length by Chief Justice GRAY in *Greenfield Sav. Bank v. Stowell*, 123 Mass. 198, in a very able and elaborate opinion; and, after deliberate advisement and careful examination, he concluded that the preponderance of authority was to the effect that the alteration in negotiable paper, after it has been signed and delivered as a complete legal instrument, by increasing the amount for which it was made by the insertion of words and figures in blank places left in the instrument in such a manner as to leave no mark or indication of alteration, avoids the paper as to the makers not consenting thereto, even in the hands of a *bona fide* holder for a valuable consideration. Mr. Justice CHRISTIANCY in *Holmes v. Trumper*, 22 Mich. 427, and Mr. Justice SEEVERS in *Knorrville Nat. Bank v. Clark*, 51 Iowa, 264, likewise reviewed the authorities, and reached the same conclusion. See, also, *Goodman v. Eastman*, 4 N. H. 455; *Wade v. Withington*, 1 Allen, 561; *Washington Sav. Bank v. Ecky*, 51 Mo. 272; *Gerrish v. Glines*, 56 N. H. 9; *Bruce v. Westcott*, 3 Barb. 874; Bigelow, Bills & N. (2d Ed.) 578, and authorities cited; 1 Rand. Com. Pap. § 187.

The maker of the check sued on did not authorize the alteration made in it, nor did or omitted anything to induce the belief that it had authorized any one to make it. It was not made by its consent, or by any person standing in a confidential relation to it, or held out as such by it. According to the evidence introduced in the trial, and the findings of the trial court, the check is void in the hands of appellees.

The judgment of the court below must be reversed, and a new trial granted.

JORDAN v. JORDAN, Adm'r.

(Supreme Court of Tennessee. March 10, 1887.)

1. LIMITATION OF ACTIONS—ACKNOWLEDGMENT—WAIVER OF PLEA.

Where the maker of a note, after the right to plead the statute of limitations has accrued by the lapse of the period prescribed by the statute, writes upon the note, while still in the possession of the owner thereof, "I hereby waive my right to rely upon or plead the statute of limitations as to the within note," this is a sufficient acknowledgment of the justice of the debt, and willingness to pay it, to imply a promise to pay, and will revive the debt, although there was no new consideration for such indorsement.¹

2. SAME—SUFFICIENCY.

A written waiver, on the back of a note, of the right to plead the statute of limitations, is not contrary to public policy, is valid, and will estop the maker from setting up the statute as a defense in an action on the note.¹

Appeal from chancery court, Rutherford county.

J. D. Richardson, for C. Jordan. *L. Jordan and Palmer & Palmer*, for L. Jordan.

FOLKES, J. This is an action upon a note executed by the plaintiff in error for \$1,165.35, dated September 18, 1860, and payable one day after date to M. C. Jordan, guardian of the minor heirs of Joshua Johnson, deceased, for borrowed money, with 10 per cent. interest on same until paid. The note is signed "Richard W. Williams, Clement Jordan, and A. E. Jordan," in the order named. Plaintiff in error pleaded: (1) Statute of limitation of six years; (2) that he was only surety on the note, and that the defendant in error, for a valuable consideration paid by the principal, held up and failed to bring suit for a given time, thereby discharging the said surety, said agreement having been made without the consent of the surety; (3) payment. To the first plea the defendant in error replied—*First*, a new promise within six years next before bringing of suit; *second*, that plaintiff in error had, by the indorsement on the note, waived his right to plead the statute of limitations, and was now estopped from pleading the same. The second plea was, upon

¹See note at end of case.

motion, stricken out. The second replication was also stricken out, but was at a subsequent day of the term re-instated. The plaintiff in error's rejoinder to second replication was—*First*, that he did not waive the right to rely upon the plea of the statute of limitations; *second*, that the indorsement pleaded as a waiver was and is void, and that it was without consideration. There is indorsed upon the note the following: "I hereby waive my right in the statute of limitations of the within note, this February 27, 1877. CLEMENT JORDAN." The cause was tried without a jury, and judgment against the plaintiff in error.

The record shows that the plaintiff in error was the father-in-law of the payee, and that he was a surety on the note, upon which a payment of \$500 was made in 1868 or 1869 by the principal on the note, said payment being the proceeds of certain trust property which was properly so applied. The plaintiff in error objected to the reading in evidence of the indorsement on the note above quoted, which objection was overruled, to which he excepted. The court held that said indorsement was a new promise, in effect, to pay said note, and upon this ground gave judgment in favor of plaintiff below for the full amount of the note, less the credit above, with interest at the rate stipulated therein. The honorable commission of referees report that the circuit judge was in error in holding that the indorsement amounted to a new promise, but that it was valid as an agreement not to plead the statute, and, as such, would be upheld and enforced. They report, however, in favor of a reversal, for error in striking out defendant's second plea. Both sides have filed exceptions to the report of referees, opening the whole case.

For the defendant in error it is insisted that the indorsement does not amount to a new promise, nor to an acknowledgment of the debt; that he has neither waived his right, nor is he estopped from exercising his right to plead the statute; that it is contrary to public policy to allow a party to thus render inoperative a statute so salutary. With this reasoning we cannot agree. We consider such stipulation, where fairly and understandingly made, effectual to arrest the running of the statute, whether regarded as an acknowledgment of the then existence of the debt which the debtor is willing to pay, upon which a new promise is implied, or viewed as a valid waiver of the defense which the statute would otherwise afford him. There is no public policy to be subserved by a contrary holding. It is not infrequently of prime importance to a debtor to obtain indulgence beyond the period fixed by law for the bar of the statute; and if, under any circumstances, he can obtain such forbearance, we know of no better means of doing so than by an express stipulation upon the proper evidence of the debt itself. If he can waive the defense by a failure to plead it, by an acknowledgment of the existence of the debt which the debtor is willing to pay within six years before suit brought, or by a new promise without any consideration other than a moral one arising out of the old debt, we fail to see why he should not be allowed to accomplish the same result by the writing exhibited in this case. The recovery is on the old debt, not on the acknowledgment, nor on the new promise. As is said by Judge COOPER in *Hannah v. Hawkins*, 5 Lea, 240: "Whether a new cause of action, sustained by the old consideration, is created by a new promise, or the old cause of action is merely revived partially or wholly by such promise, are questions of some metaphysical nicety, but of no practical importance." So, also, it may be a matter of some metaphysical nicety whether the plaintiff's right to recover in the case is to be placed on the ground assumed by the trial judge, and on the position taken in the report of the referees,—the result is the same. We are, however, well satisfied that the recovery can be maintained on both grounds. It is now well settled in this state, as already indicated, that it is the remedy which is barred, and not the cause of action, and that a direct admission of the existence of the debt, and a promise to pay it within time, revives the remedy. *Hunter v. Starks*, 8 Humph. 658; *Buller v. Winters*,

2 Swan, 91; *Woodlie v. Towles*, 9 Baxt. 595; *Cooke v. Hoffman*, 5 Lea, 109.

In *Broddie v. Johnson*, 1 Sneed, 467, it is said: "There must be an express, unconditional promise to pay, or such an acknowledgment of an existing debt as will imply a willingness or promise to pay it, if no express promise is made. The rule is thus laid down by the supreme court of the United States in *Bell v. Morrison*, 1 Pet. 362: "If there be no express promise, but a promise to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay." This is approved in *Belote v. Wynne*, 7 Yerg. 584, and in *Broddie v. Johnson*, *supra*.

Again, while the suit is on the old debt, as we have seen, yet, as was said by Judge McFARLAND in *Fugua v. Dimwiddie*, 6 Lea, 648: "To take the case out of the statute, the proof must make out a *new contract*, either by an express promise, or an acknowledgment of the justice of the debt, and willingness to pay it, *in such manner that the law will imply a promise*. * * * and the creditor must be in some way a party to the new contract." Now, where the maker of the note, after the right to plead the statute has accrued by the lapse of the period prescribed by the statute, writes upon the note, while still in the possession of the owner thereof, "I hereby waive my right to rely upon or plead the statute of limitations as to the within note," we are unable to see how it can be said that this is not an acknowledgment of the justice of the debt, and willingness to pay it, from which the law will imply a promise to pay it, notwithstanding such lapse of time. And, if no new consideration is necessary to sustain an express promise, no new consideration should be required to support the implied promise. So far as is necessary to sustain the ground upon which the circuit judge rested his judgment, we have drawn alone upon the authorities in our own state for the principles which, we think, by analogy, will warrant his action. The question, in the exact form presented in this record, is a new one in this state. But there is ample authority to be found in the courts of our sister states which maintain, independent of any question of a new promise, that the indorsement under consideration is valid as a waiver of the right to plead the statute.

In *Webber v. Williams*, 23 Pick. 302, there was a letter written by the debtor to the creditor, in which he stated that, if he would not sue the former, "he should have the same right for one year more than he then had." The creditor replied that he would not consent to the postponement as proposed, but in point of fact he did postpone suit till after six years. Chief Justice SHAW, speaking for the court, said: "The court is of opinion that this was a sufficient compliance with the defendant's offer; that he is bound by it; and that it is a good waiver of the statute of limitations."

In *Warren v. Walker*, 23 Me. 453, under the bottom of an account dated December 10, 1835, there was appended the following: "I hereby waive all defense which I might otherwise make to the above bill by law under and by virtue of any statute of limitations," signed by the debtor, and dated December 7, 1841. In Maine the statute is: "Unless such acknowledgment or promise be an *express one*, and made or sustained in some writing signed by the party chargeable thereby." The court held that under the statute it could not be considered as an *expressed* acknowledgment or promise to pay; that he had not agreed to waive the defense of payment, or the non-performance of the services as charged, or, indeed, of any other defense which he might have had to the original cause of action, but that "it was a valid agreement to waive the defense of the statute,—an agreement never to set up such defense."

In *Burton v. Stevens*, 24 Vt. 131, the language written was: "I hereby agree that I will not take any advantage of the statute of limitations on the within two notes." There, as here, the contention was that as the claim was barred before the indorsement, and no consideration passed, it was *nudum*

pactum. There, as here, it was insisted that the agreement was not an acknowledgment of any debt due, or promise, express or implied, of payment. The learned judge delivering the opinion said: "It is evident that in making the agreement the defendant intended to place in the hands of the plaintiff sufficient evidence to protect his claim from the operation of the statute, and that the plaintiff, in taking this agreement, supposed that his claim was saved thereby from its operation. It is just and reasonable, therefore, that such an effect should be given to this agreement, if it can be consistent with established rules of law. The language of Lord DENMAN, in the case of *Gardner v. McMahon*, 43 E. C. L. 870, has a direct application to this case: 'That it may well be supposed that the creditor, on his part, has forborne to sue, *relying upon this undertaking* as preserving his right of action in future. It is equally to be presumed that the creditor, *in the same reliance*, has permitted to pass from his possession the evidence to prevent the operation of the statute which he might have controlled previous to the execution of that agreement.' The defense, if available, is a violation of the defendant's agreement, and we entertain no doubt that he is concluded thereby."

In the case of *Paddock v. Colby*, 18 Vt. 485, the defendant used this language: "That he had assured the plaintiff that he would not take advantage of the statute of limitations;" and the court held that the claim was saved from its operation.

In the case of *Utica Ins. Co v. Bloodgood*, 4 Wend. 652, the defendant signed a written agreement in these words: "I hereby agree not to plead the statute of limitations," etc.; and SUTHERLAND, J., said: "The defendant is *estopped by his stipulation* from availing himself of the statute of limitations. These authorities are satisfactory upon the *effect* that should be given to the writing upon the back of the notes, for it is an agreement by the defendant that the notes shall be placed upon the same footing as if the statute had not run on the claims; the notes, then, furnishing the evidence of the debts and the promise to pay."

Shapley v. Abbott, 42 N. Y. 443, is cited by counsel for the defendant in error as authority against the position here taken. We think not. It holds that a *verbal* promise not to plead the statute, in case a promissory note shall be suffered to outlaw, is not sufficient to avoid the operation of the statute. In New York, at the time this decision was rendered, the statute (Code, § 110) required such promise to be *in writing*. It does also argue that such an agreement would be void for want of consideration, but in this respect it is out of harmony with the decisions of our own state. The case also indulges in some criticism upon the language of Judge SUTHERLAND, in the case of *Utica Ins. Co. v. Bloodgood*, as to the technical accuracy of the judge in the use of the term "*estopped*." But, as we do not rest our opinion on the doctrine of *estoppel in pais*, technically so-called, we do not think it necessary to further notice this New York case, being satisfied with the views already expressed. The result is that the defendant in error is entitled to recover judgment upon the note notwithstanding the lapse of time.

But the circuit judge erred in striking out the second plea; and, as the indorsement on the note only cuts off the bar of the statute, the plaintiff in error will be allowed to prove the truth of the matters set up in said plea, if he can. For this purpose the cause is remanded for a new trial.

NOTE.

LIMITATION OF ACTIONS—ACKNOWLEDGMENT. A debt barred by the statute of limitations will be revived by such an acknowledgment of indebtedness as reasonably leads to the inference of a promise to pay it. *Yost v. Grim*, (Pa.) 8 Atl. Rep. —; *Shipley v. Shipley*, (Md.) 8 Atl. Rep. 355; *Painter's Appeal*, (Pa.) 6 Atl. Rep. 477; *Shaeffer v. Hoffman*, (Pa.) 4 Atl. Rep. 39; *Landis v. Roth*, (Pa.) 1 Atl. Rep. 49; *Willey v. State*, (Ind.) 5 N. E. Rep. 884; *Rolfe v. Pillond*, (Neb.) 19 N. W. Rep. 970; *Devereaux v. Henry*, (Id.) 697; *Denny v. Marrett*, (Minn.) 13 N. W. Rep. 148; *Curtis v. City of Sacramento*, (Cal.) 11 Pac. Rep. 748. But an acknowledgment is not sufficient where the accompanying

circumstances are such as to repel that inference, or to leave it in doubt whether the party intended to prolong the time of legal limitation. *City of Fort Scott v. Hickman*, 5 Sup. Ct. Rep. 56; *Denny v. Marrett*, (Minn.) 13 N. W. Rep. 148.

In *Rhode Island* an admission as to the correctness of an account, including the payments credited thereon, is not such an acknowledgment of the indebtedness as to take it out of the statute, *Campbell v. Collingwood*, (R. I.) 8 Atl. Rep. 696; but the contrary is held in *Pennsylvania*, *Yost v. Grim*, 8 Atl. Rep. —. An admission by the debtor that "he owed the money, and would pay as soon as he was able," will not take the debt out of the statute, in the absence of proof of ability to pay. *Shawn v. Hawkins*, (Tenn.) 2 S. W. Rep. 34. Such acknowledgment, to be effectual, must be made to the creditor, or to some one acting for him, *City of Fort Scott v. Hickman*, 5 Sup. Ct. Rep. 56; *Gerhard v. Gerhard*, (Pa.) 4 Atl. Rep. 55; *Parker v. Remington*, (R. I.) 3 Atl. Rep. 590; and there must be no uncertainty as to the particular debt to which the promise applies, *Painter's Appeal*, *supra*; *Landis v. Roth*, *supra*.

In *Maryland* a general statement by one that he owes another an account, though no particular account is mentioned, is sufficient to remove the bar of the statute. In such case it is for the jury to determine whether the acknowledgment applies to the particular account sued on. *Shipley v. Shipley*, 8 Atl. Rep. 355. The acknowledgment may be made to the creditor, his agent or a stranger. *Stewart v. Garrett*, 5 Atl. Rep. 324.

In *Iowa* the admission must be in writing, signed by the party to be charged thereby. *Hale v. Wilson*, (Iowa,) 30 N. W. Rep. 739. In *Wisconsin* an action barred by the statute can be revived only by an unqualified promise, *Pierce v. Seymour*, 9 N. W. Rep. 71; or by unconditional part payment, *Marshall v. Holmes*, 32 N. W. Rep. —.

WILLS v. WILLS and others.

RAMSEY and others v. SAME.

(*Court of Appeals of Kentucky*. April 1, 1887.)

1. WILL—DEVISE—CONSTRUCTION—SURVIVORSHIP.

A testator, after making certain special devises, divided his estate equally between his four children, and provided that, "in case of the death of either of my children, I will that their said interest shall go to their children, in case they have any; if not, it is to go equally to my four living children, or the heirs of their body, or such as may be living." Held that, all of the children having survived the testator, each was entitled to his respective share *in fee-simple*, and not as a defeasible fee, subject to be divested upon any one of them subsequently, to testator's death, dying without issue. The survivorship referred to, and which was to determine the character of estate, was *survivorship of the testator*.

2. SAME—VESTED AND CONTINGENT ESTATES.

The courts of this country will so construe a will, when not inconsistent with the intention of the testator, as to prevent the title to real estate from remaining contingent; and, unless there are plain indications of a contrary intent, will consider the entire title as vested in those claiming under the will, rather than in abeyance.¹

Appeals from circuit court, Clark county.

Wm. Lindsay and *W. M. Beckner*, for appellants. *B. F. Buckner* and *J. S. Tucker*, for appellees.

PRYOR, C. J. These two actions, in the nature of ejectments, were instituted in the court below for the recovery of the land in controversy by the children and devisees of John P. Wills, who are the appellees, against the devisees of John G. Wills, the present appellants. The right of recovery depends upon the construction given the last will of John P. Wills, deceased. The testator

¹ As to the construction of wills, and when interests thereby created are vested and when contingent, see *Wiggin v. Perkins*, (N. H.) 5 Atl. Rep. 904, and note. For instances of vested estates, see *Id.*; *Crosby v. Crosby*, (N. H.) 5 Atl. Rep. 907; *Richardson's Appeal*, (Pa.) 6 Atl. Rep. 204; *Rubencane v. McKee*, (Del.) Id. 639; *Harris v. Carpenter*, (Ind.) 10 N. E. Rep. 422; *Dole v. Keyes*, (Mass.) 9 N. E. Rep. 625; *Byrnes v. Stillwell*, (N. Y.) Id. 241; *Delafield v. Shipman*, Id. 184; *Owens v. Dunn*, (Tenn.) 2 S. W. Rep. 29; *Vason v. Estes*, (Ga.) 1 S. E. Rep. 183; *McDaniel v. Allen*, (Miss.) 1 South. Rep. 356; of contingent estate, see *Loring v. Arnold*, (R. I.) 8 Atl. Rep. 335; *McCartney v. Osburn*, (Ill.) 9 N. E. Rep. 210; *Banta v. Boyd*, (Ill.) 8 N. E. Rep. 671; *Sager v. Galloway*, (Pa.) 6 Atl. Rep. 209; *Sager v. Cobham*, Id. 212; *Lafay v. Campbell*, (N. H.) Id. 300; *Willet v. Rutter*, (Ky.) 1 S. W. Rep. 640.

had four children living at the time of his death, and a grandchild. He disinherited his grandchild, giving his entire estate to his four children. Their names were Martha Flynn, (wife of Dudley Flynn,) John G. Wills, Benjamin Wills, and Mary E. Wills. The son, John G. Wills, took possession of his part of the realty in the year 1870, and died long after the testator, his father, without children; leaving a last will and testament by which he devised his part of the realty to the present appellants. It is maintained by the appellees that the son John G. Wills had no power to dispose of this realty by will or otherwise, and that, having died without children, his part of the estate passed, under his father's will, to his surviving brothers and sisters, or their descendants, who are the appellees; while the appellants insist that, at the death of John P. Wills, (the father,) his son John G. Wills, surviving him, took an absolute estate in the land, and therefore the title passed from him, under his last will, to them.

After the death of the first testator, his son John G. Wills, claiming to be the owner in fee of that part of the estate devised to him, sold a small strip or parcel of his land to one William S. Franklin; and, the latter refusing to pay the purchase money, and questioning the title, an action was instituted for a specific performance; that, upon the hearing, was dismissed by the court below, and, on an appeal to this court, the judgment below was reversed, and an opinion delivered, determining that John G. Wills, under the will of his father, was invested with the fee-simple title; that opinion was delivered in the year 1873, but as that action was between John G. Wills and Franklin only, the present appellees not being parties to the record, they should not be held to that judgment if the construction given the will of John P. Wills was erroneous.

The chancellor below only considered that opinion as an argument on the one side, and perhaps not entitled to that consideration that would have been given it if the question presented had been more elaborately discussed, held that John G. Wills, having died without children, had only a life-estate or a defeasible fee in the land devised to him, and rendered a judgment for the appellees.

As no argument, by brief or otherwise, was presented to this court in the case of *Wills v. Franklin*, favoring the construction given the will by the court below in the present case, we will treat the question involved as if it had arisen *de novo*, and, with the careful and able presentation of the views of counsel on each side, will have but little difficulty in placing a proper construction on the provisions of this will that must determine the right of property between these parties.

The language of the will is as follows:

"*Clause 2.* I will to my beloved wife, Nancy, what she is entitled to by law, and, in addition to that, whatever she may elect to take in the way of stock and servants; leaving it to her to take whatever she may want in kind, quality, and quantity, she having already some money that I have now given her, which is not to be taken into consideration.

"(3) It is my will that after the special devise above, that all my property be equally divided among my four living children, Martha Ann Flynn, John G. Wills, Benj. E. Wills, and Mary Elizabeth Wills, under the instructions and exceptions hereinafter made.

"(4) I give to my granddaughter, Martha Lockman, formerly Martha Flynn, one dollar.

"(5) It is my will that whatever portion of my estate should go to my daughter Mary Elizabeth shall go to her exclusive benefit and control, to the total exclusion of her husband, both as to principal and profits and proceeds; and this provision is also to apply to my daughter Martha Ann Flynn,—I herein making the same provisions with regard to her interest, not, however, through any lack of confidence in her present husband.

"(6) I will my sons, John G. and Benj. E. Wills, my executors herein, and request them to carry out faithfully the provisions of this will.

"(7) In case of the death of either of my children, I will that their said interest shall go to their children, in case they have any; if not, it is to go equally to my four living children, or the heirs of their body, or such as may be living."

The will of the common ancestor, John P. Wills, was probated in the year 1869, and his estate divided between his four children, the devisees, in the year 1870, and the nature, extent, and character of the interest devised to each must be determined under the recognized rules of construction by which courts are aided in arriving at the intention of the testator.

Did the testator in this case intend to give to his four children the fee, subject to be divested at their death, without leaving children; or, in other words, did the language used create a defeasible fee? If not, did the testator intend to give to each of his children only an estate for life in the estate devised, or was it his intention to give to them the absolute fee, in the event they were living to take the estate at his (the testator's) death?

When this case was heretofore in this court, the case of *Hughes v. Hughes*, reported in 12 B. Mon. 115, was referred to as recognizing the following rule of construction that should be applied to the language of the present will, and that is: "In the case of an immediate devise, it is generally true that a devise over, in the event of the death of the preceding devisee, refers to that event occurring in the life-time of the testator;" and this construction prevails when there is no other period to which the words can be referred. The application of all rules of construction must necessarily be varied by the language used by the testator, the object being to arrive at his intentions to be gotten from the entire will. A defeasible fee is where the devisee becomes invested with the fee-simple title, subject to be divested upon the happening of some contingency provided by the will; as where an estate is devised to A., and, if A. should die without children, then to B. In such a case, the devise over takes effect in the event A. dies without children, and B. becomes the owner in fee of the estate. If A. should have children living at his death, then B. takes no interest in the estate, nor will the children left by A. take any interest whatever under the will, but will inherit the estate from A. The contingency upon which A. is to be divested of title never happening, he was invested with the fee, and the estate passed by descent from A. to his children, and no right was acquired by them under the will. They inherit from the father, because he was the absolute owner of the estate.

Therefore, in the case before us, there was no defeasible fee, because, by the express language of the will, the testator has provided that, "in case of the death of either of my children, (John G. Wills being one of them,) their said interest shall go to their children, in case they have any; if not, to my four living children, or the heirs of their body," etc. The children of the four devisees, if any, were by the provisions of the will to be vested with an interest upon the happening of a contingency; and the question presented in the case is, what was that contingency, and when was it to happen, by which the children, if any, were to take, and, if no children, the surviving brothers and sisters of the immediate devisee.

We have seen that it was not a defeasible fee, and there being a devise over to the children, if any, and, if none, to the survivors of the first takers, the four children of the testator took either a life-estate in the property devised, and at their death it passed under the will to their children, and, if none, to the survivors of the immediate devisees, or they were to take in the event the immediate or first devisee died before the testator.

Did the testator intend to give to his four children a life-estate only? This is the real question involved. That the children of these devisees were to take under the will in a certain event is manifest, and the survivors, if there

were no children. And, if so, was the event upon which the survivors were to take the death at any time of the first devisees without children, or was the testator providing for the contingency of his children, or some of them, dying before the will took effect,—that is, before his death? Was he providing for some one to take in the event one or more of his children died before he did? The will of the testator was written and signed when he owned land, slaves, stock, and other personal estate, including moneys, choses in action, etc., and from its contents he must have been possessed of a considerable estate, real and personal. He made ample provision for his wife, disinherited his grandchild, the child of a deceased daughter, then gave his entire estate to his four children, naming them, *subject to the restrictions and exceptions hereinafter set forth*. He then provided that, as to his two daughters, their husbands were to have no interest in the estate devised to them, either in the principal or profits; and then makes his two sons his executors, with directions to them to execute faithfully the provisions of his will. It was so far a complete instrument, except the signing and attestation, as required by the statute. He had made an absolute devise of his estate, after providing for his wife, to his four living children, with the instructions and exceptions as to the interest devised to the two daughters, by which their husbands were excluded, and appointed his executors. The will seems to have been written by one of more than ordinary intelligence, is plain and undoubted in its meaning, until we reach the seventh and last clause of that instrument. That seems to be an *addendum* to an otherwise completed will, in which the testator attempts to provide the manner in which his estate is to go on the happening of a certain contingency, and that is: "In case of the death of either of my children, I will that their said interest shall go to their children, in case they have any; if not, it is to go equally to my four living children, or the heirs of their body, or such as may be living."

It is evident that the draughtsman of the instrument must have known how to create a life-estate, and equally so, we think, that the testator had no intention of limiting the devise of his moneys, choses in action, slaves, and land to a life-estate in his four children. Instead of saying, "I give this estate to each of my children for life, and then to their children, and, if no children, then to my surviving children," if such was the purpose of the testator, the draughtsman was evidently attempting to provide for the contingency of one or more of the principal devisees dying before the testator, and, there being no one to take, then he says: "In case of the death of either of my children, I will that their said interest shall go to their children, if any; if not, it is to be equally divided between my four living children, or their bodily heirs."

The testator wanted his four living children to have the estate, and not his grandchild, and, the thought suggesting itself that some of his children might die before he did without children, he would make a provision by which he would secure the estate to the survivors. There was no devise to either of the four children, *and, when they should die, to their children*, for this would be but a life-estate. There was no devise to John G. Wills, and, if he had no children, or died without children, then to the survivor, for this would be a defeasible fee. It was simply a devise over, in the event the child given the absolute estate was not living at the testator's death to take it. In that event, "*his said interest was to go to his children, if any*," etc.

If the restrictions and exceptions mentioned in the third clause of the testator's will, by which the absolute estate is devised to the testator's four children, are to be applied to the seventh and last clause of the will, it can make no difference in the construction to be given that instrument. "In case of the death of either of my children, I will that their said interest shall go to their children, in case they have any," etc. The death of the testator's four

children was an event that must certainly happen, and the period of time at which the children of the testator's children were to take is the important inquiry. This was not a devise over, in the event the immediate devisees *died without children*, but here was a devise first to the children of the immediate devisee, and, if none, to the surviving brothers and sisters. The event, then, upon which the devisee was to be deprived of the fee, was not his dying without children, because the devise was first to the children, and, if none, then to the surviving devisees; showing plainly the purpose of the testator to substitute a devisee who would take in the event either one or all of his children should die before he did; that is, the child or children of the devisee are to take, and, if none, to the survivor. "In case of the death of either of my children, I will that their interest shall go to their children." Leaving out the second devise over, and it is a devise, first, to the child of the testator, and, in case of his death, "*the said interest shall go to his children.*"

Now, if this creates a life-estate in the immediate devisee, then the appellees are entitled to recover. The devise over to the survivors, after the direct devise to the children of the immediate devisee, cannot affect the construction of this provision of the will. It is equivalent to a devise to A., and, if he is not living, to B., and if B. is dead, to C. If A. is living at the death of the testator, neither B. nor C. can take, because A. survives the testator, and is ready to take the estate. A. devise to B., and, if he should die without children, to C., the event upon which C. takes is the death of B. without children, and is a defeasible fee; but such is not the provision of the will before us.

Illustrations or examples of the various rules of construction in cases of wills are to be found in the case of *Edwards v. Edwards*, 15 Beav. 357, and relied on by counsel for the appellee in this case. The *first* of the four classes of cases is "that of a simple gift to A., and, if he should die, then to B." The *second* is "that of a gift to A., and, if he shall die without children, then to B." *Third*. "A gift to one for life, and, after his death, to A., and, if A. shall die, then to B." *Fourth*. "A gift to one for life, and, after his decease, to A., and, if A. should die without leaving a child, to B."

If the appellees are entitled to recover, this case must be brought within either the second or third class of cases. It cannot be brought under the second class, because in that class the first devisee takes the fee if, at his death, he had a child or children, and his children, when he dies, take from him, and not under the will. Here the children of the immediate devisees are to take under the will upon the happening of a contingency, and that contingency is the death of the immediate devisee before the death of the testator. This case cannot come under the third class, because, for the reasons already given, there was no intention on the part of the testator to create a life-estate.

In the case of *Edwards v. Edwards*, *supra*, a life-estate was first carved out by the testator, and then to B. absolutely, but, if he should die without leaving children, then to B.'s brother. B. survived the life-tenant, and it was held that he took an absolute estate. This is really an authority against the construction given the will below, although the cases are not analogous; for, if it is to be assumed that these devisees had only a life-estate, it ends the controversy, and the judgment below should be affirmed.

In the case of *O'Mahoney v. Burdett*, L. R. 7 Eng. & Ir. App. 388, the bequest was to A., and, if he shall die unmarried or without children, to B.; and it was held to be an absolute gift to A., defeasible by the gift over, in the event of his dying at any time unmarried or without children. The decision in *Edwards v. Edwards*, *supra*, was questioned to some extent by all the judges in the case of *O'Mahoney v. Burdett*, but we see no reason for controverting the rules laid down in that case. In *O'Mahoney v. Burdett* there was no devise to the children of the first devisee, but a fee to the first taker, to be defeated if he died unmarried or without children.

This case comes under the first class of cases mentioned in *Edwards v. Ed-*

wards,—the devise first to A., if he should die, then to B., and, if B. should be dead, to C.; first to the immediate devisees of the testator, "in case they should die, then to their children, in case they have any; if not, it is to go to the surviving devisees." If the devise to the children had been omitted, and the devise had read, "in case of the death of either of my children, then to the survivor," the intention of the testator as to the time would necessarily refer to his own death.

Cases may be found in the English Reports controverting this rule, and a variance with the rule in this state, as to the time at which the estate is to vest, or the devisee to be divested of his title; but it must be recollected that the effort of the courts in this country, when not inconsistent with the intention of the testator, is to prevent the title to real estate from remaining contingent, and, unless there are plain indications of a contrary intent, to hold the title vested in those claiming under the will or gift; and we cannot, when looking at the provisions of this entire will, hold that the prime objects of the testator's bounty were to be confined to a life-estate in all the property, real, personal, and mixed, devised to them.

In the case of *Ware v. Watson* the testator had three sons and three daughters. He divided his estate into six equal shares, with direction that each son's portion should be paid to him as soon as convenient after the testator's death; and provided that, "if any son died without having issue living at his death, the share intended for the son should accrue to the survivors of the testator's children," etc. This provision was omitted from the devise to his daughters, and the court, looking to the entire will, held that the shares of the sons surviving vested absolutely at the death of the testator. 7 De Gex, McN. & G. 248.

This last case is much stronger and goes further in support of the appellants' claim, although an English case, than any we have been able to find; and still we think, when looking to the whole will, such was the testator's intention. Neither the case of *Farthing v. Allen*, 2 Mad. Ch. 318, or that of *Child v. Giblett*, 3 Mylne & K. 71, sustain the right of recovery in the appellees. In the last-named case the testator devised his estate in equal portions to his two daughters; and, in the case of the death of either, to the survivor; and, in the event of their marrying and having children, then to the child or children of them, or the survivor, if they attain the age of 21 years; but, if not, then among the children of Paul Giblett. The question presented in that case was whether the two daughters, surviving the testator, took an absolute estate at his death, or an estate for life; the general rule that, where the devise is to the survivor, in the case of the death of one of the devisees, it means the death of the testator, the court said, was qualified by the devise over to the children of Paul Giblett.

Where there is an absolute devise to several under which the devisees or donees would be entitled to the possession at the death of the testator, with a proviso that if either should die, then to the survivors, it is a universal rule that the survivorship refers to the death of the testator; but, where the gift is to take effect after the termination of a particular estate, the survivorship applies to those who survive the period of distribution; that is, the termination of the particular estate. *Wren v. Hynes' Adm'r*, 2 Metc. (Ky.) 129.

In *Birney v. Richardson*, 5 Dana, 424, Richardson devised his estate to his widow during widowhood, and, if she married, then to his several children; but, if either should die without children, then his or her part to go to the surviving children. It was held that the children, living at the marriage of the widow, took the absolute estate, not defeasible at their death, at any time without children. In discussing that case this court said: "Had the bequests been direct and immediate to the testator's children as tenants in common, then the only question as to *dying without issue* would have been whether it meant a death in the testator's life-time, or at any time, however remote; and,

nothing else appearing to aid in the interpretation, the law would incline to construe '*dying without issue*' as meaning the death of the legatee without issue in the testator's life-time. But when the gift is not immediate, but in remainder, and there is a bequest over on the legatee's death alone, or death without issue, the inquiry will be enlarged, and, in such a case, the simple unexplained words, '*dying without issue*,' will be construed as meaning the death of the legatee after that of the testator, and before the time of distribution, or when the legacy may be reduced to possession."

In the present case there was no remainder interest in the four living children, but the absolute estate, devised without any particular estate intervening, and a substitution of other devisees by the testator in the event his children, or any of them, died before he did. Can there be any doubt but that the testator intended his children to take the estate in the event they survived him? It is insisted by counsel that his purpose was to invest the four children, who were the objects of his bounty, with an estate for life only, with the fee in their children, if they had any, and, if none, to the survivors of the tenants in common. Such is not a proper construction of the will of the testator. It might be argued, if required in support of the conclusion reached, that the language used in the latter part of the seventh and last clause of the will sustains the construction heretofore given that instrument. The testator had but four children when the devise was made, all of whom were living at his death, and, in making provision for those whom he desired should be the recipients of his bounty, (having disinherited his grandchild,) after saying "that, in case of the death of either of my children, I will that their said interest shall go to their children, if they have any," he then proceeds to say: "If not, it is to go *equally to my four living children, or the heirs of their body, or such as may be living.*" Living when? At the death of the testator. His four living children were to take, and he was providing for the contingency of them being, by reason of death, prevented from accepting his bounty. Yet the clause is awkwardly written; but the entire will, properly construed, gave to the four children, who survived their father, the testator, the fee-simple and absolute title to the moneys, choses in action, stocks, and bonds devised to them by his last will.

The judgment below is therefore reversed, and remanded, with directions to sustain the demurrer of appellants to the two petitions, and for proceedings consistent with this opinion.

SHUCK'S EX'R v. McELROY and others.

(Court of Appeals of Kentucky. March 19, 1887.)

APPEAL—DAMAGES—SUPERSEDEDAS.

Civil Code Ky. § 764, provides that, "upon affirmance of * * * a judgment for the payment of money, the collection of which * * * has been superseded, * * * ten per cent. damages on the amount superseded shall be awarded against the appellant." The devisees under a will claimed the estate of the executor, by whom it was also held in trust for them under the will, relieved of the trust; but the executor, in order to obtain a judicial construction of the will, refused to pay over the trust fund, and the devisees sued him, and obtained judgment directing him to pay over the amount of the fund. Whereupon he appealed from and superseded the judgment; but it was affirmed on the appeal. *Held*, that the affirmance should not carry damages, as it appeared that part of the judgment was payable in stocks and bonds; that the appellees were directed to execute an indemnifying bond to the executor, which they had not done; and that the executor had taken the appeal in good faith.

Appeal from circuit court, Marion county.

The will of M. S. Shuck appointed R. B. Edmonds executor, and also trustee of the share of testator's estate devised to his daughter, Mrs. McElroy. Mrs. McElroy's interest being a life-estate, with remainder to her children, she and her husband conveyed to the children all her interest. The children

thereupon, claiming that they were entitled to the entire estate relieved of the trust, demanded possession of Edmonds, the trustee, and he refusing to pay over, suit was brought, and a judgment obtained directing him to do so. He appealed from and superseded the judgment; but the judgment was affirmed, *with damages*. For opinion on affirmance see 2 S. W. Rep. 178. The executor, claiming that, under Civil Code Ky. § 764, the affirmance did not properly include damages, moved to quash so much of the mandate as awarded damages. That section provides: "Upon the affirmance of * * * a judgment for the payment of money, the collection of which, in whole or part, has been superseded, * * * ten per cent. damages on the amount superseded shall be awarded against the appellant." The judgment affirmed directed the executor to pay over to the children \$11,857.91, but permitted him to pay part of it, about one-third, in stocks and bonds, and directed them to give a bond of indemnity to the executor to protect him against any claim he might have against Mrs. McElroy.

Rountree & Lisle, for appellant. *Harrison & Belden* and *W. C. McChord*, for appellees.

PRYOR, C. J. On the hearing of this motion the question again arises as to the liability of the appellant for the 10 per cent. damages on the affirmance of the judgment. It must be recollected that here is a trustee who is invested with the legal title in property to be held in trust during the life of another. He might well inquire as to the right of the remainder-man to take the estate from him until the life-estate is gone; and as the instrument under which he held was the subject of judicial consideration, we are not prepared to say (although the decision of the court below would have protected him) that he should be compelled to pay the 10 per cent. damages out of his own pocket; and to pay it out of the fund would not avail the appellees anything, as it is their own money. Besides, a part of this judgment was to be paid or could be paid in stocks and bonds; and the court reserves the power to enforce the judgment by rule or attachment, indicating an intention not to let an execution go on the judgment. Again, the judgment could not be enforced until bond was given. It does not appear that any bond has been given, and therefore no execution could go, even if the appellees' construction of the judgment was proper.

We are satisfied that the 10 per cent. damages allowed was improper.

The mandate is modified, and the 10 per cent. damages disallowed. The appellees are entitled to 6 per cent. on the judgment until the debt is paid them.

LEWIS & MASON CO. TURNPIKE ROAD CO. v. THOMAS.

(Court of Appeals of Kentucky. March 31, 1887.)

1. TURNPIKE COMPANY—CHARTER—TAXATION.

The charter of a turnpike company authorized the company to levy a tax upon adjoining property owners to aid in constructing the road. *Held*, that the company had no right, in the absence of an express charter provision authorizing them to do so, to borrow money in order to complete the road at an earlier date, and charge the interest paid on the loan to the tax-payer, and include it in the tax levied.

2. SAME—RIGHTS OF TAX-PAYER—EQUITY—FRAUD AND MISTAKE.

The tax-payers were entitled to have in equity a statement of the cost of constructing the road and of the amount of taxes collected; and, if it appeared that they had paid more than was due, the company might be compelled to refund. And in such an action it was not necessary to allege mistake on the part of the tax-payer in paying, or fraud on the part of the company in collecting, the tax.

3. SAME—FISCAL AFFAIRS—OFFICERS.

The question as to how the income of the road should be applied, whether to the repair of the old part or to the completion of the new, should be left to the discretion of the president and directors of the company, without any attempt, on the part of the chancellor, to control them in the matter.

Appeal from circuit court, Mason county.

Barbour & Cochran and John G. Hickman, for appellant. *Wm. Lindsay and Willoughby Rodman*, for appellee.

PRYOR, C. J. This is a controversy between certain tax-payers of Lewis county and the Lewis & Mason County Turnpike Road Company. The turnpike road had its beginning in the county of Mason, and extended several miles into the county of Lewis. It seems that each county, or the citizens of each, undertook to furnish the funds necessary to construct the road within its particular boundary; and, with few exceptions, the subscriptions of private stock were applied in that way. There not being money sufficient raised in Lewis to build the road within that county, the turnpike charter was amended, by which the owners of property located within a certain distance of the road on either side were taxed to aid in its completion, or, in the language of the amendment, to equalize the burden and expedite its construction. The taxes were to be collected until the road was finished. That part of the road was four miles, and divided into sections of two miles each; and by the amendment the tax was to be appropriated to building the road where the taxable property was situated; and, when any one section was finished and paid for, then the local tax as to that section ceased. The taxes were collected from time to time, and applied to the construction of the road, when some one or more of the tax-payers, suing in the name of all, filed a petition in equity for a settlement of the accounts, alleging that they had overpaid the amount necessary to construct the road, and asked that the company be enjoined from making any further collections; further, that the chancellor return to them the amount overpaid.

It is established, both from the pleadings and proof, that the taxes collected were sufficient to construct the road when properly applied; but the company says that, in order to have the road constructed at once, it borrowed money at 10 per cent. interest, and, when that interest is discharged, the tax-payers will have been taxed a sum sufficient for its construction; that the purpose of the act was to enable the company to undertake at once the construction of the turnpike, and to do so it became necessary to borrow the money, and, besides that, its completion at an early date gave to the tax-payer a more speedy return from the income of the road.

We find nothing in the amendment to the charter authorizing the company to borrow money, or to pay interest upon money advanced, and then charge the tax-payer with that interest, as being a part of the cost necessary in the construction of the turnpike. The company, by its original charter, was authorized to borrow \$5,000, but no more. That sum had already been obtained, and there was no authority given the corporation to borrow any additional sum at interest for a speedy completion of the road, and thereby increase the burden of taxation on those tax-payers, many of whom were doubtless unwilling tax-payers, although they obtained stock in the road for the taxes paid. But, if voluntary stockholders, there is no power given in the charter to increase this burden; nor do we find any order of the board of directors authorizing this borrowing by the company; and, while the company may be at least equitably bound to pay those who have loaned it money that was applied to the construction of the road, still, as to the tax-payer, the legislature in imposing this tax, and authorizing its collection by the company, or for the construction of the road, has confided no power in the company to collect a greater tax than was necessary to complete the road the distance specified. A certain tax was collected from year to year, and as collected was to be applied to the construction of particular sections. The contracts should have been made so as the funds could have been applied to the payment of the construction as they were collected,—that is, so much of the work to be done each year. But this, as is insisted by appellants, would delay the work and

defeat the purpose for which the amendment was obtained. There is nothing in the amendment to prevent the company from applying its own means to the construction of the road, if it had any, or of obtaining from the legislature the power to borrow this money. The company may be liable to pay this interest, (a question not before us, nor decided,) but it is certain the taxpayer cannot be compelled to pay it.

While the right of the legislature to impose the tax must be conceded, the courts will be careful not to add to the burden by implication. If this road had been built only as the money was collected, no interest would have been due; and the company, desiring the road completed at an earlier date, should pay the interest, and not the tax-payers. This question was, in effect, decided by this court in the case of *Concord & Tollesboro Turnpike Co. v. Montith*, MSS. opinion delivered in November, 1884.

It is insisted by the appellant that there is no averment of fraud or mistake in the collection and payment of this money, and therefore no recovery should be had. The overpayment is distinctly alleged, and the amount necessary to be paid was within the knowledge alone of the appellants. They were proceeding to collect this tax, or have it collected, under the amended charter, with the power to collect as much as would complete the road, and no more. These tax-payers, who were made stockholders, have called upon the company for a settlement, and asked for relief if there had been an overpayment. They were partners in the undertaking, and required to invest only a certain amount of capital; and, if those associated with them have received more than they were entitled to on a settlement, the amount will be adjudged to be refunded. They were required to contribute to a common fund a sum sufficient for a particular purpose. That contribution was collected from them by the process of taxation, and paid over to those who were to use it for that purpose. They want to know the state of the account, and had a right to go into equity to have that statement made, and, if they have paid more to this corporation than they were bound to pay, the corporation should refund it.

The only objection that we perceive to the judgment is that the commissioner reports a balance of \$2,637.50, less amount in hands of James Thomas, the collector, of \$347.52. The chancellor, in rendering his judgment, has given it for the entire sum, without deducting the \$347.52. This was doubtless on the idea that, as it had been collected, (this \$347.52,) it belonged to the company, and, adopting that view of the judgment, it must be affirmed, leaving the company entitled to the \$347.52. We perceive no objection to the suit progressing in the name of James Thomas alone; Walker, one of the tax-payers, having been united in the action with him, but dying before judgment.

Some question has been made as to the right of the directors to apply the income in repairing that portion of the road in Mason, instead of applying it to the construction of the road in Lewis, or in appropriating a certain portion of the profits, at least, to repairing the road in Lewis. That question is left entirely to the discretion of the president and directors. The repairs may be needed on the Mason end of the road to make it fit for travel, and, besides, the chancellor will not undertake to direct those constructing the road as to what part of it shall be repaired, and how the tolls are to be applied for that purpose. This is with the board of directors.

Judgment affirmed.

HARDESTY v. GRAHAM. (Two Cases.)

(Court of Appeals of Kentucky. April 14, 1887.)

ACCORD AND SATISFACTION—OPENING—LACHES.

A., holding a lien note for purchase money due on land, brought suit to enforce the lien against the vendee and against B., who had bought the land from the vendee.

He obtained judgment against A., and for the sale of the land, but afterwards agreed with B., in consideration of the latter executing his note for a certain amount, to dismiss the suit. The suit was accordingly dismissed, the note executed, and paid when it fell due. But six years afterwards A. moved to reinstate the case on the docket, claiming that he had not accepted the note in satisfaction of the judgment, as it was less than was due on the judgment. *Held*, that the agreement was to accept in satisfaction, and was binding upon A., though for less than was due on the judgment, as he thereby obtained the obligation of B., who was not before primarily or personally liable for the debt. Six years after the agreement was made, was too late to raise the claim that the note was not accepted in satisfaction.¹

Appeal from circuit court, Washington county.

W. E. Seecmen and W. P. D. Bush, for appellant. *J. W. S. Clements and Hill & Rives*, for appellee.

PRYOR, C. J. In this case it appears that Margaret Murphy sold the land for which the note for the purchase money was executed to Daniel McCallister, and then assigned the note to the appellee Graham. McCallister sold the land to the appellant Hardesty, the former still owing the purchase money. Graham brought the present action to enforce the lien that had been retained on the land by his assignor Murphy, and obtained a judgment to sell it. Hardesty being indebted to McCallister on account of his purchase some \$523, and being also a party to the action, paid that sum on the original purchase note executed by McCallister to Murphy, and received a credit for that sum by the judgment rendered.

On the eleventh of June, 1877, after the judgment had been rendered, the appellant, Hardesty, executed his note to Graham, the assignee of the original purchase-money note, for the sum of \$124.70, payable in three months, in settlement of the claim of Graham that had been reduced to judgment; and, by the terms of the note and the agreement, when the note was paid, the suit was to be dismissed. The note for \$124.70 was paid by Hardesty; and at the November term, 1877, of the Washington circuit court, in which the action was pending, on the motion of Graham, the case was stricken from the docket.

In the month of March, 1884, the appellee, Graham, upon notice to the appellant, Hardesty, moved to have the case reinstated on the docket, claiming that the amount paid him failed to satisfy the judgment, and asked that the land be sold. The court below reinstated the case, and directed the land to be sold. In response to the motion to reinstate the case, Hardesty set up the agreement under which the suit was dismissed, alleging the payment of the note, and that Graham, on his own motion, had the action stricken off. Graham fails to deny, in his answer to the response of Hardesty, any of the facts alleged, except the statement that he accepted the note as a satisfaction of his judgment. The agreement and note are both filed with the response; and the acceptance of the note, that purports to be a settlement of the judgment, and its payment, is nowhere controverted.

Six years after this had been done, the transaction having been made with the attorney of Graham, and the note and money received by him, he repudiates the settlement in no other manner except to say that it was not a settlement, or accepted as such by him. Hardesty was not the original debtor, or personally liable for the purchase money, but the land he had bought of McCallister was subject to this lien. The right to enforce the lien was contested on various grounds; and, although there was a judgment below, still the facts presented by the defense were such as might well have been the basis of a settlement with one who was not primarily liable, or in any manner personally bound for the debt. After paying what he owed McCallister, Hardesty then gives his individual note, fixing upon himself a personal liability, with a view

¹As to when part payment of an undisputed debt is sufficient to constitute a valid accord and satisfaction, see *Kirchoff v. Voss*, (Tex.) 3 S. W. Rep. 548, and note.

of settling the controversy. There is neither fraud nor mistake alleged, and the note, that Graham admits was paid, shows the true character of the transaction. It is too late after the lapse of six years to make this complaint, and, when made, the merits of the controversy require a judgment for the defendant. When the case was heretofore heard, the condition of the pleadings was not consistent, or the attention of the court called to them.

The judgment is reversed, with directions to dismiss the motion. The appeal from the order overruling the exceptions to the report of sale is dismissed, without prejudice. The report has not been confirmed, and therefore the order is not final.

LUEN v. WILSON.

(Court of Appeals of Kentucky. April 16, 1887.)

1. EJECTMENT—PLEADING—CLAIM OF TITLE UNDER COMMON GRANTOR.

Where both parties to an action of ejectment claim title under the same third party, it is sufficient to show derivation of title from him; and it is not necessary to trace back to commonwealth.

2. CHAMPERTY—CHAMPERTOUS DEED—RESCISSION.

Under Gen. St. c. 11, § 2, which provides that a sale or conveyance of land in the adverse possession of another shall be void, and section 4, which provides that any person in such adverse possession, or the person under whom such occupant claims, may plead the sale or conveyance in bar of any suit or action against him to recover possession or title to the land so held, such a conveyance is valid as against the grantor until rescinded, and he must first rescind the deed before he can maintain an action to recover the land.

Appeal from circuit court, Kenton county.

Ejectment.

J. F. & C. H. Fisk, for appellant. *H. P. Whittaker*, for appellee.

HOLT, J. This action of ejectment was instituted by the appellee, Rothwell Wilson, against the appellant, John Luen, on May 7, 1884, to recover a lot in the city of Covington. The evidence shows that one Hunter conveyed it to Joseph H. and E. Taylor, in 1853, and that the Taylors deeded it to the appellee Wilson on February 10, 1860. The appellant, Luen, held a claim against it for a street improvement; and in 1875 brought an action to enforce his lien, the Taylors alone being defendants to it, and proceeded against as non-residents. A judgment was obtained, the property sold, and purchased by Luen, and on June 14, 1878, it was conveyed to him by a commissioner's deed. The testimony does not manifest, or place beyond all doubt, the identity of the property in contest; but, in our opinion, when considered as a whole it shows that the lot conveyed by the Taylors to Wilson, and described in the petition, is the same as that deeded by the commissioner to Luen, and now claimed by him.

It is urged that the appellee was not entitled to a recovery, because he did not exhibit or trace his title back to the commonwealth. Both parties are, however, claiming under the same third party; and in such a case it is sufficient to show a derivation of the title from him. 2 Greenl. Ev. § 307. It appears that Luen took possession of the property several years before he obtained his commissioner's deed,—possibly so long before that he may have held it for 15 years before this action was brought; and it is therefore claimed that he had a possessory title to it, and was, under the statute of limitations, entitled to hold it. This is not clearly shown by the testimony, however; but, if it were, yet adverse possession is not pleaded, and it is evident, as the jury found in their special verdict, that he took possession merely because he had a lien on it, and with the intention of enforcing it when the owner should appear. Moreover, the bringing of the suit for the enforcement of his lien dissipates this ground of defense, even if it had been set up by pleading. As the Taylors' had parted with the title long before Luen brought his action

to enforce his lien, it, of course, follows that he acquired none by his commissioner's deed.

There is but one other question necessary to be considered. It is fatal, however, to the judgment rendered below. Upon the trial, the appellant offered to introduce in evidence, and for the purpose of defeating a recovery by the appellee, a deed made by the latter on September 17, 1883, to one Patton, to the property in contest, and which had been duly acknowledged and recorded. The court rejected it, and refused to let the appellant show by a witness that it covered the property in dispute. This ruling was doubtless based upon the ground that the deed was champertous, and therefore void. It is true that the appellant was by his evidence, but not by plea, relying upon adverse possession to defeat a recovery; and the testimony already offered tended to show such holding by him at the date of the deed to Patton. By its rejection, however, the court, in effect, decided that Luen was in the adverse possession of the land when it was executed. This was a question for the jury; but aside from this it should not have been rejected. *Prima facie* it passed the title to Patton, and Wilson, when he brought the action, had no right to sue.

It is said, however, that, under the statute, it was absolutely void. It is true that section 2, c. 11, of the General Statutes, provides that all sales or conveyances of land at the time adversely held shall be void; but it must be considered in connection with section 4 of the same chapter, which provides who may prove this in bar of an action. It says: "The person in the adverse possession, according to the provisions in the second and third sections of this chapter, his personal representatives, heirs, or assigns, or the person under whom such occupant claims or holds, his personal representatives, heirs, or assigns, may give in evidence under the general issue or may plead the sale or purchase of any pretended right or title in violation of the second section of this chapter, or any contract or agreement made in violation of the third section of this chapter, in bar of any suit or action against them, to recover the possession or title to the land so held." Here, Patton is not suing for the property, but the grantor in the deed to him; and when the defendant offers it in evidence to defeat a recovery, the grantor, and not the party in possession, says it is champertous, and therefore void and inadmissible as testimony. The party in the adverse possession does not offer it as showing a champertous sale; but when it appears from it that the plaintiff has no title, he says that it is champertous, and it cannot therefore affect me.

It has been held by this court in more than one case that, if one who has previously sold land to another seeks to recover it, he cannot maintain his action upon the ground that the sale was champertous. The champertous contract must be abandoned or rescinded in good faith before he brings his action. *Hobson v. Hendrick*, MSS. opinion, November 12, 1885; *Harman v. Brewster*, 7 Bush. 355.

In the case now before us, there is nothing showing that this had been done. In fact it is not so contended.

Wilson cannot prosecute the action for the benefit of Patton. In such case the appellant can rely upon the still existing champertous contract. The law of champerty was intended as a shield to the possession, and not as a weapon of offense; as a defense to the remedy sought by a plaintiff; and a grantor, after he has conveyed property adversely held, cannot, without first rescinding or abandoning the contract in good faith, be heard to say that it was champertous, and it cannot therefore affect me. This is the right of the occupant; and his protection was clearly the aim of the statute.

It results that the lower court erred in rejecting as evidence, upon behalf of the appellant, the deed to Patton and the testimony showing that it covered the lot in contest; and the judgment is reversed, with directions to grant a new trial, and for further proceedings consistent with this opinion.

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NOTE. A star (*) indicates that the case referred to is annotated.

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account rendered by the vendor, addressed to another member of the firm, *held*, this constituted an account stated.—*Heidenheimer v. Ellis*, (Tex.) 666.

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ALIENS.

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ALTERATION OF INSTRUMENTS.

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Official bond.

2. Where a bond or other obligation has been altered materially by the principal by the erasure of the name of one of the sureties, it is void as to all the obligors who had no knowledge of it, or did not consent to the alteration, and had not ratified the bond in its altered shape.—*State v. Churchill, (Ark.) 852.**

3. The bond of a state treasurer, signed by the governor of the state as one of the sureties, was materially altered by erasure of the name of one of the sureties. Upon presentation of the bond to the governor himself for approval, he observed the erasure, but his attention was not particularly called to it; neither did he ratify or assent to the alteration. *Held*, that his mere approval of the bond in his official character did not operate as an assent to its alteration in his private character, so as to except him from the release inuring to the benefit of other sureties.—*Id.*

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- II. REQUISITES.
- III. PRACTICE.
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I. APPELLATE JURISDICTION.

When appeal lies.

1. Under Rev. St. Tex. art. 1380, providing that an appeal or writ of error may be taken to the supreme court from every final judgment of the district court in civil cases, *held* that, although a complainant voluntarily dismisses his bill upon the dissolution of his preliminary injunction, he may afterwards prosecute an appeal from the order of dissolution; and, upon executing *supersedes*, the injunction will be continued in force pending the appeal, and defendant disobeying it may be punished for contempt.—*Gulf C. & S. F. Ry. Co. v. Fort Worth & N. O. Ry. Co., (Tex.) 564.*

Appeal from justices' courts.

2. Rev. St. Tex. art. 1573, provides that, in a suit in a justice's court, a brief statement of the pleadings shall be noted on the docket, and article 1640 further provides that, when an appeal is taken from a justice's court to the district court, the justice shall make out a true copy of all the entries on his docket in the cause, and certify the same, with the original papers in the case, to the clerk of the district court. *Held*, on appeal in a cause originating in a justice's court, that the cause of action must appear from the entries made on the justice's docket, from the pleadings filed in the case, if any, or from an agreed case, as the district court can pass on no other case than the one tried in the justice's court; nor can the supreme court review the action of the district court unless the issues appear from the transcript in some of these methods.—*Maass v. Solinsky, (Tex.) 289.*

3. Under a statute which makes the judgment of a justice of the peace final where the amount in controversy is less than \$20, such a judgment cannot be reviewed by means of an application to a superior court for an injunction restraining the enforcement of the judgment, when it appears that every defense which the applicant for the injunction had the right to urge might have been proved in the suit in the justice's court.—*Odum v. McMahon, (Tex.) 286.*

4. Three cases were pending in a justice's court, all instituted by the same plaintiff, but against different defendants. One of the actions was tried and appealed to the district court. A stipulation was entered into by the parties in the other cases that

they would abide the result of the case appealed, and the same judgment should be rendered by the district court as had been given in the case appealed. *Held*, that the district court, having no original jurisdiction in the subject-matter, could not obtain jurisdiction by consent, but only by appeal.—*Woodruff v. Bass*, (Tex.) 48.

II. REQUISITES.

Time of taking.

5. Mansf. Dig. Ark. § 4185, provides that an appeal from the judgment of a justice of the peace to the circuit court must be "within 30 days after the judgment was rendered, and not thereafter." *Held*, that the pendency of a motion for a new trial does not enlarge the time.—*Scott v. Meyer*, (Ark.) 888.

Appeal-bond.

6. A., having appealed from a judgment rendered against him, died before the expiration of the 20 days allowed for executing an appeal-bond, without having executed the bond. *Held*, that his administrator, who was not appointed until after the expiration of the 20 days, could not pursue the appeal by thereafter executing the bond, notwithstanding Rev. St. Tex. art. 1408, allows an administrator to prosecute an appeal without giving bond. That article applies only to appeals taken by the administrator after his appointment.—*Hanlon v. Silk*, (Tex.) 290.

Liability of sureties.

7. In order to hold the sureties on *superseas* bond bound for the payment of the judgment superseded and affirmed on appeal, it is not necessary that the court, upon affirming, should award the 10 per cent. damages allowed by Civil Code Ky. § 764, which provides that, upon the affirmation or dismissal of an appeal from a judgment for the payment of money, the collection of which has been superseded, 10 per cent. damages on the amount superseded shall be awarded against the appellant.—*Gilpin v. Hord*, (Ky.) 148.

8. A judgment having been obtained against several jointly, they all appealed from it, and all superseded it by the execution of a *superseas* bond. The judgment was afterwards reversed as to all but one. *Held*, that this did not release the obligors on the *superseas* bond, even though the appellant, as to whom the judgment was affirmed, was insolvent.—*Id.*

III. PRACTICE.

Stipulations.

9. The submission of an appeal upon an agreement in writing, signed by the counsel for each party, expressly waiving all but a certain question or questions in the case, is binding upon the parties as to

all questions so waived.—*Downes v. State*, (Tex.) 242.

Assignment of error.

10. An assignment of error that, upon the evidence adduced on the trial, judgment should have been for plaintiff, is too general to be considered on appeal.—*Boehm v. Calisch*, (Tex.) 238.

11. An assignment of error that the court erred in each and every finding of fact, because said findings "are not just and fair conclusions from the evidence in the case," is too general, and will not be regarded.—*Richardson v. Levi*, (Tex.) 444.

12. An assignment of error that "the court erred in refusing to give the jury the special charge No. 2 asked by defendant," lacks the precision demanded by the rules of the Texas supreme court, where the charge asked embraced four distinct instructions, each involving a separate proposition, and not necessarily related to each other, and will not be considered on appeal.—*Cannon v. Cannon*, (Tex.) 86.

13. Where three several special exceptions are taken which set up two separate, distinct, and independent objections to the petition in the suit, an assignment of error as follows: "The court erred in not sustaining defendant's special exceptions to plaintiff's supplemental petition filed November 6, 1886,"—fails to show the error relied on with the precision required by the rules of the supreme court of Texas, and will not be considered on appeal.—*Id.*

14. Assignments of error which object to the judgment on the ground that it is not supported by the evidence, and is not in accordance with the allegations of the plea in reconvention, without stating in what respect the evidence is insufficient to support the plea, nor pointing out the variance between the allegations of the plea and the evidence introduced in support of it, are too general, and will not be considered.—*Garcia v. Gray*, (Tex.) 42.

Transcript—Time of filing.

15. Under the rules of the supreme court of Texas, no statement of facts in the record of a suit which appears to have been filed more than 10 days after the adjournment of the court can be considered or reviewed.—*Berryman v. Schumacher*, (Tex.) 46.

Statement of facts.

16. The failure of the trial judge to sign the statement of facts agreed upon by both parties to the case, or to sign and file with the clerk a statement of the facts compiled by himself, as required by Rev. St. Tex. art. 1378, deprives the appellant of a statement of facts without fault on his part, and is reversible error.—*Sara v. State*, (Tex.) 839.

Transcript—Sufficiency.

17. Where the bill of exceptions fails to set out sufficiently the facts alleged in an application for a continuance, and the record brings up no such application, the action of the trial court cannot be revised by the appellate court.—*Cooper v. State*, (Tex.) 884.

IV. REVIEW ON APPEAL.**Rulings on evidence.**

18. A party complaining of the rejection of evidence must show what the rejected evidence was, in order that the court may determine upon review whether he was injured by the rejection.—*Pennington v. McQueen*, (Tex.) 815.

19. *General* objections and exceptions to the rulings of the trial court upon the admission or exclusion of evidence cannot be reviewed on appeal. The objections should show the *specific* grounds upon which they are made.—*Peck v. Chouteau*, (Mo.) 577.

20. The ruling of the trial court, in refusing to allow a witness to answer questions put to him, cannot be reviewed, on appeal, where the record does not disclose that the answer expected of the witness would have been material to the issue in the case.—*Kraxberger v. Rolter*, (Mo.) 872.

21. Where the finding of the lower court rests largely upon the credence to be given to a particular witness, the judgment of the chancellor, who heard the witness face to face upon the matter, will be deferred to upon appeal.—*Cox v. Cox*, (Mo.) 585.

22. Where evidence is excluded by a chancellor in Tennessee, his action can only be reviewed in the supreme court by a bill of exceptions.—*Steele v. Friarson*, (Tenn.) 649.

23. Unless the bill of exceptions shows what the appellant expected to prove by the witness in answer to a question, the ruling of the lower court in excluding the question cannot be revised on appeal.—*Tucker v. Smith*, (Tex.) 671.

Sufficiency of evidence.

24. It is the peculiar province of the jury to reconcile conflicts and inconsistencies in the evidence adduced before them, and their finding will not be disturbed by this court, if the evidence, though improbable, is sufficient to support the verdict.—*Stout v. State*, (Tex.) 281.

25. If the fact appears upon appeal that the trial judge, although refusing to set aside the verdict, thought that it was against the preponderance of evidence, the judgment will be reversed on appeal.—*Turner v. Turner*, (Tenn.) 121.

Sufficiency of petition.

26. In Kentucky the action of the trial court in overruling a demurrer to the peti-

tion need not be made a ground for new trial, in order to enable the court of appeals to determine the sufficiency of the petition.—*Bogenschutz v. Smith*, (Ky.) 800.

Objections must be raised below.

27. An objection not taken below to a paper offered in evidence cannot be taken for the first time on appeal.—*Cannon v. Cannon*, (Tex.) 86.

28. Exception to the ruling of the lower court in excluding or admitting evidence cannot be made for the first time on appeal.—*McFaddin v. Prater*, (Tex.) 806.

29. Where, in an action to recover an undivided half interest in personal property and damages, in which the petition does not allege who is the owner of the other interest, no plea in abatement or exception raising the question of proper parties is filed, and judgment is rendered for plaintiff, the defendant cannot, on appeal, obtain a reversal of the judgment for the non-joinder of the co-owner.—*Hill v. Neuman*, (Tex.) 271.

Presumptions in favor of trial court.

30. Where, in the settlement of a guardianship account, the court below finds that but few, if any, of the claims paid by the guardian had been established before payment, an appellate court will, where no vouchers appear in the statement of facts, conclude the finding to be correct.—*Jones v. Parker*, (Tex.) 222.

31. Before a judgment can be reversed because of the admission of immaterial evidence, it must clearly appear that the evidence was immaterial. The presumption is in favor of the ruling of the court.—*Peck v. Chouteau*, (Mo.) 577.

32. Under Gen. St. Ky. c. 39, art. 1, § 4, providing that the county court may require bond with surety of an executor, although the will directs otherwise, if from the knowledge of the court, or upon motion of some one interested, "it may appear proper to require the bond," *held*, upon appeal to the circuit court from an order of the county court requiring the bond notwithstanding the provision of the will, it should be presumed, in the absence of evidence to the contrary, that the county court had cause to require the bond, and the order requiring it should not be reversed unless it affirmatively appeared that the court acted capriciously.—*Grigsby v. Cocke's Ex'r*, (Ky.) 418.

Harmless error.

33. An erroneous instruction in relation to the consideration of an alleged agreement, where there was no evidence tending to establish such agreement, does not affect the merits of the action, within the meaning of Rev. St. Mo. § 8775, which provides that the supreme court shall not re-

verse the judgment of any court unless it shall believe that error was committed by such court materially affecting the merits of the action.—*Valle v. Picton*, (Mo.) 860.

V. DECISION.

Final determination on appeal.

34. Where the assets of an estate have all been converted into money, and all debts paid, and there is no necessity for further proceedings in the administration, a court of chancery, in proceedings to open the administrator's account and for further accounting, will retain the cause for final adjustment, instead of certifying its conclusions and corrections down to the probate court.—*Sorrels v. Trantham*, (Ark.) 198.

Damages.

35. Civil Code Ky. § 764, provides that, "upon affirmance of * * * a judgment for the payment of money, the collection of which * * * has been superseded, * * * ten per cent. damages on the amount superseded shall be awarded against the appellant;" but this does not apply to the affirmance of a judgment against an executor, when it appears that part of the judgment was payable in stocks and bonds; that the appellees were directed to execute an indemnifying bond to the executor, which they had not done; and that the executor had taken the appeal in good faith.—*Shuck's Ex'r v. McElroy*, (Ky.) 906.

APPEARANCE.

What constitutes.

1. Where a party moves to quash process, and the motion is sustained, this is equivalent to an entry of appearance by such party.—*Rabb v. Rogers*, (Tex.) 808.

2. Under Rev. St. Tex. art. 1243, providing that, if the citation or service is quashed upon motion of the defendant, he shall be deemed to have entered his appearance to the succeeding term of the court, whenever a defendant appears and moves to quash the service he is considered as having appeared to the merits at the next term, whether his motion be sustained or overruled.—*Central & M. R. Co. v. Morris*, (Tex.) 457.

ARBITRATION AND AWARD.

See, also, *Contracts*, 2; *Reference*, 2.

Oath.

1. If the parties to an arbitration waive the swearing of arbitrators and witnesses, the award cannot afterwards be assailed on the ground they were not sworn; and such waiver may be either express, or inferred from surrounding circumstances.—*Cochran v. Bartle*, (Mo.) 854.

2. In case of such waiver, it is immaterial that the party making waiver did not know that the statute required an oath, it not appearing that his action would have been otherwise had he known of the statutory requirement.—*Id.*

Award.

3. An award need not state in words and figures the precise amount to be paid, if nothing remains to be done in order to render it certain and final but mere mathematical calculations. So, where the accounts of partners were referred to arbitrators to determine the amount due each, and to settle whether one of the partners should be charged with any part of the losses, and the award decides merely that plaintiff is not to be charged with any part of the losses, and that, with that exception, the accounts are to stand as on the books, the award was sufficiently definite and enforceable.—*Id.*

Confirmation.

4. An award of arbitrators, such as is contemplated by chapter 4, Rev. St. Mo., relative to arbitrations, is not subject to confirmation by the court, unless a copy thereof, together with a notice in writing of the motion to confirm, is served upon the opposite party at least 15 days before filing the award and motion in the proper court, as required by section 884, Rev. St. Mo.—*Springfield & S. Ry. Co. v. Calkins*, (Mo.) 82.

Presumption in favor of.

5. An award will not be set aside for any mistake of law or fact not appearing on its face; so, while a communion of profits between partners implies a communion of losses, yet, as partners may agree between themselves that one of them shall not be charged with losses, it will be presumed that the above award, relieving the plaintiff from liability for losses, was made upon the evidence of such an agreement.—*Cochran v. Bartle*, (Mo.) 854.

Arrest.

Homicide in effecting, see *Homicide*, 42.

ASSAULT AND BATTERY.

See, also, *Damages*, 11.

Conviction, bar to indictment for homicide, see *Criminal Practice*, 9.

Rape, assault with intent to commit, see *Rape*, 2.

Verdict in prosecution for assault with intent to kill, see *Criminal Practice*, 44.

Assault to commit rape.

1. *Threats*, unaccompanied by force, as a means resorted to to obtain sexual intercourse with a female, will not support a

conviction for assault to rape, and will authorize only a conviction for attempt to rape.—*Taylor v. State, (Tex.) 753.*

Assault with intent to kill.

2. On an indictment for an assault with intent to kill, an instruction to the effect that if defendant feloniously shot at a third party with the intention of killing him, and, missing him, shot deceased, he was guilty, is correct.—*State v. Montgomery, (Mo.) 379.*

Aggravated assault.

3. An assault with a knife is not necessarily an aggravated assault; and a charge which declares such an assault, without any qualification whatever, to be an aggravated assault, is misleading.—*Warren v. State, (Tex.) 240.*

Self-defense.

4. Where the defendant is indicted for an assault with a knife, if he went upon the premises of B., the person assaulted, without the intent to injure B. or his property, and with B.'s consent, he was not a trespasser; and if defendant cut B., but B. was attacking defendant at the time, or had done some act showing an immediate intent on his part to attack defendant, and such attack or the acts of B. done at the time produced in defendant a reasonable expectation or fear of death or some serious bodily injury, defendant was justified in cutting B., and it made no difference whether such danger was real or imaginary, if it had the appearance to defendant of being real, and if he acted on such belief or apparent danger.—*Warren v. State, (Tex.) 240.*

5. A *deadly* assault is not named in the statute prescribing the rules governing self-defense; and, where there is evidence calling for an instruction on the law of self-defense, it is error to give an instruction only defining the right to protect one's self from a *deadly* assault, especially when what is meant by that term is not explained to the jury.—*Id.*

ASSIGNMENT.

See *Assignment for Benefit of Creditors.*

Partnership, assignment of individual interest, see *Partnership, 7.*

Heir's expectancy.

1. An heir's expectancy is assignable in equity. The interest assigned is subject to be charged with legal advancements made to the heir during the life-time of the ancestor, but not with debts due from him to the ancestor.—*Steele v. Friarson, (Tenn.) 649.*

Pro tanto of chose in action.

2. An assignment of part of a chose in action is good in equity, and may be made

either by direct transfer, or by order upon a particular fund.—*Campbell v. Hildebrandt, (Tex.) 243.*

3. An order for \$800, in favor of M. & Co., drawn by a contractor having a claim against a county for \$898, directed "to the county commissioners," payable out of the amount due him for putting blinds in the court-house, and containing a recital that a part of his claim, sufficient to pay the amount of his order, was thereby transferred to M. & Co. for a valuable consideration, is a valid assignment in equity of the claim itself *pro tanto*, and operates to make the assignees the owners of the part of the debt so assigned, at and from the date of the order.—*Id.**

4. But a simple order upon the county judge for \$150 is not a valid assignment *pro tanto* of the claim itself, although supported by a valuable consideration; there being nothing in the order to show that it was made payable out of any particular funds.—*Id.**

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Discharge of claims, see, also, *Trusts, 8.*
Rights of creditors, see *Landlord and Tenant, 7.*

Validity.

1. A., having made a secret conveyance of his interest in an insolvent partnership to B., a creditor, C., his copartner, upon learning of the transfer, took B. in, and continued the business with him, without notifying creditors of the change. *Held*, that an assignment afterwards made as the act and deed of the new firm, and for the benefit of its creditors, was fraudulent and void as to the creditors of the old firm.—*Cleveland v. Battle, (Tex.) 681.*

2. An assignment by partners for the benefit of creditors, which exacts releases of accepting creditors, is valid only when it conveys all the firm and individual property not exempt.—*Id.**

Preferences.

3. In the absence of legislation forbidding it, a debtor, even though insolvent at the time, may convey his property so as to give one creditor a preference over another.—*Scott v. McDaniel, (Tex.) 291.**

4. In such a case, a conveyance of property in trust to sell and pay off certain enumerated debts, is, in effect, a mortgage, with power of sale, and not an assignment; and any residue that might remain after payment of the preferred or enumerated debts, would be subject to the claims of creditors generally, although not specially so provided in the conveyance, and might be reached by any appropriate process;

but, until it has been determined by the payment of the enumerated debts that there is a residue, the trustee under the deed is entitled to the possession of the property, and it cannot be taken from him by the levy of an attachment or other writ.—*Id.*

Effect.

5. A deed of assignment for the benefit of creditors divests the assignor of title, and the Kentucky act of March 8, 1876, requiring the assignee to take an oath and execute bond, does not alter the rule, but is intended only as a security to those interested in the estate.—*Petry v. Randolph*, (Ky.) 420.

Assignee.

6. The trust conferred upon an assignee under an assignment for the benefit of creditors is personal, and does not, upon his death, pass to his widow as successor to the trust; and so, where a suit is pending at the time of his death between him and a creditor claiming adversely to the deed of assignment, the widow is not entitled to be substituted, and to prosecute the suit as his successor.—*Woessner v. Crank*, (Tex.) 818.

ATTACHMENT.

Chattel mortgage, validity of, see *Chattel Mortgage*, 2.

Conditional sale, attachment of property, see *Sale*, 5.

Intervening claimant, bond by, see *Estoppel*, 5.

What subject to.

1. No lien is acquired upon an equitable interest in land arising from a title-bond, by a levy of attachment, or by a decree in a suit to which the holders of the legal title are not parties.—*Blackburn v. Clarke*, (Tenn.) 505.

Priority.

2. Where a debtor executes a chattel mortgage to secure an actual indebtedness to a creditor, and subsequently delivers possession of the goods to the mortgagee under a written agreement reciting the mortgage, and the mortgagee takes actual possession prior to the levy of an attachment, and continues to hold possession up to the time of the levy, he will be preferred, in the absence of fraud, to the subsequent attaching creditor, although the mortgage covers after-acquired property.—*Petring v. Heer Dry-Goods Co.*, (Mo.) 405.

ATTORNEY AND CLIENT.

Authority to file information, see *Quo Warranto*, 8.

Malicious prosecution, liability for, see *Malicious Prosecution*, 1.
Privileged communications, see *Witness*.

Authority of attorney.

1. An attorney has implied authority to dismiss a suit.—*Davis v. Hall*, (Mo.) 882.*

2. Power given by statute to a party to dismiss a suit in vacation may be exercised by his attorney.—*Id.*

3. A motion to dismiss on the ground that the suit has been instituted by an attorney at law "without the knowledge, sanction, or authority of the plaintiff, and against her wishes," cannot be sustained when the presumption of authority is opposed only by the affidavit, on mere belief of the defendant, which fails to state specific facts from which the court itself might be induced to doubt such authority.—*Valle v. Picton*, (Mo.) 860.*

Attorney's lien for services.

4. If, in a suit brought by a judgment debtor, an execution sale previously made is set aside upon condition of plaintiff's satisfying the judgment, plaintiff's attorney can have no lien for fees on the land recovered which will take precedence of defendant's right to have his judgment satisfied.—*Blackburn v. Clarke*, (Tenn.) 505.

Autrefois Acquit.

See *Criminal Practice*, 9-12.

BAIL.

When allowed.

1. The fact that a single trial of an accused for murder resulted in the disagreement of the jury will not authorize the refusal of bail; and the failure of the proof to establish satisfactorily a killing upon express malice, entitles the applicant to bail.—*Ex parte England*, (Tex.) 714.

2. Upon application of defendants, charged with murder of an infant, to be admitted to bail, evidence tended to show that the infant had died of disorders induced by unwholesome nourishment, but there was no positive testimony that starvation willfully induced was the cause of death. *Held*, that they should be admitted to bail.—*Ex parte O'Conner*, (Tex.) 840.

3. Upon application for bail by one charged with murder, the evidence showed that a state of bad feeling had existed for some time between deceased and accused, but there was no direct evidence to connect accused with the killing. Circumstantial evidence tended to show that the paper wadding used in the gun which killed deceased fitted into paper found at accused's house. On the other hand, evi-

dence tended to show motives in another than accused for the crime. *Held*, that he was entitled to bail.—*Ex parte Kunde*, (Tex.) 832.

Forfeiture.

4. Upon a forfeiture taken upon a bail-bond, a judgment *nisi* was rendered against the surety, one Atanacio Vidauri, and a citation upon said judgment for Atanacio Vidauri was returned by the sheriff executed upon Rafael Vidauri. *Held*, that the judgment was void, in the absence of proof that Rafael and Atanacio Vidauri were the same person.—*Vidauri v. State*, (Tex.) 847.

5. Recognizance which recites the principal's obligation to the state in a fixed sum, but does not bind him to appear before the court at a fixed time, and which binds only the surety for the appearance, is *per se* invalid, and is illegal, in that it is more onerous on the surety than the law requires.—*Wright v. State*, (Tex.) 846.

6. In Texas, an indictment presented by a body of 14 persons assuming to act as a grand jury is void, and a judgment upon the forfeited recognizance of the person indicted is a nullity.—*Harrell v. State*, (Tex.) 479.

BANKRUPTCY.

See, also, *Assignment for Benefit of Creditors*.

Jurisdiction of claims, see *Courts*, 1.

Revival of debt after, see *Contract*, 8.

Composition.

1. A composition in bankruptcy is no defense to an action on the original indebtedness after breach of the agreement on the part of the bankrupt. So held in the case of an action brought by a creditor who did not assent to the composition, and where the composition agreement provided that a failure by the bankrupt to perform should, "at the option of the creditor, work a release of his acceptance thereof."—*Pubke v. Churchill*, (Mo.) 829.

2. The summary proceeding in the bankrupt court, provided by the statute, for the enforcement of a composition in bankruptcy, is cumulative, not exclusive.—*Id.*

Discharge.

3. In pleading a discharge in bankruptcy as a bar to an action of debt, it is not necessary to allege that the court granting such discharge had jurisdiction, or to state facts showing that it had such jurisdiction.—*Reidhar v. Pfeiffer*, (Ky.) 8.

BANKS AND BANKING.

Custom as affecting liability, see *Custom and Usage*, 8.

Ratification of cashier's unauthorized act, see *Principal and Agent*, 1.

Taxation of bank stock, see *Taxation*, 6.

Trust funds, deposit of, see *Trusts*, 10, 11.

Collections.

1. Where a bank indorses a draft for collection to another bank, which bank, in turn, indorses it also for collection to a third bank, and that bank collects it, *held*, it cannot apply the proceeds to a debt due it by the second or intermediate bank, that bank having become insolvent, but the proceeds belong to the bank first making the indorsement, the restrictive indorsements giving notice of such ownership to the collecting bank. It is not a question of agency as to which bank the collecting bank is agent of, but the rights of the parties are determined by the fact that the collecting bank knowing, from the indorsements, to which bank it belonged, is liable as a trustee, to such owner, for the proceeds.—*City Bank v. Weiss*, (Tex.) 299.

Change of organization.

2. Where an insolvent banking corporation transfers all its assets, including its name and franchise, to a new association, under an agreement by which the latter is to pay a composition agreed on by the former with most of its creditors, but is to be repaid any amount in excess of the composition rate, which it may be obliged to pay to the non-assenting creditors, and such new association assumes the name of and carries on a banking business in the office theretofore occupied by the old association, and claims its franchise and uses its seal, there is a mere change of membership, and not a new corporation; and the new organization is liable to creditors who did not accept the composition.—*Island City Sav. Bank v. Sachtleben*, (Tex.) 738.

National banks—Contracts by.

3. Where one sells bonds to a national bank at a certain price, the bank agreeing to resell the bonds to the vendor at the same price or less, but, the bonds subsequently appreciating in value, the bank refused to resell them, *held*, in a suit by the vendor for the breach of contract, the bank cannot escape liability by setting up that it had no authority, under the national bank act, to buy the bonds, as it might have discharged its obligation by returning the bonds, and receiving back the purchase money; and to permit it to retain the bonds would be to allow it to profit by its own violation of the act.—*Logan Co. Nat. Bank v. Townsend*, (Ky.) 123.

Usury.

4. The right of action against a national bank for collecting usurious interest, given by Rev. St. U. S. § 5198, to the person paying it "or his legal representatives," is not

available to a judgment creditor of such person. *TURNER, J.*, dissenting.—*Barret v. Shelbyville Nat. Bank, (Tenn.)* 117.

BASTARDY.

Legitimation.

Gen. St. Ky. c. 81, § 6, providing that if a man, having had a child by a woman, shall afterwards marry her, such child, or its descendants, if recognized by him before or after marriage, shall be deemed legitimate, does not apply to children of a married man begotten and born of another woman than his wife during his wife's life.—*Sams v. Sams' Adm'r, (Ky.)* 598.

Bawdy-House.

See *Disorderly House*.

Double conviction under state law and city charter, see *Criminal Practice*, 11.

Bills of Exchange.

See *Negotiable Instruments*.

Bona Fides.

Of purchasers, see *Vendor and Vendee*, 8, 4.

BONDS.

See *Appeal*, 6, 7; *Assignment for Benefit of Creditors*, 5; *Executors and Administrators*, 8; *Principal and Surety*.

Alteration of signature, see *Alteration of Instruments*, 2.

Joint bonds, see *Appeal*, 85.

Judgment on appeal-bond, amendment of, see *Judgment*, 5.

Official bond, alteration of, see *Alteration of Instruments*, 8.

Surety, discharge of, by notice to sue, see *Principal and Surety*, 4.

—prosecution of claim-bond by, see *Principal and Surety*, 6.

Equity jurisdiction of suit upon.

1. A suit for breach of an official bond is within equity jurisdiction, if it involves the adjustment of difficult accounts between the state and the official, without regard to the singleness or mutuality of the same.—*State v. Churchill, (Ark.)* 852.

2. Where the treasurer of a state keeps the accounts of the state against himself, and his own, at the same time, against the state, he may, in the sense of the legal expression, be said to have kept "mutual accounts."—*Id.*

Boundaries.

See *Surveys and Surveyors*, 2.

Evidence as to, see *Evidence*, 5.

Misrepresentations as to, no bar to plea of statute of limitations, see *Limitation of Actions*, 14.

Uncertain boundary, see *Grant*, 1.

BREACH OF MARRIAGE PROMISE.

Waiver of right of action.

In an action for breach of promise, defendant relied upon the act of plaintiff in returning to him the engagement ring when he told her he no longer loved her, and would not marry her. *Held*, that such act did not constitute a waiver or release on plaintiff's part of her right of action for the breach.—*Kraxberger v. Roiter, (Mo.)* 872.

BREACH OF THE PEACE.

Public place.

It is no defense to an indictment under the Texas statute for disturbing the peace by cursing and swearing, and by displaying a knife in an angry and threatening manner in a private house, that at the time the offense was committed the house was thrown open to guests invited to a wedding. Such use of a private residence does not make it a public place.—*Terry v. State, (Tex.)* 477.

BURGLARY.

Larceny, conviction of, as bar to indictment, see *Constitutional Law*, 11.

Indictment.

1. An indictment need not allege the want of the owner's consent to the entry of the house.—*Smith v. State, (Tex.)* 288.

2. It is not essential to the sufficiency of an indictment for burglary with intent to commit larceny that it shall describe the property intended to be stolen.—*Neiderluck v. State, (Tex.)* 578.

By servant.

3. A domestic servant, conspiring with those who are not servants, may be guilty of burglary, though the breaking be not actual, and such as, if committed by the servant acting alone, would, under Pen. Code Tex. art. 714, not be burglarious.—*Neiderluck v. State, (Tex.)* 578.

4. Under Pen. Code Tex. art. 714, an actual breaking is an essential prerequisite to the burglary by a domestic of his master's premises; and the lifting from the outside of a latch on a back door, through a crevice, is not such actual breaking.—*Id.*

5. Where, on the trial of an indictment for burglary by force, threats, and fraud, the evidence shows that two of the persons indicted were let into the premises by the servant of the owner, who was their co-conspirator, there is an absolute failure of an entry by fraud, and a charge which is so framed as to hinge the guilt of the accused upon an entry effected by fraud, ignoring force and threats altogether, is erroneous.—*Id.*

Employment of child.

6. Under Pen. Code Tex. art. 77, providing that whoever, "by employing a child or other person who cannot be punished to commit an offense, * * * or by any other indirect means causes another to receive an injury to his person or property, becomes a principal;" those who conspire with a servant to admit them to his master's premises, so that they may commit robbery, are guilty of burglary, although the servant makes only a constructive breaking, which would not be burglary if he alone were concerned.—*Neiderluck v. State*, (Tex.) 578.

"Breaking."

7. Upon trial of an indictment for burglary, the evidence showed an entry at 8 A. M., through a window which defendant raised. *Held*, that there was no evidence to sustain a conviction.—*Levine v. State*, (Tex.) 660.

CANALS.

Conditional toll franchise.

A franchise of collecting tolls on all freight passing over a certain channel granted to the city of Corpus Christi was transferred by the city to plaintiffs upon certain considerations, among them that of keeping the channel of a certain width and depth, throughout its entire length, as required by the laws of the state. There was evidence to show that during the entire month of May, 1881, the channel was not of the requisite depth and width, for its whole length; and that the city council, after having given notice to plaintiffs to restore it to its contract dimensions, passed an ordinance suspending the collecting of tolls till the channel should be restored, and that the order was in force during that month. *Held*, in a suit by plaintiffs to recover tolls on freight transported during the month of May, 1881, that, as they had failed to keep the channel of the depth and width required by the state and their contract with the city, they were not entitled to maintain the suit.—*Morris v. The Schooner Leona*, (Tex.) 281.

CARRIERS.

See *Railroad Companies*.

Contract for carriage of live-stock, see *Contract*, 1.

—limiting liability, see *Telegraph Companies*, 1.

Damages for delay in transportation, see *Damages*, 6-8.

Railroads, regulation of freight charges, see *Railroad Companies*, 4.

Refusal to carry, see *Railroad Companies*, 1.

Care of passengers.

1. A railroad company is bound to protect all passengers on its trains from oppression, fraud, malice, insult, or other willful misconduct on the part of those in charge of the train, and to protect female passengers from obscenity, immodest conduct, or wanton approach, but not from "indecorous" conduct.—*Louisville & N. R. Co. v. Ballard*, (Ky.) 580.

Refusal to carry goods.

2. In an action against a railroad to recover damages for its refusal to transport plaintiff's lumber, it is not necessary to allege what place the lumber was tendered for transportation to, or its market value at such place, had it been transported by the railroad, the action being, not for failure to carry one specific lot of lumber, but plaintiff's lumber generally.—*Central & M. R. Co. v. Morris*, (Tex.) 457.

Limiting liability.

3. A condition in a bill of lading providing that the carrier's liability shall cease upon delivery to the consignee or carrier over whose connecting line the freight is to be shipped, is valid.—*T. & P. R. Co. v. Rogers*, (Tenn.) 660.*

CARRYING WEAPONS.

Brass knuckles.

1. Knuckles made of steel are within the meaning of the term "brass knuckles," in Pen. Code Tex. Art. 318; and where an information under that section charges the carrying of brass knuckles, and the proof establishes the carrying of steel knuckles, there is no variance.—*Harris v. State*, (Tex.) 477.

Journey.

2. The Tennessee act of 1870, (2d Sess. c. 18, § 8,) carried into Thomp. & S. Code, § 4759d, exempting from the provisions of the statute prohibiting the carrying of concealed weapons a person on a journey out of his county or state, was repealed by Acts 1879, c. 186, and it is not a defense to a prosecution for carrying a pistol that the defendant was on a journey out of his county or state.—*Poe v. State*, (Tenn.) 698.

CHAMPERTY.

Champerious deed.

Under Gen. St. Ky. c. 11, § 2, which provides that a sale or conveyance of land in the adverse possession of another shall be void, and section 4, which provides that any person in such adverse possession, or the person under whom such occupant claims, may plead the sale or conveyance in bar of any suit or action against him to recover possession or title to the land so held, such a conveyance is valid as against the grantor until rescinded, and he must first rescind the deed before he can maintain an action to recover the land.—*Luen v. Wilson*, (Ky.) 911.

CHARITIES.

Certainty.

A bequest as follows: "I direct said Willson [the executor] to divide said remainder among such charitable institutions in the city of St. Louis, Mo., as he shall deem worthy,"—is sufficiently definite, and will be carried into effect.—*Howe v. Wilson*, (Mo.) 890.

CHATTEL MORTGAGES.

Validity, see *Attachment*, 2.

Validity.

1. A stipulation in a chattel mortgage that the mortgagor shall remain in possession, with power to sell and apply the proceeds, *not for his own benefit*, but to pay off the mortgage debt, does not render the mortgage fraudulent or void.—*Hubbell v. Allen*, (Mo.) 22.*

2. An instrument executed by a debtor, without knowledge or assent of his creditors, as follows: "Know all men by these presents that I * * * bargain, sell, and convey the merchandise in my two houses, situated in * * *, to the undersigned parties, to satisfy a part or all of certain claims held by them against me for the following amounts,"—setting out the names of his creditors, with the claims over against each name, and signed by the debtor alone, and delivered by him to the county clerk,—is not a valid mortgage which will avail against an attachment, nor does the assent of the creditors thereto subsequent to the attachment make it so available.—*Wallis v. Taylor*, (Tex.) 321.

Checks.

See *Negotiable Instruments*.

Worthless check as payment, see *Payment*, 1.

Claim and Delivery.

See *Replevin*.

CONFLICT OF LAWS.

See *Limitation of Actions*, 21.

Contract of married woman.

By the law of Missouri, the contract of a married woman imposes no personal obligation, and cannot be enforced as against her *general* estate. A joint promissory note, therefore, of a married woman and her husband for necessities, executed and made payable in that state, cannot be enforced against the general estate of the wife in Kentucky, although by the law of Kentucky such a contract could, if made in that state, be enforced against such estate.—*Griswold v. Golding*, (Ky.) 535.

Conspiracy.

Burglary, conspiracy to commit, see *Burglary*, 8.

Evidence, declaration of co-conspirator, see *Evidence*, 9.

CONSTITUTIONAL LAW.

See, also, *Eminent Domain*, 1, 2, 4.

Courts, jurisdiction of circuit courts, see *Courts*, 8, 4.

Municipalities, creation of debts, see *Coun- ties*, 2.

Office, extension of term, see *Office and Officers*, 1.

— power of governor to appoint judges, see *Judge*, 1.

Statutes, enactment of, see *Statutes*, 1-8.

Taxation, see *Railroad Companies*, 21-24.

— license tax, see *Municipal Corporations*, 1.

In general.

1. Constitutional provisions are absolutely mandatory, and can in no case be regarded as directory merely, to be obeyed or not within the discretion of either or all of the departments of the government.—*Hunt v. State*, (Tex.) 233.

Legislative powers.

2. Mansf. Dig. Ark. § 6343, providing that "no action, plea, prosecution, or proceeding, civil or criminal, pending at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provision had not been repealed," is unconstitutional, as the legislature cannot deprive itself of the right to exercise its power of amending or repealing statutes by prescribing the method in which it shall be done.—*State v. Hicks*, (Ark.) 524.

8. The proclamation of the governor of Texas convening the legislature in special session announced the purpose, among others, "to reduce the taxes, both *ad valorem* and occupation, so far as may be found consistent with the support of an efficient state government." *Held* that, under this notice, the legislature had power to deal with the whole subject of taxation, and that the act of May 4, 1882, levying an occupation tax upon persons who engage in the sale of the Illustrated Police News and the Police Gazette, etc., is not unconstitutional, as being in violation of Const. Tex. art. 3, § 40, in that it was enacted at a special session, and was not designated by the governor as a subject of legislation for which the legislature was convened in special session.—*Baldwin v. State*, (Tex.) 109.

4. In Arkansas a levee district is not a political subdivision of the state, nor a municipal corporation, so as to require taxes therein to be collected through the instrumentality of the county court; and it is within the power of the legislature to appoint a special agency outside of the county authorities, even though it be unknown to the constitution, to assess and collect taxes upon property benefited by the building and repair of levees.—*Davies v. Gaines*, (Ark.) 184.

Obligation of contracts.

5. Rev. St. Mo. § 8034, providing that, in distributing the assets of an insolvent and dissolved insurance company among policy-holders, a deduction shall be made in computing the share of foreign policy-holders who have a lien upon securities deposited in their respective states or countries, so as to put them on a like footing with resident policy-holders, is not unconstitutional as impairing the obligation of the contract of insurance, as applied to a case where the dissolution occurred after the passage of the act, although the policy was issued before such passage.—*Bockover v. Superintendent of Ins. Department*, (Mo.) 833.*

Retrospective laws.

6. Const. Tex. art. 1, § 16, providing that "no bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts, shall be made," was intended to protect every right, although not strictly a right to property. Therefore a statute, taking away the defense of the statute of limitations to a suit for the payment of taxes, cannot apply to taxes already barred at the date of its passage.—*Mellinger v. City of Houston*, (Tex.) 249.

Equal and uniform taxation.

7. Section 16 of the Arkansas act of March 20, 1883, to provide for building and repairing levees in Chicot county, Arkan-

sas, is unconstitutional and void in so far as it provides for the reimbursement to citizens of moneys voluntarily contributed by them for levee purposes, by allowing them a credit upon their future taxes for sums so contributed; such provision being in effect an exemption unauthorized by law.—*Davies v. Gaines*, (Ark.) 184.

8. Section 14 of the same act violates the constitutional requirements of equality and uniformity, in so far as it exempts certain townships which belong to the class of land upon which the tax is levied, from taxation for the first year.—*Id.*

Trial by jury.

9. Under the seventh section of the Arkansas declaration of rights, which provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to amount in controversy," the right is confined to cases which at common law were properly so triable before. The discretion of a court of chancery to dispense with jury trial in cases of which it has properly assumed jurisdiction is unaffected by the above provision.—*State v. Churchill*, (Ark.) 852.

Right to be heard in person.

10. The constitutional right of an accused to appear and be heard in person in his own behalf applies only to trial in the *nisi prius* court.—*Tooke v. State*, (Tex.) 782.

Former jeopardy.

11. Pen. Code Tex. art. 712, which provides that "if a house be entered in such manner as that the entry comes within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit larceny, or any other offense, he shall be punished for burglary, and also for whatever offense is so committed," is not unconstitutional as violating the provision against putting a person twice in jeopardy; and a person may, under that section, be convicted of burglary, although he has already been convicted of theft committed in the same transaction; following *Howard's Case*, 8 Tex. App. 447.—*Smith v. State*, (Tex.) 238.

12. The Texas local option law being within the scope of the police power of the state, it does not "take, damage, or destroy" private property for public use, within the meaning of section 1 of the Texas bill of rights.—*Ex parte Kennedy*, (Tex.) 114.*

CONTINUANCE.

See, also, *Criminal Practice*, 6, 7.

Application.

1. In a suit to set aside attachments, in which the sheriff is made a defendant, a

first application for a continuance, which shows that the witness for whose testimony the continuance is sought is sick and unable to attend, and has been served with a subpoena, should be granted; and the fact that no attempt was made to take the witness' depositions, or that the subpoena was served by the sheriff's deputy, or that the witness' fees were not tendered him, or that the affidavit is made by an agent of the party seeking the continuance, does not show any irregularity.—*Blum v. Bassett*, (Tex.) 88.

Due diligence.

2. The refusal to grant a continuance rests in the discretion of the trial judge, and neglect to take the deposition of an absent witness, who had previously been accessible for many months, is sufficient ground for denying a motion for a continuance in order to procure the testimony of the absentee.—*Valle v. Picton*, (Mo.) 860.

8. Where a defendant, in a criminal action, asks and obtains a continuance of one week to take depositions of six witnesses, and at the expiration of that time admits that no steps have been taken to take the depositions, and applies for a further continuance to take depositions of witnesses, five of whom are the same as those in respect of whom time had been previously granted, the continuance is properly refused on the ground of plaintiff's inaction.—*The Gold Brick Case*, (Tenn.) 848.

4. Interrogatories were filed on September 27th to take the depositions of witnesses residing in other counties, commissions to take the depositions issued October 1st, and it appeared that they had been placed in the hands of proper officers, but it did not appear when this had been done. The case was set for trial for October 7th. *Held* not sufficient diligence to entitle the party to a continuance, because the depositions had not been received.—*Gulf, C. & S. F. Ry. Co. v. Wheat*, (Tex.) 455.

5. An action was set for trial for October 7th; subpoenas for the witnesses were issued on September 24th, and were returned September 27th "not found," and no others were issued before the case was called for hearing. *Held*, this did not constitute sufficient diligence to entitle the party to a continuance on account of the absence of the witnesses.—*Id.*

6. The fact that a witness resident in another county went home on the day of trial, on account of sickness in his family, and expecting to return the next day in time to testify, but was unable to do so, does not entitle a party to a continuance. The law provides how the evidence of a witness living in another county may be obtained, and a party failing to use those means to preserve the evidence of such a witness

cannot be said to have used due diligence.—*Id.*

CONTRACTS.

See, also; *Chattel Mortgages; Damages*, 1-8; *Deed; Fraud; Insurance; Mortgages; Negotiable Instruments; Orders; Partnership; Principal and Agent; Principal and Surety; Sale; Usury; Vendor and Vendee.*

Negligence, contract relieving from liability, see *Master and Servant*, 1.

What constitutes.

1. In an action against a railroad company to recover damages for failure to provide transportation for plaintiff's cattle, as agreed, plaintiff testified that he met S., the general freight agent, on May 27th, and told him he wanted 23 cars on May 30th, 8 at Mound City, and 15 at Maitland, for Chicago, and asked him if he could get them ready. S. said he could, and called the clerk to take down the order, and asked plaintiff if he would have the cattle there, and was told he would, and that he wanted the cars on Monday, so he could bed them. S. told him he could have the cars, and to see the agent at Mound City and Maitland, which plaintiff did. *Held*, that the evidence proved a valid contract, the consideration of which was the mutual promises of the parties.—*Baker v. Kansas City, S. J. & C. B. R. Co.*, (Mo.) 486.

Agreement to abide by award of third party.

2. Under a contract making an engineer's decision upon disputed questions final and conclusive, such decision will be final and conclusive, in the absence of fraud, or such gross mistake as would necessarily imply bad faith.—*Hot Springs R. Co. v. Maher*, (Ark.) 639.

Consideration.

8. The moral obligation to pay a debt is sufficient consideration to support the promise of a bankrupt, made after his discharge in bankruptcy, to pay a debt from which he had been discharged.—*Wislizenus v. O'Fallon*, (Mo.) 837.*

4. A. and several others being liable as makers of two notes aggregating \$350, the holder of the notes agreed to release A., and also to release a lien which he held as security for the notes, if A. would pay \$100 cash, and give his note for \$115, payable at an earlier date than the last maturing of the joint notes. *Held*, that there was sufficient consideration to support the promise to release, as the original notes were satisfied, to the extent of \$215, earlier than they matured; and the original obligors other than A. still continued liable for the balance.—*Kirchoff v. Voss*, (Tex.) 548.*

Public policy.

5. Under the Arkansas act of March 8, 1879, prohibiting the sale of "any compound or preparation of ardent spirits" commonly called "tonics, bitters," etc., without first procuring a license, a contract between the manufacturers of certain bitters containing intoxicating liquor as the chief ingredient, and a licensed liquor-dealer, whereby the latter is supplied with the bitters, which he sells with a warranty that they may be sold without a license, is contrary to public policy, and void, and the manufacturers cannot maintain an action for goods sold and delivered.—*O'Bryan v. Fitzpatrick*, (Ark.) 527.

6. Appellants made a contract to buy for appellee a certain quantity of cotton for future delivery. It appeared that appellants were members of the New Orleans Cotton Exchange; that they had bought in the year preceding this contract 800,000 bales of cotton, and were under contract to take 60,000 bales, worth \$200,000, at the time of this contract, while they were worth only \$75,000. *Held*, that these circumstances showed the cotton contracted to be bought for appellee was on speculation only, and no future actual delivery was intended, and therefore void, notwithstanding a rule of the exchange provided that actual delivery of the cotton might be exacted.—*Beadles v. McElrath*, (Ky.) 152.*

7. In an action upon an option contract to recover the difference between the purchase price of pork and the sale price, the purchaser resisting recovery on the ground that no delivery was made of the pork, the broker's evidence that he sold the pork at a certain price, by the purchaser's direction, is competent, as a sale and delivery to a third person, at the request of the purchaser, was equivalent to a delivery direct to the purchaser.—*Morrison v. Day*, (Ky.) 411.

Time of the essence.

8. The holder of a vendor's lien agreeing to release the lien when a certain note should be paid, it is not necessary that the note should be paid promptly at maturity in order to secure the release, time not appearing to be of the essence of the contract.—*Kirchoff v. Voss*, (Tex.) 548.

Performance.

9. Where a builder contracts to do certain repairs on a house for an agreed sum, without stipulating as to when the money shall be payable, and when the repairs have been only partially completed the house is destroyed by fire, the builder is entitled to recover compensation *pro rata* upon the contract price for the repairs then completed.—*Weis v. Devlin*, (Tex.) 728.

10. An instruction in an action against a county by a contractor to recover a balance

claimed to be due under a contract for putting inside blinds in the court-house, that, if the jury found that the contractor had done the work for the county, and the county had accepted the work, or had gone into possession of and had used the blinds, they should find for the plaintiff for the reasonable value of the blinds, although they should find that the contract had not been complied with, is correct as a principle of law, and is warranted by the evidence, where it appears that the blinds remained in the court-house, were used, and were not rejected by any formal order of the commissioners' court until after the contractor had sold his claim to innocent *bona fide* purchasers.—*Campbell v. Hildebrandt*, (Tex.) 243.

CORPORATIONS.

See, also, *Banks and Banking; Insurance*, 8-11; *Railroad Companies; Telegraph Companies; Turnpikes*.

Banks, liabilities, transfer of assets, see *Banks and Banking*, 2.

Charter, construction of, see, also, *Turnpikes*, 1.

Creation and organization, see *Turnpikes*, 4.

Franchise, effect of forfeiture on incidental powers, see *Turnpikes*, 2.

Service on, see *Writs*, 6.

Stock, verbal subscription, see *Frauds, Statute of*, 1.

Taxation of stock, see *Taxation*, 1, 2.

Turnpike companies, control of courts over, see *Turnpikes*, 8.

Ultra vires, see *Banks and Banking*, 2.

Forfeiture of franchise.

1. The requirement of Gen. St. Ky. c. 56, § 4, that articles of incorporation shall be recorded in the county clerk's office in a book kept for that purpose, is satisfied, so far as the corporation is concerned, by filing the articles for record.—*Walton v. Riley*, (Ky.) 606.

2. It is a tacit condition, annexed to the creation of every corporation, that it is subject to dissolution by forfeiture of its franchise for willful misuser or non-user in regard to matters which go to the essence of the contract between it and the state; and a proceeding upon an information in the nature of *quo warranto*, filed by the attorney general on behalf of the state, is the proper mode of trying the issue.—*Darnell v. State*, (Ark.) 365.

Subscription to stock.

3. Where one, prior to the incorporation of a turnpike company, subscribes a certain amount to its capital stock, to be paid when the incorporation is completed and work begun, the subscription is not a mere voluntary donation, but is enforceable,

having been made in consideration of receiving a property right as stockholder in the road; and other persons having subscribed on the faith of that subscription, and work having been commenced, the subscriber was estopped to deny the subscription.—*Bullock v. Falmouth & Chipman Hall Turnpike Road Co.*, (Ky.) 139.

4. By a Kentucky statute (2 Acts Ky. 1865, p. 97, § 2) the Kentucky River Navigation Company was incorporated, for the purpose of improving the navigation of the river by building *additional locks and dams*. A county interested in securing such additional improvements subscribed to the stock. The work of making new locks and dams was soon abandoned, and the company undertook to maintain and repair the old locks, which were not in any way beneficial to the county. *Held*, that the subscription could not be enforced either by the corporation or by creditors whose debts had been contracted after the abandonment of the building of new locks.—*County of Jessamine v. Swigert's Adm'r.* (Ky.) 13.

COSTS.

Writes, excessive issue of, see *Writes*, 2.

Security.

1. An affidavit of plaintiff stating that he is unable to give security for, or to make a deposit sufficient to cover, all the costs, but that he cannot swear that he is unable to pay the costs as they accrue; that he has paid all accrued costs, except a small balance, to cover which he has made a deposit with the clerk, who failed to give him the exact amount,—is a sufficient answer to a rule for costs under Rev. St. Tex. art. 1483.—*Long v. McCauley*, (Tex.) 689.

Guardian and ward.

2. Under Rev. St. Tex. art. 2427, providing that "each party to a suit shall be liable for all costs incurred by him, and, in case the costs cannot be collected of the party against whom the same have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more," where an action is brought against infants, and a guardian *ad litem* is appointed to defend for them, the plaintiff, although successful in the suit, is liable for a reasonable fee to the guardian *ad litem*, where execution issued for the fee, against the infants, is returned unsatisfied.—*Ashe v. Youngst*, (Tex.) 454.

COUNTIES.

Action by, see *Statutes*, 4.

Assignment of claim against, see *Assignment*, 2-4.

Bridges, see *Equity*, 9.

Contract with, acceptance of material, see *Contracts*, 10.

County court, taxation by, see *Intoxicating Liquors*, 4.

County-seat, see *Courts*, 6.

Union for judicial purposes, see *Jury*, 4.

Election of officers, see *Elections*, 2, 3.

—pleading in election contest, see *Quo Warranto*, 1, 2.

Highway, cost of opening, see *Highways*, 3.

Judgment, proof of judgment of commissioners, see *Judgment*, 4.

Suits against.

1. Arkansas act February 27, 1879, expressly repealing all laws declaring counties to be corporations, and prohibiting suits against them elsewhere than in the county courts, does not apply to a cause of action in equity which had already accrued; and, as the county court has no equity jurisdiction, such a suit may be brought in the circuit court of the county sued.—*Griffith v. County of Sebastian*, (Ark.) 886.

Debts.

2. Const. Ky. art. 2, § 36, providing that no act of the legislature authorizing the creation of any debt on behalf of the commonwealth shall become effective until it has been submitted to the people at a *general* election, does not include debts created by a county or other municipal division of the state.—*Walton v. Riley*, (Ky.) 605.

Officers.

3. Under Acts Mo. 1885, p. 108, § 5362, in counties which have adopted township organization, the term of office of county treasurer terminates on the first day of April next after the election of his successor, even though township organization is first adopted at the election at which such successor is elected.—*State v. McGovney*, (Mo.) 867.

—Personal liability.

4. County commissioners, in order to raise money to build a court-house and jail, issued bonds of the county, and instructed the county judge to sell some of them to a bank, the bank paying nothing in cash, but agreeing to pay the price of the bonds when the money should be needed for the buildings. Rev. St. Tex. arts. 995, 1200, authorizing the county treasurer to bring suit in the name of the county for all debts due the county, the treasurer accordingly sued the county judge, seeking to charge him for the price of the bonds, as if he had actually received the money in cash from the bank; it appearing that the bank had realized upon the bonds by selling them as soon as they were delivered. *Held*, the action could not be maintained, as the county commissioners' court has control

of the financial affairs of the county; and if it makes a contract by which money does not become due so soon as it ought, the county treasurer cannot correct their mistake or bad management by holding the county judge liable, when he did only what he was directed to do.—*McConnell v. Wall*, (Tex.) 287.

COURTS.

See, also, *Justices of the Peace*.

Bankrupt, jurisdiction of claim against, see *Bankruptcy*, 8.

Counties, jurisdiction of action against, see *Counties*, 1.

Federal courts, mandate to state court, see *Taxation*, 5.

Infants, jurisdiction over, see *Guardian and Ward*, 9.

Mandamus to courts, see *Mandamus*, 2, 3.

Probate courts, jurisdiction of, see, also, *Executors and Administrators*; *Infancy*, 1.
—impeachment of order of, see *Judgment*, 10.

State courts, Louisville law and equity court, see *Judicial Sales*, 7.

—supreme, power to issue *habeas corpus*, see *Habeas Corpus*.

Turnpikes, control of courts over, see *Turnpikes*, 8.

Federal courts.

1. The exclusive jurisdiction of the United States district court over actions upon claims against a bankrupt does not continue, in case of termination of the proceedings by composition, beyond the time allowed the bankrupt in which to perform the composition agreement.—*Pubke v. Churchill*, (Mo.) 839.

State courts.

2. In Missouri a sheriff is not a "state officer," within the meaning of the constitution of Missouri, art. 6, § 12, and the fifth section of the amendment thereto adopted in 1884, (Laws Mo. 1883, p. 216,) giving the supreme court of Missouri exclusive appellate jurisdiction in causes where "any state officer is a party." *BLACK, J.*, dissenting.—*State v. Spencer*, (Mo.) 410.

3. A state constitution providing that the circuit courts of the state shall have original jurisdiction of all criminal offenses, those courts cannot be deprived of such jurisdiction except by legislation, and, the instant such legislation is repealed or expires, the jurisdiction of the circuit revives. So, while Magoffin county was in the Sixteenth judicial district, a criminal court was established for that district, and was given exclusive criminal jurisdiction for the district, and appellant was indicted for murder; but, before his trial, the county was put in another district, but the act,

although abolishing the criminal court of the Sixteenth judicial district as to Magoffin county, did not, in express terms, restore criminal jurisdiction to the Magoffin circuit court. *Held*, the latter court had jurisdiction, nevertheless, to proceed with the trial of the indictment.—*Anderson v. Commonwealth*, (Ky.) 127.

4. The Kentucky circuit courts being vested by the Kentucky constitution with original jurisdiction in all criminal cases, they can only be deprived of it by direct legislation, and, in case of repeal of the legislation, the jurisdiction immediately revives. If, after an indictment has been found, the county in which it is found is removed from the judicial district to which it has previously belonged, and the criminal court of the district is deprived of jurisdiction over that county, the jurisdiction of the circuit court revives, and the indictment is properly tried in that court.—*Stapleton v. Commonwealth*, (Ky.) 793.

Municipal courts.

5. The recorder's court of the city of Hannibal, Missouri, was not abolished by the Missouri constitution of 1875; and by the act of March 8, 1878, to consolidate the acts relating to the charter of the city, express power is given to the recorder to hear and determine all actions for the recovery of personal property, where the amount in controversy does not exceed \$100.—*Cake v. White*, (Mo.) 486.

County courts.

6. The jurisdiction of a county court to try a criminal prosecution at a certain place does not depend upon such place being the county-site *de jure*; if it is the county-site *de facto*, it is sufficient.—*Watts v. State*, (Tex.) 760.

COVENANT.

Warranty.

In an action to recover for a breach of warranty, the nature of the paramount claim under which the grantee has been evicted, and that the claim was such an incumbrance upon the land, as the grantor, by reason of his covenant of warranty, was bound to discharge, must be alleged.—*Bland v. Thomas*, (Ky.) 595.

Creditors' Bill.

Action to set aside fraudulent conveyances, see *Fraudulent Conveyances*, 13.

Criminal Law.

See *Criminal Practice*.

Justices of the peace, jurisdiction, see *Justices of the Peace*, 2.

Principal and accessory, see *Burglary*, 6.

CRIMINAL PRACTICE.

See, also, *Assault and Battery; Burglary; Carrying Weapons; Conspiracy; Continuances; Disorderly House; Embezzlement; Extortion; False Pretenses; Forgery; Gaming; Habeas Corpus; Homicide; Indictment and Information; Intoxicating Liquors; Jail and Jailer; Larceny; New Trial; Perjury; Rape; Receiving Stolen Goods.*

Attorney, argument of counsel, see *Homicide*, 25.

Bail, when allowed, see *Bail*, 1-3.

— judgment of forfeiture, see *Bail*, 4.

Constitutional right of accused to be heard in person, see *Constitutional Law*, 10.

Continuance, application for, as evidence, see *Evidence*, 7.

Evidence, burden of proof, see *Receiving Stolen Goods*, 2.

Former jeopardy, see *Constitutional Law*, 11.

Homicide, aiding and abetting, see *Homicide*, 8.

Instructions, see *Burglary*, 5.

— degree of offense, see *Rape*, 6.

— weight of evidence, see *Larceny*, 15.

Jurisdiction, see *Courts*, 4.

Recognizance, see *Bail*, 5.

Variance, see *Larceny*, 5.

Witness, conviction of co-defendant, see *Witness*, 1.

— examination of, see *Witness*, 15.

Change of venue.

1. The ruling of the trial court upon the application of a prisoner for change of venue on the ground of the prejudice against him of the inhabitants of the county where he was being tried, is conclusive, and cannot be reviewed upon appeal, unless it appear that palpable injustice has been done him, or that there has been an abuse of judicial discretion.—*State v. Hunt*, (Mo.) 858.

Continuance.

2. Failing to allege that the absent testimony cannot be obtained from another source, and that the accused has reasonable expectation of procuring it at the next term of court, an application for a second continuance is insufficient.—*Smith v. State*, (Tex.) 684.

3. Diligence to procure the attendance at the trial of an absent witness is essential to the award of a postponement.—*May v. State*, (Tex.) 781.

4. The facts set out in the application for continuance not appearing to be probably true when viewed in the light of evidence adduced on the trial, the ruling of the trial court refusing the continuance will not be revised.—*Rice v. State*, (Tex.) 791.

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Continuance — Materiality of evidence.

5. In a murder trial, a continuance on account of the absence of a witness was refused the accused. The accused expected to prove by the witness that deceased had threatened his life. *Held*, that the appellate court would not reverse because of such refusal, it appearing that, even if threats were made, accused had no fear of deceased, or, if he had, sought to provoke deceased, that he might have an excuse for killing him.—*Stapleton v. Commonwealth*, (Ky.) 798.

— Admission of testimony of absent witness.

6. The accused having obtained the presence of all the witnesses mentioned in his affidavit for a continuance, except one, and the commonwealth having consented that the affidavit as to what that witness would swear, at least so much of it as was competent, might be read as evidence on the trial, a motion for a continuance is properly overruled.—*King v. Commonwealth*, (Ky.) 480.

7. Under Rev. St. Mo. 1879, §§ 1884-1886, regulating continuances in criminal cases, on an application by the accused for a continuance, if the state admits that the desired witness would testify as stated in the application, the motion is rightly overruled; following *State v. Henson*, 81 Mo. 386.—*State v. Jewell*, (Mo.) 77.

Severance.

8. Under Code Crim. Proc. Tex. arts. 669, 670, severance upon the request of any one of several defendants, jointly indicted, is a matter of right, when the application therefor is made in conformity with the statutes.—*Willey v. State*, (Tex.) 570.

Former jeopardy.

9. A conviction for aggravated assault and battery under an indictment for assault with intent to murder will not bar a prosecution for murder, after the death of the assaulted party, although the death result from the same transaction.—*Curtis v. State*, (Tex.) 86.

10. Former acquittal of a co-defendant, jointly indicted with the present defendant for exhibiting a gaming table, the two being indicted as individuals, cannot operate as a bar to the subsequent prosecution of defendant for the same offense, even though it were true that both parties indicted were partners.—*Goforth v. State*, (Tex.) 832.

11. Where the general state law applicable to the keeping of bawdy-houses in a city punishes the offense with fine and imprisonment, and the city charter and ordinances impose a fine only, a conviction

under the city laws is not a bar to a prosecution under the state law.—*Kemper v. Commonwealth, (Ky.) 159.*

12. Two indictments were brought against a defendant,—one for burglariously entering a house, and committing a larceny by taking and carrying away clothing, the property of one person; and the other charging the simple larceny of clothing belonging to another person. It appeared that all the articles were taken from the same room. *Held*, that an acquittal upon the first indictment was no bar to the trial under the second indictment, upon the ground of "former jeopardy," there being two separate and distinct larcenies.—*Phillips v. State, (Tenn.) 434.**

Trial—Separation of witnesses.

13. The statutes of Texas do not exempt expert nor any particular class of witnesses from the operation of the "rule" sequestering witnesses. The enforcement of that rule is left largely to the discretion of the trial court.—*Leache v. State, (Tex.) 539.*

14. Upon trial for murder, the trial court permitted and directed a state's witness to retire from the court-room into a room by himself so that he could examine certain papers for the purpose of identifying and explaining them in his evidence. *Held* not error.—*Kunde v. State, (Tex.) 325.*

Evidence.

15. Article 751 of the Texas Code of Criminal Procedure provides that "when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; and when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." Upon trial for murder, written testimony of a deceased witness was read by the state, tending to show motive on the part of accused to commit the crime, and relating solely to the prosecution of the defendant and his co-defendants by deceased. That part proposed to be read by the defense related solely to a prosecution against the deceased. *Held*, that that portion of the testimony offered to be read by the defense had no relation whatever to that portion read by the state, was not necessary to explain the portion read, was clearly inadmissible under the provisions of the said article of the Code of Criminal Procedure, and was properly excluded.—*Kunde v. State, (Tex.) 325.*

—Proof of venue.

16. The venue of an offense should be proved affirmatively; and where the venue of a larceny is laid in Liberty county, and

the only proof is that the parties all lived in that county, there is no such proof.—*Ryan v. State, (Tex.) 547.*

—Motive.

17. An indictment against a defendant for an offense different from that for which he is on trial may be introduced in evidence against him if such indictment, in any degree, tends to show a motive on the part of the defendant to commit the offense for which he is on trial. So *held* where an indictment against accused for stealing A.'s hogs was admitted in evidence to show motive in the accused for the murder of A.—*Kunde v. State, (Tex.) 325.*

18. In such a case, the indictment is admissible, though found against the accused subsequent to the offense for which he is on trial, if connected by other testimony with transactions which occurred before the offense, and which tend to show motive in the accused for its commission.—*Id.*

19. When motive is the issue sought to be established, it is permissible for a state's witness to testify to previous criminal acts of a like nature as that on trial, perpetrated by defendant; but the failure of the charge to confine such evidence to the purpose of proving motive only, is fatal error.—*Taylor v. State, (Tex.) 753.*

20. Upon trial for murder, the reproduced evidence of a deceased justice of the peace, which disclosed prosecutions against defendant and others for offenses against the property of the deceased, is admissible to show motive for the murder on the part of accused.—*Kunde v. State, (Tex.) 325.*

21. Upon trial of A. for murder, perpetrated by fire-arms, evidence showed that B. had furnished two persons with guns the night before the murder, and that these guns were found in their hands, with barrels discharged, on the next day. *Held*, that a foundation was laid for the introduction of evidence of acts and declarations of B., tending to show motive on B.'s part for the murder.—*Id.*

22. If, when a party is examined as a witness in proceedings before a magistrate's court or a coroner's inquest, he is charged or suspected of the crime then under investigation, and is then aware that he is so charged or suspected, his testimony before the said investigation cannot be received against him upon his trial for the same offense.—*Wood v. State, (Tex.) 836.*

—Flight of accused.

23. Flight of the accused after his indictment and release on bail is a fact which may be proved by the state in cases either of positive or circumstantial evidence.—*Hart v. State, (Tex.) 741.*

Evidence at former trial.

24. Under a statute requiring an "oath" of a "credible person" to facts necessary to be shown in a criminal case, as a foundation for introducing testimony taken at a former trial, if an affidavit is offered to show the facts, the defendant has a right to require the affiant to be sworn, in order to examine him as to the facts alleged. —Steagald v. State, (Tex.) 771.

—Impeachment.

25. Upon trial for murder, the state attempted to discredit the testimony of witnesses for the defense as to certain facts, by showing that, upon the *habeas corpus* trial of the accused, these witnesses had been silent concerning such facts, though examined at such trial. *Held*, that it was competent for the defense to introduce the evidence of the attorney of the accused at that trial, to show that because of the local prejudice at the time the attorney did not expect to obtain bail, and did not undertake to develop the evidence in accused's behalf. —Kunde v. State, (Tex.) 825.

Conduct of jury.

26. On a trial for murder a separation of the jury, by which some of them remain in the dining-room of a hotel, while others go out of their sight into a saloon, with the sheriff, during the progress of the trial, and after the jury were put in charge of the sheriff, is ground for reversal. NORRIS, C. J., and RAY, J., dissenting. —State v. Murray, (Mo.) 397.

Instructions—In general.

27. An erroneous charge should be excepted to, or its correction sought by special instruction. Otherwise such error will be revised only if, under the facts, it is calculated to injure the rights of the accused. —White v. State, (Tex.) 710.

28. The charge of the court should be limited to the case as made by the evidence, and should carefully omit all issues not arising upon the testimony. —Hartwell v. State, (Tex.) 715.

29. Omissions in one part of a charge become immaterial if supplied in another so as to correctly present the issue involved. —Smith v. State, (Tex.) 694.

30. However correct a special instruction may be, it is properly refused if its substance was given in the general charge. —Rummel v. State, (Tex.) 763.

31. A defendant is entitled to a distinct and affirmative, and not merely an implied or negative, presentation of the issues which arise upon his evidence. —Wimberly v. State, (Tex.) 717.

32. Special charges are properly refused when the general charge comprehends all of the law of the case. —Pless v. State, (Tex.) 576.

33. Error in one portion of a charge may be cured by another portion. —Hodges v. State, (Tex.) 739.

—Modification.

34. Under Code Crim. Proc. § 679, trial courts are specially empowered to modify requested instructions before giving them to the jury. —Jones v. State, (Tex.) 478.

—Separate offenses.

35. Article 470 of the Texas Penal Code defines two separate offenses, and on the trial of an indictment under it for false packing, by putting sand in a bale of cotton with intent to defraud the purchaser, it is error for the trial court to embody the entire section in his charge. —Jones v. State, (Tex.) 478.

—Grades of offense.

36. If a *nolle prosequi* has been entered upon one of two counts charging different grades of offense, it is error to give an instruction upon the grade of offense charged in such count. —Serio v. State, (Tex.) 784.

37. An instruction to the jury that "if they believe from the evidence that the defendant did assault the said B. with a knife, under circumstances not amounting to an intent to murder as hereinbefore explained, they will, if they so believe from the evidence, find the defendant guilty of an aggravated assault," is misleading and erroneous, in that it assumes the defendant to be guilty of one or other of the offenses named, and invades the province of the jury by instructing them to find the defendant guilty, at any rate, of the lesser grade of offense. —Warren v. State, (Tex.) 240.

—Application to case made out.

38. "The law of the case," as those terms are used in article 677 of the Texas Code of Criminal Procedure, requiring the court to give a written charge to the jury, means the case as made by the evidence. Where the evidence discloses a rape accomplished by threats alone, the charge of the court confining the jury to a rape by threats was correct. —Cooper v. State, (Tex.) 334.

39. The "case" to which the statute requires the charge of the court to apply means the case as made by the evidence. If, then, the evidence shows the rape to have been committed by one or two of the several means, viz., force, threats, or fraud, but not by all three of those means, it is error to charge the jury upon all three of the said means. —Serio v. State, (Tex.) 784.

—Alibi.

40. Evidence of *alibi* is ordinary evidence, to be treated in the instructions to the jury as is other evidence of like sort. —State v. Johnson, (Mo.) 868.

41. An instruction, as to the defense of *alibi*, that "if the jury believe, and find from

the evidence, that the defendant was not present at the place and time the alleged rape is stated to have been committed by the prosecuting witness, K. F., but that the defendant, at the time of the alleged rape, was elsewhere, at another and different place than where the alleged rape is stated to have taken place by said K. F., then you should acquit the defendant," was held proper, as against the objection that the language was calculated to convey the idea that an *alibi* is a substantive affirmative defense, which must be made out by a preponderance of evidence, which error was not cured by an appropriate instruction as to reasonable doubt in its application to the whole case.—Id.

Instructions—Credibility.

42. An instruction correctly embodying the rule arising from the maxim, *faisus in uno, falsus in omnibus*, is proper, where the defense is an *alibi*, and the testimony of the witnesses directly conflicts.—State v. Johnson, (Mo.) 868.

43. On an indictment for incest, where the only evidence of the commission of the crime is that of the prosecuting witness, to the effect that the carnal act was committed by force, within about 50 yards of a public road and 150 yards from a house, from which the parties could be seen; that there was no outcry or alarm by the prosecutrix; that she did not tell anybody about it; that she had carnal intercourse with the defendant but the one time, and never with any one else; that the act was committed on tenth November; that her child was born on twenty-ninth June following, seven months and nineteen days after; was mature; that defendant is almost black, prosecutrix brown, and the child yellow, of lighter color than the mother.—the evidence adduced is such as to call imperatively for an instruction to the jury that they are the exclusive judges of the weight of the testimony, and a verdict of guilty will be reversed for failure to do so.—Jackson v. State, (Tex.) 111.

Verdict.

44. Rev. St. Mo. § 1927, requiring a verdict to state the degree of the offense of which defendant is found guilty when he is convicted of a degree inferior to that charged, applies only to offenses which are divided into degrees, and does not require a verdict upon an indictment for an assault with intent to kill to determine whether there was or not malice aforethought.—State v. Berning, (Mo.) 588.

45. Where an indictment is in two counts charging different offenses, punishable with different penalties, but both of which offenses grow out of the same transaction, the jury may give a general verdict, the effect of which is to convict defendant of

the higher offense; and therefore an instruction to the jury as follows: "In case you find defendant guilty it is always safest for a jury to return a general verdict, specifying the offense, and, by fixing the punishment, leaving the court the duty of affixing the count upon which the conviction should be placed,"—though objectionable, is not prejudicial and ground for reversal.—The Gold Brick Case, (Tenn.) 848.

New trial.

46. If, upon a trial for theft, one of the jurors was related to the owner of the property, and a cause of challenge to him existed on that ground, but the fact was not discovered until after the trial, and no neglect was attributable to defendant in not discovering it earlier, a new trial should be granted.—Page v. State, (Tex.) 745.

Absence of witnesses.

47. Where an application for a continuance on the ground of the absence of four witnesses was overruled, and two of the witnesses appeared in court before the testimony was closed, but were not called upon by defendant to testify, and the testimony of the other two, viewed in the light of the other testimony in the case, was not material, the verdict will not, on appeal, be reversed because of such refusal.—Murray v. State, (Tex.) 104.

Newly-discovered evidence.

48. A motion for new trial, unless it discloses proper diligence to secure on the trial the newly-discovered evidence upon which it is based, is properly overruled.—Smith v. State, (Tex.) 288.

49. Where, on an indictment for murder, a main ground upon which a verdict of guilty is arrived at on circumstantial evidence is the identification of a knife as belonging to defendant by a principal witness, an affidavit by a member of the grand jury to the effect that such witness had made very different statements as to the character and description of the knife outside of the court-room to those made by him on the witness stand, is newly-discovered evidence, sufficient to form grounds for a new trial.—State v. Murray, (Mo.) 897.

Appeals—Records.

50. The action of a trial court in refusing a motion for a new trial, where the grounds urged are not supported by affidavit or otherwise, as appears by the record, cannot be reviewed by the supreme court.—State v. Jewell, (Mo.) 77.

51. Venue of the offense is an issue indispensable to the legality of a conviction, and must affirmatively appear by the rec-

ord on appeal to have been proved.—*Terry v. State*, (Tex.) 477.

— **Objections not taken below.**

52. The action of a trial court in overruling an application of defendant for a continuance, upon the admission by the state that the desired witness would, if present, testify as stated in the application, not having been urged in the motion for a new trial, is thereby waived, and cannot be reviewed by the supreme court.—*State v. Jewell*, (Mo.) 77.

53. Where a charge is not excepted to at the trial, but the same is objected to for the first time on the motion for a new trial, or in this court on appeal, the question is whether or not such charge was calculated to injure the rights of defendant, and, unless that is made to appear, the court of appeals will not revise the error.—*Cook v. State*, (Tex.) 749.

— **Presumption on appeal.**

54. If the record, upon appeal, shows that a plea of not guilty was filed, and is silent as to arraignment, the presumption that the accused was properly arraigned will obtain.—*Steagald v. State*, (Tex.) 771.

— **Prejudicial error.**

55. An erroneous charge of the court, in the absence of an exception, will not be revised, unless it appears that the same was calculated to injure the rights of the defendant.—*Hill v. State*, (Tex.) 764.

56. In a criminal prosecution, if there is a material misdirection of the law as applicable to the case, or a failure to give in charge to the jury the law which was required by the evidence in the case, and such error or omission was calculated, under all the circumstances of the case, to prejudice the rights of the defendant, the Texas court of appeals will, for either cause, reverse the judgment, even though there has been no exception taken or objection made in the trial court.—*Jackson v. State*, (Tex.) 111.

CROPS.

Mortgage.

Under Mansf. Dig. Ark. § 4452, providing that, where land is rented for a share in the crop, no mortgage or conveyance of any part of the crop made by the person cultivating the land shall be valid, unless made with the consent of the employer or owner of the land or crop, which consent must be indorsed on such mortgage or conveyance, when their respective rights in the crops have been ascertained and adjusted; and the laborer's or tenant's part specifically set aside to him, he may mortgage it or dispose of it as he will, independently of the landlord's consent. And a mortgage made in such case of the tenant

or laborer's share, without the landlord's consent, will prevail as against a subsequent purchaser from the tenant or laborer.—*Parkes v. Webb*, (Ark.) 521.

CUSTOM AND USAGE.

See, also, *Insurance*, 2.

Evidence.

1. Evidence of a custom is inadmissible to subvert a well-established rule of law, and the legal effect of a deed.—*Tucker v. Smith*, (Tex.) 671.

2. Evidence of a usage adopted by cotton factors, during the existence of a panic, of shipping cotton to Europe without the consent of the owner of the cotton, is not admissible to prove the existence of such a custom binding on the owner, it appearing that such shipments had been resorted to only temporarily during the existence of the panic, and that the owner had expressly refused to allow his cotton to be so shipped.—*Wootters v. Kauffman*, (Tex.) 465.

3. Where the fact of a loan being made, and the money thereon paid by a bank, has been plainly established by positive proof, testimony of other bankers and merchants of the town tending to show that they would not have lent the money, and that it was out of the course of business and custom of bankers in the place, is inadmissible.—*Blum v. Bassett*, (Tex.) 83.

Proof.

4. Where there is the testimony of only one witness in proof of a custom, and he is contradicted by other witnesses, the custom cannot be considered as proved.—*Wootters v. Kauffman*, (Tex.) 465.

DAMAGES.

Appeal, damages on affirmance, see *Appeal*, 35.

Eminent domain, compensation, see *Eminent Domain*, 3, 4.

Highways, amendment of report of damages, see *Highways*, 7.

Injunction, damages on dissolution, see *Injunction*, 3.

Interest as, see *Interest*, 1.

Jury, assessment by on default, see *Jury*, 13.

Negligence, evidence of loss, see *Negligence*, 9.

Telegraph, error in message, see *Telegraph Companies*, 2.

Trade-mark, infringement, see *Trade-Mark*, 1, 2.

Breach of contract.

1. The measure of damages for breach of contract to convey lands is (where the price has not been paid) the difference be-

tween the contract price and the value of the lands at the date of the breach.—*Hartzell v. Crumb*, (Mo.) 59.

2. In computing the damages for breach of contract to sell lands, the date of the breach is the time when the vendor put it out of his power to perform his contract by conveying to another, unless he had previously given direct notice to the vendee that he would not convey to him.—*Id.*

8. In an action upon a contract for the floating and delivery of logs brought by the contractor against the owner, the measure of damages is the contract price for floating and delivering, less the cost to the contractor of performing the contract, including in such cost the value of his own services, as well as necessary outlay of money.—*Long v. McCauley*, (Tex.) 689.

Breach of contract—Pleading.

4. In an action upon a contract for the floating and delivery of all logs put into a river by A. during a certain time, to recover for breach thereof by A., a petition alleging the number of logs put into the river, the contract price per thousand feet for floating them, and the cost of floating and delivering them, and claiming the difference between the estimated cost and contract price as damages, is not open to objection on the ground of not properly alleging the damages.—*Long v. McCauley*, (Tex.) 689.

5. In an action upon a contract for the floating and delivery of logs, if damages are claimed for breach of the contract in permitting the logs to clog the skidways, and consequently obstruct the business of the mill, or in failing to supply the logs fast enough, and consequently causing the stoppage of the mill, a general allegation of the damages caused by such breaches, respectively, is sufficient.—*Id.*

— Delay in transportation.

6. The measure of damages for delay in the transportation of goods beyond the time specified, or, if not specified, beyond a reasonable time, is, as a general rule, the difference between the value of the goods at the time and place they should have been delivered and their value when they were in fact delivered, computed at the place of destination, with interest, less freight unpaid.—*St. Louis, I. M. & S. Ry. Co. v. Mudford*, (Ark.) 814.*

7. Damages for loss of an advantageous bargain are recoverable if the carrier was informed of the bargain, and the consequent necessity for prompt transportation, but not otherwise.—*Id.*

8. The plaintiff is not entitled to recover for loss of time and expense incurred in going to the place of shipment to look after the goods during transportation.—*Id.*

Sale under erroneous judgment.

9. Upon the reversal of a judgment, appointing a receiver and ordering sale, the title to land and personalty sold under it having in the mean time passed to a purchaser for value, so that the property cannot be recovered *in specie*, the original owner may bring an action to recover damages against those who procured the erroneous judgment; and the measure of damages in such case is the value of the property *on the day it was sold*, with the reasonable rents that had accrued from the land up to the day of sale, or to the time the purchaser obtained possession, it having been placed in the hands of a receiver, with interest from that time, and ordinary costs, not including attorney's fees, incurred by the owner in the action, subject to a credit of any debts that may have been paid out of the sale money to creditors who had filed their claims, and upon which the owner was liable.—*Hays v. Griffith*, (Ky.) 431.

10. Upon the reversal of a decree which declared a mortgage a general assignment, and under which a sale of the mortgaged premises had taken place before the reversal, only the parties who sought and obtained the erroneous decree are liable in damages to the owner, and not creditors who merely proved claims before the commissioner to obtain their share of the distributable proceeds.—*Id.*

Assault and battery.

11. In an action for an assault and battery, the elements of damages are the personal indignity involved in the assault, the plaintiff's bodily pain and suffering, loss of time and labor, and diminished capacity to work from the date of the assault, and the expenses of medical and surgical attendance consequent upon the injuries received.—*Ward v. Blackwood*, (Ark.) 624.

Personal injuries.

12. A verdict for \$7,500 in an action to recover for personal injuries of a permanent nature received by plaintiff, when an infant 19 months old, by being run over by a street car, *held* not excessive.—*Galveston City R. Co. v. Hewitt*, (Tex.) 705.

DEED.

Champerous deed, see *Champerity*.
Consideration, failure of, see *Equity*, 8.
Dower, condition subsequent, see *Dower*, 1.
Fraud and undue influence, see *Fraud*, 8.
Infancy, disaffirmance, see *Infancy*, 2.
Mortgage, deed absolute in form, see *Mortgages*, 2.
Reformation of, see *Equity*, 2.
Sunday, execution on, see *Sunday*.

Construction.

1. A deed, in consideration of love and affection, and a covenant on the part of the grantees to pay the grantor \$400 a year during her natural life in quarterly installments, the first to be paid on the first day of January, 1880, by way of condition provided that, in the event the grantees failed to perform the covenant, it should be lawful for the grantor, whenever she elected so to do, to take, repossess, and enjoy the property conveyed as in her former estate. *Held*, that the grantor having died about the twenty-first of January, 1880, without claiming a defeasance of the estate for the breach of the condition, that the title remained with the grantees, subject to the payment of the installment which had matured.—*Berryman v. Schumacher*, (Tex.) 46.

Description.

2. A deed contained the following description: "Three-fourths of the south part of the north-west quarter of section 30, township 1 south, range 10 west, containing forty-four and 81-100 acres." *Held*, that it was void for uncertainty.—*Adams v. Edgerton*, (Ark.) 628.

3. Where a deed conveys all the lands located by virtue of certificates issued to a certain railroad, and gives the numbers of the certificates, but does not give the field-notes of the surveys, *held*, as the land could be definitely located by reference to the records of the surveyor's office and general land-office, the description is sufficient. The rule that that is certain which can be made certain applies.—*Bitner v. New York & Texas Land Co.*, (Tex.) 801.

Quitclaim deed.

4. A party receiving a quitclaim deed to land cannot be deemed a *bona fide* purchaser without notice of any interest adverse to his grantor. But where the language of the deed is that the grantor "grants, bargains, and sells," as well as "quitclaims," the grantee may take what *either* of these words would convey, and may therefore escape being charged with notice under the "quitclaim" by electing to take under the "grant, bargain, and sale."—*Richardson v. Levi*, (Tex.) 444.

DESCENT AND DISTRIBUTION.

See, also, *Executors and Administrators; Will.*

Assignability of expectancy, see *Assignment*, 1.

Community property.

Under the law of Texas, upon the death of a married merchant, his stock in trade, being community property, passed to his wife and children charged with the pay-

ment of community debts; and where the widow, forming a partnership with some of the children, continues the business under the old name, and contracts debts by purchasing new stock, the interests of such partners, subject to administration, are liable therefor.—*Cleveland v. Harding*, (Tex.) 587.

Discovery.

In suit for infringement of trade-mark, see *Trade-Mark*, 1.

DISORDERLY HOUSE.**Indictment.**

1. An indictment which alleges that the accused, "on the tenth day of March, 1886, in Victoria county, Texas, did keep a disorderly house, said house being then and there kept for the purpose of public prostitution," sufficiently charges the keeping of a disorderly house, under Tex. Pen. Code, art. 339.—*Lorraine v. State*, (Tex.) 340.

Evidence.

2. That a house is a house of prostitution may be shown by general reputation.—*Cook v. State*, (Tex.) 749.

3. The character of a house as a disorderly house may be established by common reputation, but the proof must directly implicate the person charged with keeping it, in order to convict.—*Sara v. State*, (Tex.) 339.

Sufficiency.

4. Upon trial for keeping a disorderly house, a conviction will be set aside when there is no positive testimony that defendant was the keeper thereof.—*Lorraine v. State*, (Tex.) 340.

District and Prosecuting Attorneys.

Misfeasance, see *Extortion*.

DIVORCE.**Setting aside decree.**

Civil Code Ky. § 844, providing for a new trial in cases where the grounds therefor are discovered after the term at which the decision was rendered, but declaring that the section shall not apply to divorce cases, does not prohibit setting aside the judgment in a divorce case during the term at which it was rendered, and while the conditions of both parties remain unchanged.—*Ficener v. Ficener*, (Ky.) 597.

DOWER.

Estoppel to claim, see *Estoppel*, 9.

Release of, by antenuptial contract, see *Husband and Wife*, 12.

Sale by administratrix no bar, see *Estoppel*, 10.

Nature of the estate.

1. Where lands are conveyed to a railroad company, on the condition subsequent that, if the railroad should not be constructed through the tract and a station established thereon, the deed should be void, and such condition is not fulfilled within a reasonable time, the failure to fulfill the condition does not, without re-entry, vest the estate in the grantor so as to entitle his widow to dower therefrom.—*Ellis v. Kyger*, (Mo.) 28.

2. A widow is entitled to work mines on the dower tract, already opened, and may take out enough coal to furnish the farm with fuel, and sell enough besides to keep up fences; and, being denied entrance to the mine by the regular opening on a neighbor's tract, she may make a new opening to the mine on the dower tract.—*Whittaker v. Lindley*, (Ky.) 9.

3. A. conveyed certain land to his wife in fraud of his creditors, and, pending a suit to set aside the conveyance and subject the land to the payment of his debts, died. *Held* that, as against a purchaser of such land at a sale under decree of court, the wife could not claim dower, as A. had not died seized of the land within the meaning of New Code Tenn. § 3244, but that she could claim any surplus existing after satisfaction of the debts.—*Hopkins v. Bryant*, (Tenn.) 827.

How barred.

4. A conveyance of land to a wife absolutely in fee, the deed containing no provision that it is to be in discharge of dower, does not create an estate of jointure, which under Rev. St. Mo. §§ 2201, 2202, she was required to renounce in order to claim dower, notwithstanding that the husband in his will recited the conveyance as having been made in lieu of dower.—*Martien v. Norris*, (Mo.) 849.

5. Rev. St. Mo. §§ 2199, 2200, providing that a devise of land by the husband to the wife shall be in lieu of dower, unless she renounces the devise, do not apply where the husband devises personally unconditionally, but devises no land.—*Id.*

Druggists.

Intoxicating liquors, sale by, see *Intoxicating Liquors*, 2, 3, 5, 6.

EJECTMENT.

Adverse possession, see *Limitation of Actions*, 1-4.

Parties, waiver of defect in, see *Appeal*, 29.

Title to support.

1. Where both parties to an action of ejectment claim title under the same third

party, it is sufficient to show derivation of title from him; and it is not necessary to trace back to commonwealth.—*Luen v. Wilson*, (Ky.) 911.

Adverse possession.

2. In an action of ejectment, when the evidence shows that the possession of plaintiffs and their grantors was open, notorious, and adverse, and continued for more than seven successive years before the defendant purchased or entered into possession, this is sufficient to vest in plaintiffs the title to the land, and to enable them to maintain action of ejectment for it; following *Logan v. Jelks*, 84 Ark. 547.—*Crease v. Lawrence*, (Ark.) 196.

Parties.

3. The landlord cannot be dispossessed of his property by judgment rendered in an action to try title brought against his tenant to which he was no party, and of which he had no notice; and upon his application the judgment in such case should be set aside, himself let in as a party defendant, and the whole action tried *de novo*.—*Moser v. Hussey*, (Tex.) 688.

Pleading.

4. Plaintiff having improperly brought his action to recover land in equity, it was transferred to the ordinary docket. Plaintiff then filed an amended petition stating a cause of action in ejectment, and defendant filed an answer to it. *Held*, that it was open to plaintiff to prove any facts alleged in the amended petition additional to those contained in the original petition, and not inconsistent with the allegations of the latter, and that a demurrer to the amended petition was improperly sustained.—*Julian v. Stephens*, (Ky.) 596.

Improvements.

5. The Texas statute allowing a party who is ejected from land the value of his improvements, when he is shown to have been a possessor in good faith, and deferring the owner's right of possession until he pays such party the excess of the value of such improvements over the rents, is valid, but such statute cannot be extended beyond its letter, and a judgment awarding damages against the owner cannot be sustained.—*Van Valkenberg v. Ruby*, (Tex.) 746.

6. The Texas act of February 5, 1840, (Pasch. Dig. art. 5300,) provided that, where one has improved the land of another being in possession *bona fide*, he shall be entitled to compensation for the improvements, and Rev. St. art. 4814, established a different rule, exempting the tenant in possession from liability for the use and occupation of the improvements; but section 5, p. 718, of the final title of the Revised Statutes, provided that the repeal

of any statute shall not impair any vested right. *Held*, in suit brought after the passage of the Revised Statutes, where the improvements had been made under the act of 1840, and the tenant claimed compensation therefor, his claim may be set off by the owner's claim for the use and occupation of the improvements during the time the old statute was in force, and also during the time after the new statute took effect.—*Bitner v. New York & Texas Land Co.*, (Tex.) 801.

Election.

See *Dower*, 4, 5.

ELECTIONS.

See, also, *Quo Warranto*.

Of ineligible candidate, see *Office and Officers*, 2.

Time of election.

1. An election for an officer of government, to be valid, must be held on the day fixed by law, or by proclamation or writ of election issued by the governor; and where a special election is to be held to fill a vacancy in an office, and neither the constitution nor statutes fix a day for it, and the governor refuses to issue a writ or proclamation fixing a day, no valid election can be held.—*Toney v. Harris*, (Ky.) 614.

Statutory regulations.

2. In a proceeding to test the title to a county office the district court may count the returns or the ballots, as the case may be, notwithstanding irregularities by the officers in holding the elections, where such irregularities are in breach of requirements which are directory only, and it is shown that they have in no manner changed the result of the election, or its fair and honest character.—*Fowler v. State*, (Tex.) 255.

3. In an election for county officers a failure to comply with the requirements of the election law on the following points was shown: (1) No tally-sheets of the votes cast, or poll-list of the voters by whom they were cast, was kept or returned by the presiding officer and managers of the election; (2) the election returns contained no more than a mere statement of the result of the voting, and the ballot-box, containing the tickets voted, was sent to the county judge and clerk through the United States mail, instead of by the presiding officer, or any manager of the election; (3) the non-reception of the returns sent him by the county judge; (4) the returns not made in triplicate; (5) the box used at the election, and in which the returns were made to the county court, not a proper one. *Held*, that

these defects would not vitiate the election, provided it is made to appear that the neglect or misconduct of the officers has not prevented an honest and fair election.—*Id.*

4. Rev. St. Tex. art. 3229, makes it the duty of the proper authority to order an election on the question of local option, not less than 15 nor more than 80 days after an order therefor. Article 3280 requires the notice of the election to be posted at least 20 days before the election. *Held*, that the law is not void for inconsistency, and that the latter statute controls.—*Ex parte Kennedy*, (Tex.) 114.

5. Where the writs of election and copies of the forms of returns are not delivered to the presiding officer of an election precinct, as required by Rev. St. Tex. art. 1683, and no election is held in such precinct by reason thereof, the election is void, if the votes of such precinct might have changed the result.—*Id.*

Certificates of election.

6. Gen. St. Ky. c. 83, art. 5, § 2, authorizing the county board to give certificates of election, does not apply to the office of judge of the Louisville law and equity court, or to any other district office that requires the voters of two or more counties to fill, especially as section 6, art. 5, c. 83, and chapter 21, § 28, make it the duty of the state board to give certificates of election to judges of the circuit and other courts of similar jurisdiction.—*Toney v. Harris*, (Ky.) 614.

EMBEZZLEMENT.

What constitutes.

1. An agent for the sale of property, who sells it as his own property, and not as agent, and who has, at the time of sale, a fraudulent intent to appropriate the proceeds of the sale to his own use, and afterwards does so, is guilty of embezzlement of the thing itself.—*Epperson v. State*, (Tex.) 789.

2. Where a church appoints one as its agent to solicit and collect subscriptions for repairing the church, and the agent collects money from various persons which he fails to pay over to the church, he cannot be indicted for embezzlement, under Gen. St. Ky. c. 29, art. 12, § 2, punishing any person, who, being intrusted with money to be delivered to another, embezzles or fraudulently converts it to his own use. The money could not be considered as paid to one to be delivered to another, but payment to the agent was equivalent to payment directly to the church.—*Shelburn v. Commonwealth*, (Ky.) 7.

Construction of statute defining.

8. Texas act of March 16, 1883, (Gen. Laws Eighteenth Leg. 24.) providing that "if any person shall fraudulently receive or conceal any property which has been acquired by another in such manner as that the acquisition comes within the meaning of embezzlement, knowing the same to have been so acquired, he shall be punished in the same manner as the person embezzling the same would be liable to be punished," *held*, not to be so indefinite as to be inoperative. *HURST, J.*, dissenting.—*Hodges v. State*, (Tex.) 789.

Indictment.

4. It is not necessary, in an indictment for receiving embezzled property, to specifically allege the elements of the embezzlement.—*Hodges v. State*, (Tex.) 789.

EMINENT DOMAIN.

See *Railroads*, 8.

Arbitration as bar to proceedings, see *Pleading*, 6.

Evidence of value, see *Evidence*, 12.

Highways, amendment of report of damages, see *Highways*, 7.

Mandamus to compel impaneling of jury, see *Mandamus*, 2, 8.

What is a public use.

1. In Texas the change of a road from third class to first class necessitates the taking of more of the owner's land, and prevents him from erecting gates across such road. Such a change is a *taking* injurious to the land-owner, and, in the absence of compensation, is void under Const. Tex. art. 1, § 17, which prohibits taking for public use without compensation. — *Thompson v. State*, (Tex.) 232.

2. Under Const. Mo. 1875, art. 2, § 20, providing "that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined," a question as to whether the condemnation of land for an alley-way is for a public use is one for the court, and should not be submitted to the jury.—*City of Savannah v. Hancock*, (Mo.) 315.

Compensation.

3. In a proceeding begun by a railroad company to condemn certain lands of defendant for a right of way for plaintiff's railroad, the land of defendant described in the petition was the 80-acre tract, being the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 29; but the defendant's farm, of which said tract was a part, consisted of 94 acres, and was an entire compact tract of contiguous parcels. *Held*, that the jury had a right to con-

sider the entire tract of defendant in the assessment of damages, and that the inquiry was not confined to the tract of land described in the petition.—*Springfield & S. Ry. Co. v. Calkins*, (Mo.) 82.

Benefits.

4. Const. Mo. 1875, art. 2, § 21, which provides "that private property shall not be taken or damaged for public use without just compensation," "and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed," does not affect or alter in any way the rule established by *Newby v. Platte Co.*, 25 Mo. 258, that damages for property taken for a public use may be compensated for or paid in benefits peculiar to that which is not taken, but not in such benefits as are common to the public at large.—*Dougherty v. Brown*, (Mo.) 210.

EQUITY.

See, also, *Fraud*; *Fraudulent Conveyances*; *Injunction*; *Laches*; *Partition*; *Reference*; *Specific Performance*.

Account, right to, see *Trade-Mark*, 2.

Accounting by turnpike company for taxes, see *Turnpikes*, 2.

Counties, equity jurisdiction of action against, see *Counties*, 1.

Decree, scope of relief, see *Partition*, 1.

— prayer for general relief, see *Fraudulent Conveyances*, 14.

Fraud and undue influence, setting aside deeds, see *Fraud*, 8.

Jury, trial by, in chancery, see *Constitutional Law*, 9.

Official bond, jurisdiction of suit for breach, see *Bonds*, 1, 2.

Jurisdiction.

1. Where the allegations of the complaint showed that plaintiffs were not entitled to any relief in equity, but defendant's cross-complaint showed that defendant was entitled thereto, this supplied any defect in the equitable jurisdiction of the court, the original and cross-complaints being but one cause, and imposed upon the court the duty of granting relief to the party entitled thereto.—*Crease v. Lawrence*, (Ark.) 195.

Reformation of deed.

2. A deed of settlement of land on a wife by her husband, in which no boundaries are given, and no landmarks, natural or artificial, are mentioned, will not be reformed in equity against a subsequent purchaser for value.—*Adams v. Edgerton*, (Ark.) 623.

Mistake.

3. Land in the place to which, as was supposed, the county-seat had been legally removed, was conveyed, for the nominal

consideration of one dollar, for the erection of a court-house, the anticipated enhancement of the grantor's other property thereby being the real consideration for the deed. The proceedings to remove the county-seat being held void, a bill was filed to cancel the deed. *Held*, that the deed, being founded on an assumption which was a mutual mistake that could be relieved against in equity, as the parties could be placed in their original position by requiring the grantor to refund to the county what it had expended for improvements, and to pay the taxes for the years during which the land had been held exempt as county property.—*Griffith v. County of Sebastian*, (Ark.) 886.*

4. When no opportunity is afforded a party to an action at law to move for a new trial because the court adjourns, and the term lapses, before the motion can be made and disposed of, equity will grant relief, if the judgment is against conscience, but not merely on account of the loss of opportunity to move for a new trial, or on account of error committed at the trial.—*Johnson v. Branch*, (Ark.) 819.

5. Where a lessee for years attorned to the holder of a superior title, paid rent to him, and made improvements, and afterwards such owner sought to evict the lessee before the expiration of the term of his original lease, but judgment went in the lessee's favor, although there was no writing between the parties to satisfy the statute of frauds, *held* that, even if the judgment was erroneous, the case was not one in which the relief referred to would be granted.—*Id.*

Fraud.

6. An executor fraudulently suffered lands belonging to his testator's estate to be sold for taxes, and bought them in for his own use and benefit. *Held* that, although such a transaction was grossly fraudulent, it was wholly outside the jurisdiction of the probate court, and could be remedied in equity.—*Hankins v. Layne*, (Ark.) 821.

Account.

7. Where a defendant was held entitled, as preliminary to certain relief to be granted to plaintiff, to satisfaction of a judgment obtained by him against plaintiff in an action of slander, and remitted all the money except enough to cover the costs and expenses of the two suits, *held*, that plaintiff could not maintain an objection to an accounting and decree upon that basis, the sum thus arrived at not equaling the amount of the judgment in the slander suit.—*Blackburn v. Clarke*, (Tenn.) 505.

—Executor's account.

8. A suit in equity will not be entertained to correct fraudulent credits allowed to an

executor, upon a settlement of his accounts made 18 years before.—*Hankins v. Layne*, (Ark.) 821.

Bill of review.

9. Evidence that since a decree, directing a county to pay for a bridge built under contract as a public bridge, had been passed, the contractor had bought up a charter issued by the county to another person to erect a toll-bridge at the same point, and was using the public bridge as a toll-bridge, is not sufficient to support a bill of review on the ground of newly-discovered evidence, where, from the facts and circumstances, the county must have been aware of such purchase and toll-taking at the time the decree was made.—*State v. Hicks*, (Tex.) 524.

Multifariousness.

10. In an action against the treasurer of the state of Arkansas and the sureties in his official bonds for a proper settlement of his accounts, in equity, covering three terms of office, an objection of a misjoinder of parties, and that the complaint is multifarious, cannot be sustained, where both are intimately connected with the subject-matter of jurisdiction.—*State v. Churchill*, (Ark.) 852.

Decree.

11. Upon a bill of review to vacate the settlement of a guardianship account, where the items alleged to be incorrect are numerous, and evidence is adduced to show the errors, the findings (when the trial is in the district court) ought to point out distinctly which are found correct and which incorrect, and to show clearly the several corrections and revisions made by the court.—*Jones v. Parker*, (Tex.) 222.

Reports of masters.

12. An exception to a report of the master, like a special demurrer, must point out certainly and specifically the objections relied on. It must be positive, explicit, and certain, leaving nothing to supposition or inference.—*Kader v. Yeargin*, (Tenn.) 178.

Escape.

Homicide, in prevention of, see *Homicide*, 42.

ESTATES.

See, also, *Dower*.

Liability of life-tenant.

A life-tenant is bound to pay assessments for a granite pavement laid on an asphalt foundation, in front of the property, and cannot have a portion of the property sold by order of court to pay them, when the remainder-man is an infant only eight years of age, as such improvements as to

him cannot be considered permanent.—*Reyburn v. Wallace*, (Mo.) 483.

ESTOPPEL.

Infants, estoppel of, see *Guardian and Ward*, 4, 5; *Infancy*, 8.

Execution, estoppel to set aside sale, see *Execution*, 6.

Landlord, estoppel to evict tenant, see *Landlord and Tenant*, 8.

Limitations, estoppel to plead statute of, see *Limitation of Actions*, 14; *Municipal Corporations*, 2.

Res adjudicata, see *Judgment*, 7, 8.

Ultra vires, estoppel to plead, see *Banks and Banking*, 8.

By deed.

1. N., an attorney, recovered two separate judgments, for S. and B., respectively, against L., an administrator. L., with the authority and approval of the probate court, conveyed three tracts of land, part of the estate, to W., in trust, towards the payment of each of said judgments *pro rata*, at an agreed price for each parcel. Only one of these tracts was sold, and S. received no part of the proceeds thereof. W. conveyed two of the tracts to B. Subsequently L., as administrator, under order of the court, conveyed to S. a tract other than the three before mentioned, in full satisfaction of S.'s judgment, by a deed reciting that L. and W. had been required to settle the balance due on said judgment by such conveyance, and the land so conveyed formed no part of the land conveyed originally to W. This deed was unknown, and was never delivered to S. *Held*, in a suit by S. to recover an interest in part of the land originally conveyed in trust to W., and for a partition thereof, that the deed to him in satisfaction of his judgment was no estoppel.—*Stephenson v. Martin*, (Tex.) 89.

By record.

2. Where, at the time of a final settlement by a guardian of his accounts, the ward was in fact a minor, and was not represented by a guardian *ad litem*, the ward is not estopped, by a recital of the court that he has arrived at majority, from disputing the recital, so as to defeat a plea of the statute of limitations interposed by the guardian in a suit for the revision of the settlement.—*Jones v. Parker*, (Tex.) 222.

3. A defendant in an action to try title to land who disclaims and takes judgment for costs, will be estopped to claim title in a subsequent action between plaintiff, or those claiming under him, and defendant, unless he can show that he has since acquired title.—*Wooters v. Hale*, (Tex.) 725.

4. A. took out a policy of insurance on the goods in his store, and indorsed the

policy to B., his brother, to secure to the latter a debt alleged to be due him by A. The goods being destroyed by fire, A.'s creditors sued him, making B. a party also, and garnishing the insurance company. The court in that action determined that B. was a joint owner of the goods with A., and liable to the creditors as a partner with A., and referred the case to the commissioner to take proof of loss, and collect the amount of the policy from the company. The company refusing to pay, A. and B. brought this suit, for the benefit of the creditors, to compel payment. The company defended on the ground that, A. not being the sole owner of the goods, as he represented in securing the insurance, the policy was void. A. and B. attempted to deny that the latter had any interest in the goods. *Held*, the judgment in the former action was conclusive as to such joint ownership of the goods, and the question could not be again raised in this action. The order referring the case to the commissioner to make out proof of loss was not, however, conclusive as to the liability of the company on the policy so as to preclude it from contesting its liability in this action upon the ground of A.'s misrepresentation of the ownership of the goods.—*Fire Ass'n v. Dickey*, (Ky.) 372.

Estoppel in pais.

5. Where goods subject to a mortgage, that have been delivered into the possession of the mortgagee to secure payment of his debt, are subsequently attached by another creditor of the mortgagor, and the mortgagee executes a forthcoming bond to the sheriff, and retains possession, he is not, as an interpleader, estopped, by reason of having given such bond, from denying that the goods were the property of the mortgagor, in the absence of evidence to show that the attaching creditor has been deceived or induced, in some way injurious to him, to alter his position with reference to the property of his debtor in the writ, in consequence of the execution of the bond.—*Petring v. Heer Dry-Goods Co.*, (Mo.) 405.

By abandonment of claim.

6. Although, under the common law, title to realty is not subject to be divested by abandonment, yet a settlor on land may be estopped by such abandonment from claiming adversely against one who has gone into possession on the strength of it.—*Sydeck v. Duran*, (Tex.) 264.

By representations.

7. In an action to recover personal property by a plaintiff claiming under an execution sale on a judgment against the defendant, the defendant is not estopped by the fact of the execution against him from

denying that he owned the property, and asserting that it belonged to a third person; and this though he had declared previously to the execution sale that the property belonged to him.—*Hill v. Neuman*, (Tex.) 271.

8. As against a *bona fide* purchaser of land from a grantee under an absolute recorded deed, the grantor cannot maintain a bill to redeem on the ground that the deed was a mortgage, when, prior to buying, the purchaser informed the grantor that he was about to take the land, and the grantor failed to tell him that his grantee's title was incumbered with these secret trust.—*Gill v. Hardin*, (Ark.) 519.

— To claim dower.

9. Upon the sale of her husband's land, the widow and the agent employed to make the sale stated to the purchaser that the title to the land was perfect, and that the will provided for dower; the widow believing at the time that the provision of her husband's will excluding her dower right was enforceable. The will was of record, accessible to the purchaser. He bought the land without requiring her to relinquish dower, "being convinced in his own mind that she had no dower." *Held*, that the widow was not estopped from subsequently claiming dower.—*Martien v. Norris*, (Mo.) 849.

10. The auctioneer at an administrator's sale stated that a warranty deed and perfect title would be given, but the administrator present corrected him by saying that nothing would be sold except the title and interest of the decedent. The purchaser, however, was not present when this statement was made. He took an administrator's deed of the land. The widow, who was one of the administrators, made no representations, and did not appear at all in the transaction. *Held*, that she was not estopped from afterwards claiming dower in the land.—*Id.*

EVIDENCE.

See, also, *Appeal*, 18-25, 27, 28, 31; *Continuance*; *Criminal Practice*, 15-25; *Custom and Usage*, 1-4; *Disorderly House*, 2-4; *Fraudulent Conveyances*, 12; *Homicide*, 6-12, 32-34; *Intoxicating Liquors*, 8; *Larceny*, 6-11; *Malicious Prosecution*, 4, 5; *Malpractice*; *Negligence*, 5-9; *Partnership*, 3, 4; *Perjury*, 4-7; *Railroad Companies*, 15-19; *Rape*, 3, 4; *Receiving Stolen Goods*, 2; *Trial*, 2; *Trusts*, 1-5; *Witness*.

Burden of proof, see *Limitation of Actions*, 20, 21; *Malpractice*, 8; *Negligence*, 18.

Competency, see *Larceny*, 8; *Negligence*, 5, 8. Criminal practice, evidence of accused at coronor's inquest, see *Criminal Practice*, 22.

Declarations, see *Rape*, 3; *Trusts*, 1-3.

Indictment as evidence, see *Criminal Practice*, 17, 18.

Judgment, proof of, see *Judgment*, 4.

Opinion of experts, see *Malpractice*, 1, 2.

Parol, to explain trust, see *Trusts*, 1-5.

— to vary indorsement, see *Negotiable Instruments*, 6.

Pleading and proof, see *Pleading*, 5, 6.

Presumption, as to purchase for value, see *Negotiable Instruments*, 4.

— from possession of stolen property, see *Larceny*, 11.

Railroads, evidence in stock-killing cases, see *Railroad Companies*, 10, 15, 16.

Reputation, see *Disorderly House*, 2.

Res gestæ, see *Homicide*, 11.

Signature by mark, see *Signature*.

Sufficiency, see *Larceny*, 9.

— proof of custom, see *Custom and Usage*, 1, 4.

Weight of, see *Appeal*, 24, 25.

Witness, transactions with deceased person, see *Witness*, 10-12.

Declarations—*Res gestæ*.

1. In an action to recover damages of a railroad for killing plaintiff's stock, evidence of the statements of a section foreman as to the fact of the killing, made after the event, are inadmissible as part of the *res gestæ*.—*Smith v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 836.

2. The declarations of a switchman, made immediately after an accident by which he has been knocked down and run over, and while he is still under the car, touching the cause of the accident, are competent, as part of the *res gestæ*.—*Little Rock, M. R. & T. Ry. Co. v. Leverett*, (Ark.) 50.

3. In an action against a railroad for damages in carrying plaintiff beyond her station, and for misconduct towards her on the part of the conductor of the train, evidence of misconduct towards her on the part of a brakeman is admissible, although the misconduct of the conductor only is complained of in the petition, when the brakeman's misconduct occurred in the presence of the conductor, and at the time of the acts of the conductor complained of.—*Louisville & N. R. Co. v. Ballard*, (Ky.) 530.

4. The declarations of a defendant subsequent to the commission of the offense, if wanting in spontaneity and instinctiveness, and are but the party talking about the facts, and not the facts speaking through the party, form no part of the *res gestæ*, but are self-serving declarations, and as such are properly rejected as evidence.—*Jones v. State*, (Tex.) 280.

— Of deceased persons.

5. Evidence of the declarations of disinterested parties, who were dead at the time

of the evidence offered, as to the location of a boundary line, is admissible.—Tucker v. Smith, (Tex.) 671.

Dying declarations.

6. That a declarant said he was going to die, and sent for a priest, is sufficient to show that he made the declaration under a sense of impending death, so as to render his declaration admissible.—Cook v. State, (Tex.) 749.

Confessions.

7. It is only in case the defendant was in custody at the time of his application for a continuance that such application is considered as so far in the nature of a confession or admission that it cannot be used against him, unless he was warned that it might be.—Wimberly v. State, (Tex.) 717.

8. Though warned by the justice of the probable consequences of his plea, the accused, on his examining trial, pleaded guilty, upon the suggestion of the injured party that to do so would secure the lightest penalty. Proof of this plea on the final trial was objected to. *Held*, that the objection was properly overruled.—Rice v. State, (Tex.) 791.*

9. Confessions or declarations of one conspirator, made after the consummation of the conspiracy, and not in the presence of his co-conspirator, cannot be used in evidence against the latter.—Willey v. State, (Tex.) 570.

Opinion evidence.

10. One familiar with a river, and who has had experience in rafting logs on it, may give his opinion as to whether he can accomplish a certain work in rafting logs on the river in a certain time.—Long v. McCauley, (Tex.) 689.

11. Where an expert witness bases his opinion upon a state of facts which he has heard other witnesses testify to, and not upon actual knowledge of his own, the value of his opinion depends upon the existence of those facts, and their existence must be determined by the court or jury, and not by the expert.—Armendaiz v. Stillman, (Tex.) 678.

12. Upon the question of the value of property, real or personal, and as to the amount of damages done to property in controversy, parties shown by the evidence to be acquainted with the value or damage may, in connection with the facts, state their opinion as to the value or damage.—Springfield & S. Ry. Co. v. Calkins, (Mo.) 82.

13. Where a physician, superintendent of an insane asylum, testifying as an expert, has given it as his opinion that the accused, at the time of the homicide, was suffering with recurrent insanity, it is not error to refuse him permission to give il-

lustrations of recurrent insanity which had come within his own personal experience, where such refusal has worked no prejudice.—Leache v. State, (Tex.) 539.

Documentary evidence.

14. Where a constable signs a constable's deed as such, his signature is *prima facie* evidence of his authority, and such a deed is rightly admitted in evidence in the absence of proof to the contrary.—Cannon v. Cannon, (Tex.) 86.

15. In an action against the principal and sureties on the bond of the treasurer of a benevolent association to recover for a conversion of moneys claimed to have been in the treasurer's possession on January 1, 1885, the bond having been executed January 21, 1885, an official report of the treasurer, made in accordance with the laws of the corporation after the bond was executed, showing the funds in question to have been in his possession at the time of making the report, is admissible in evidence to charge the sureties, who would not be liable if the conversion occurred before the bond was executed. Such evidence is a part of the *res gesta*.—Barry v. Screwwmen's Benev. Ass'n, (Tex.) 261.

16. In such an action, the stub of the treasurer's private check-book is not admissible to show a conversion of such funds before the bond was executed.—Id.

17. The admission in evidence of certified copies of judgments of other courts is governed by Rev. St. Tex. art. 2253, relative to the admission of copies of records of courts, and not by Rev. St. Tex. art. 2257, relative to the admission of certified copies of instruments recorded in the office of the clerk of the county court; and a certified copy of a judgment of another court may therefore rightly be admitted without notice.—Cannon v. Cannon, (Tex.) 86.

Map.

18. In an action to recover for injury caused to land abutting on a river by the effect of a jetty, built in the river, on the current, a map of a survey of the river, made some years after the injury, held competent, although it appeared that the river often changed its course; the map enabling the court to apply other evidence.—Armendaiz v. Stillman, (Tex.) 678.

Proof of handwriting.

19. The cashier of a bank which had paid a check alleged to be forged, testified that the signature to the check was genuine. Upon cross-examination plaintiff showed him a number of signatures of his (plaintiff's) name. Witness stated they were all genuine. Plaintiff, in rebuttal, proved by another witness that plaintiff had not written them. *Held*, the signatures were inadmissible, either to test the

witness as an expert, or his knowledge of plaintiff's handwriting.—*Rose v. First Nat. Bank, (Mo.) 876.*

Parol evidence.

20. Parol evidence is admissible to show that a written contract, regular in form, and purporting to be for the purchase and actual future delivery of cotton, was in fact entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price and the price on a future named day; but, the terms of the contract implying good faith, the burden of proof is on the party resisting to show the illegal purpose.—*Beadles v. McElrath, (Ky.) 152.*

21. A contract not under seal for the sale of land being signed by one as agent, but the terms of the instrument leaving it in doubt whether the principal is bound, or the agent only, parol evidence is admissible to charge the principal.—*Hartzell v. Crumb, (Mo.) 59.*

22. Recovery upon a promissory note, by one to whom it has been assigned, cannot be defeated by the maker showing a parol condition accompanying the making of it that it should be paid only in event it was used for a certain purpose, and that it had not been used for that purpose.—*Wislizenus v. O'Fallon, (Mo.) 887.**

Competency.

23. In an action against a railroad company for negligence, evidence on the part of plaintiff was admitted that A., a witness for defendant, had said that, if the company could find a witness who would swear that the injured man had been fishing or wading after the accident, money would be no object. A. himself gave no testimony as to the man's going fishing or wading. *Held*, that the admission of the evidence was improper.—*Louisville & N. R. Co. v. Ritter's Adm'r, (Ky.) 591.*

Settlement and filing of bill.

24. Where a statement of facts embodying exceptions is filed after an adjournment of the court for the term, under an order of court allowing this to be done, such order does not render valid the exceptions embodied in the statement.—*Franco-Texan Land Co. v. Chaptive, (Tex.) 81.*

25. Bill of exception failing to show the objections made to the evidence rejected, or even that it was rejected by the trial court, cannot be considered on appeal.—*Goforth v. State, (Tex.) 332.*

26. If a bill of exceptions states that certain instructions were given, a certificate of the clerk stating that none of the instructions were in fact given is inadmis-

sible.—*Smith v. St. Louis, I. M. & S. Ry. Co., (Mo.) 886.*

EXECUTION.

Damages for stay, see *Appeal, 85.*

Evidence, constable's deed, see *Evidence, 14.*
Homestead, liability to execution, see *Homestead, 2.*

Insurance, execution upon certificate, see *Insurance, 9.*

Return, as court record, see *Record.*

Sale, setting aside, see *Justices of the Peace, 8.*

What subject to.

1. Land conveyed in fraud of creditors is subject to an execution against the fraudulent grantor.—*Scott's Ex x v. Scott, (Ky.) 698.*

Stay of execution.

2. The provision of Code Tenn. (M. & V.) § 3774, to the effect that, as between a judgment debtor who is surety upon the cause of action on which the judgment was rendered, and a stayor, entered at the instance of the principal alone, the stayor is liable to execution before the surety, does not apply as between the judgment creditor and the surety; the surety, as to the creditor, is treated as the principal.—*Stafford v. Montgomery, (Tenn.) 438.*

Lien of execution.

3. Kentucky act March 8, 1878, (1 Acts 1877-78, p. 30.) provides that, where an execution is issued from one county to another to be levied, it shall be the duty of the sheriff of the county to which it is issued to return it, after levying it, to the clerk of the circuit court of his county to be recorded, and, after it has been recorded, to return it to the county whence it issued. *Held*, that the failure of the sheriff to do his duty, and have the execution recorded as directed by the statute, does not deprive the execution creditor of his lien under the execution and levy.—*Soaper v. Howard, (Ky.) 161.*

4. Where a claimant to property proposed to amend her former affidavit, and substitute a new one in its stead, claiming the goods levied on as her own property, in contradiction of her former affidavit, in which she claimed them as the partnership property of herself and another, she will not be permitted to file such affidavit, whether she has the right to amend or not, without the execution of a bond as required by the statute.—*Zadek v. Dixon, (Tex.) 247.*

Return of writ.

5. The entry of the levy upon an execution not explicitly stating when levy was made, but there being an entry as to when the execution came to the officer's hands,

held, that the two entries, when read together, must be regarded as substantially stating that the execution was levied the day it reached the officer's hands.—*Scott's Ex'r v. Scott*, (Ky.) 398.

Setting aside sale.

6. A judgment debtor who has allowed a merely equitable interest which he has in land to be levied upon and sold without objection, and who afterwards rents the land of the judgment creditor, the latter having bought it in at the sale, cannot, in an independent suit brought long afterwards, have the levy and sale set aside, except upon condition of satisfying the judgment.—*Blackburn v. Clarke*, (Tenn.) 505.

Redemption from sale.

7. The statutory right of a judgment debtor to redeem from an execution sale of his land, made by a creditor, cannot be reached and subjected to sale by another creditor, who is in a position to redeem from the sale, and the filing of a bill in equity for that purpose is no obstacle to a redemption by the debtor, or an assignment by him of his right of redemption.—*Ewing v. Cook*, (Tenn.) 507.

8. Under the Tennessee practice requiring a judgment creditor buying in his debtor's property at an execution sale, or a redemptioner from the sale, to advance his bid within a certain time to such a sum as he wishes, not exceeding the amount of his judgment, and allowing the debtor or another creditor to redeem from him at such price, a creditor or redemptioner, failing to make such advance, will hold the land subject to redemption at the price paid by him, and will have no equity to be paid the full amount of his debt, upon suit brought against him by one seeking to redeem. If he is a trustee, and has no authority to advance his bid, that fact will not alter the case.—*Id.*

EXECUTORS AND ADMINISTRATORS.

See, also, *Descent and Distribution; Will.*

Accounting, reopening, see *Limitation of Actions*, 10.

Appeal-bond, power to execute, see *Appeal*, 6.

Appointment, collateral attack on, see *Judgment*, 10.

Bond, exemption from giving, see *Appeal*, 32.

Damages on appeal, see *Appeal*, 35.

Fraud of executor, see *Equity*, 6.

Witness, transactions with deceased person, see *Witness*, 10-12.

Jurisdiction.

1. An order of a probate court, granting administration in the county in which it

sits, although erroneous, by reason of the non-residence of the decedent, is not for that reason void, but voidable only.—*Martin v. Robinson*, (Tex.) 550.

2. An order of a probate court, granting administration upon the estate of an intestate, will not be deemed void upon the sole ground that over 14 years elapsed after the death of the intestate before administration was granted.—*Id.*

Bond.

3. Under Gen. St. Ky. c. 39, art. 1, § 4, authorizing the county court to require bond with surety of an executor, if it appears to the court proper to do so, notwithstanding the will directs that no bond be required, where it appears that the estate is a large one; that it consists mostly of personality; that the executor is devisee of one-half, and the applicants for the bond are devisees of the other half; that the executor intends to remove from the state; that he has no estate of his own, and contemplates bringing suit to construe the will so as to give him the entire estate,—the county court should require the executor to give bond, although the will exempts him from doing so. Evidence of bad faith is not necessary, under the statute, to authorize the court to require the bond.—*Grigsby v. Cocke's Ex'r*, (Ky.) 418.

4. The surety on the bond of a deceased administrator is not relieved from liability, on his bond, for a debt due by the administrator to the intestate; by the fact that the administrator's estate was settled as an insolvent estate more than five years after the date of his appointment, where it is not shown that the money could not have been recovered during his life.—*Kader v. Yeargin*, (Tenn.) 178.

Allowance of demands.

5. Gen. St. Ky. c. 39, art. 2, § 53, providing that no interest accruing after his death shall be allowed or paid on any claim against a decedent's estate, unless the claim be verified as required by law, and demanded of the personal representative within one year after his appointment, *held*, the mere fact that an executrix, in advance of the verification of the debt and demand of its payment, makes a payment thereon, does not constitute a waiver of her right under the statute to refuse to pay interest; the claim not having been proved, and payment thereof demanded, within a year after her qualification.—*Jett's Ex'r v. Cockrill's Ex'r*, (Ky.) 423.

Settlements and accounting.

6. Where an administrator, indebted to his decedent's estate, files claims for administration expenses and disbursements without setting off his indebtedness, and his successor indorses his allowance upon

them, the allowance and payment of such claims is a constructive fraud upon the rights of those interested in the estate by the administrator, who is chargeable with knowledge of his predecessor's transactions.—*Sorrels v. Trantham*, (Ark.) 198.

7. An administrator *de bonis non*, etc., is not entitled to credits for legacies paid, where, when they were paid, he had funds in hands sufficient to pay debts which, by such payment, became insufficient, although the will provided that such legacies should be paid as soon as practicable.—*Lewis v. Carson*, (Mo.) 488.

8. A court of equity will not, at the instance of an heir, open an administrator's account on the ground merely that expenditures made for the benefit of decedent's children had not been specifically allowed or ordered to be paid by the probate court.—*Sorrels v. Trantham*, (Ark.) 198.

9. A suit in equity will not be entertained to correct frauds in unconfirmed settlements of an executor's accounts; and if an executor has settled his accounts several times, and another settlement is pending in the probate court, his failure to charge himself with certain assets in any of the settlements cannot be the subject of an equitable suit.—*Hankins v. Layne*, (Ark.) 881.

Liability of executor.

10. An administrator with the will annexed, who, in his individual capacity, buys up an outstanding interest in land partially owned by the estate, pays off a mortgage, sells and conveys the land by a deed executed in the individual names of himself and his sister, his sole residuary co-legatee, and carries the proceeds into his accounts as administrator, is responsible, along with the sureties on his bond, for the proper application of the money, although the sale was made on his own motion, and not by order of court, or under the power of sale given in the will.—*Lewis v. Carson*, (Mo.) 488.

Sales under order of court.

11. Where a person purchases land in good faith from an executor, he is, in the event of the sale proving void, entitled to recover the price paid, in so far as the estate or the beneficiaries have received benefit therefrom.—*Mayes v. Blanton*, (Tex.) 40.

12. Claims against a decedent's estate having been allowed by the fraudulent collusion of the claimant and the administrator, and lands ordered sold by the court to pay the claims, the claimant purchased the lands, and afterwards sold to others. *Held*, in an action by the heirs of the intestate against these subsequent purchasers, the lands could not be recovered; it appearing they had been purchased *bona fide*, and for

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value, from the original purchaser, who was guilty of the fraud.—*Martin v. Robinson*, (Tex.) 550.

Actions against executors.

13. Where a plaintiff sues an executor without first making the affidavit authenticating his claim prescribed by Mansf. Dig. Ark. § 103, he will be nonsuited.—*Ross v. Hull*, (Ark.) 190.

14. The requirement of the Arkansas statute for authenticating claims against the estates of deceased persons is not fulfilled by an affidavit, made at some period in the life-time of the decedent, to the effect that he was then justly indebted to the affiant in a sum stated, and that nothing had been paid or delivered towards the satisfaction of the demand.—*Wilkerson v. Gorden*, (Ark.) 183.

Express Companies.

License tax on, see *Licenses*, 1, 2.

EXTORTION.

Indictment.

Indictment for extortion charged, in effect, that the defendant, while county attorney of Newton county, received a fee to dismiss a certain prosecution pending in the justice's court, which fee was paid on behalf of the party accused. *Held* that, if the indictment attempts to charge the offense under Pen. Code Tex. art. 353, it is defective in that it fails to charge the acceptance of a fee *in excess of that allowed by law*; if it attempts to charge the offense under the act of February, 1883, it is defective in that it does not charge directly that the defendant received a fee when he was *entitled to none* for the service.—*Poole v. State*, (Tex.) 476.

Factors and Brokers.

Custom, powers growing out of, see *Custom and Usage*, 2.

Option contract, see *Contract*, 7.

FALSE PRETENSES.

Instructions as to what constitutes, see *Criminal Practice*, 35.

False packing.

1. Upon the trial of an indictment under Pen. Code Tex. art. 470, for false packing by putting sand in a bale of cotton with intent to defraud the purchaser, the facts that the sand was put in before ginning, and that the process of ginning would remove some, but not all of it, are, the in-

tent being proved, no defense.—*Jones v. State*, (Tex.) 478.

Indictment.

2. An indictment under Gen. St. Ky. c. 29, art. 13, § 2, punishing any person who, by any false pretense or statement, with intention to commit a fraud, obtains from another money or property which may be the subject of larceny, alleged that the accused fraudulently represented to R. that C. had told him to come to R.'s store, and get certain property specifically described in the indictment, and that C. would pay for it, and the said R., relying on the representations of the accused, let him have the goods; that *all said statements* were false, and known to be false when made. *Held*, that the averment that *all said statements* were false was sufficiently definite to enable the accused to know the nature of the charge against him. — *Commonwealth v. Whitney*, (Ky.) 583.

8. An indictment charged defendant with fraudulently obtaining from one A. a chance in a raffle for an organ, and also alleged that the defendant obtained the chance after he knew that it had obtained the prize. *Held* too uncertain to support a conviction, because it did not appear whether the charge was for swindling A. out of a chance in the raffle, or out of the value of the organ. — *Rosales v. State*, (Tex.) 344.

Fences.

See *Railroad Companies*, 12, 13.

Ferry.

Forfeiture of ferry privilege, see *Turnpikes*, 9.

Fire Insurance.

See *Insurance*, 1-6.

FORCIBLE ENTRY AND DETAINER.

Conditional purchase.

One who goes into possession of land under a written contract for a conveyance, and fails to pay the first note for the purchase money, which note contained a stipulation that, upon such failure, the vendee should pay "customary rent," becomes the tenant of the vendor, and a purchaser under the foreclosure of a mortgage rendered prior to the execution of the contract of conditional sale, succeeding to the rights of the original vendor, may maintain unlawful detainer against such vendee to recover possession of the land.—*Ish v. McRae*, (Ark.) 440.

FORGERY.

See, also, *Indictment and Information*, 6.

May be predicated of what.

Forgery may be predicated of the following instrument:

"JULY 3, 1835.

"*Apollas & Halsal*: Please let Mr. G. B. Rollins Have 4\$00d. in goods, and oblige. Charge to me. JOEL E3LER,"

—As of an order on Apollas & Halsal for four dollars in goods, purporting to be drawn by Joel Eller; the indictment containing the necessary explanatory allegations.—*Rollins v. State*, (Tex.) 759.

Former Jeopardy.

See *Criminal Practice*, 9-12.

Franchise.

Corporation, forfeiture by, see *Corporations*, 2.

Forfeiture of, effect, see *Turnpikes*, 9.

FRAUD.

See, also, *Frauds, Statute of*; *Fraudulent Conveyances*.

Fraud in administrator's account, see *Executors and Administrators*, 6.

Limitation affected by fraud, see *Limitation of Actions*, 5.

What amounts to, see *Insurance*, 10.

False representations.

1. A woman conveyed her property to her grandchildren, reserving not enough for a support for herself. The evidence showed she was induced to do so by the false representations of her son (the father of the grantees) that she was about to be sued for slander, and might, in that way, prevent the enforcement of any judgment obtained against her. *Held* that, although she was thus attempting to evade the law, and was *in delicto*, yet she was not *in pari delicto* with her son, in the sense that she could not have the deed set aside, or other relief.—*Harper v. Harper*, (Ky.) 5.

Undue influence.

2. A son-in-law obtained from his mother-in-law a conveyance to him of all her interest in the estate of her deceased husband in consideration of the payment to herself and her sister of annuities amounting to \$3,500. It appeared that the interest of the grantor in her husband's estate was represented to her by the grantee as worth \$50,000, when it was in fact worth more than double that sum; that the grantee had exclusive management and control of the entire estate from the time

of his marriage into the family to the date of the deed; that grantor had implicit confidence in him; that, though the deed stated that a settlement and accounting had been made to grantor, such in fact had not been made; and that the deed operated to disinherit a son of the grantor. *Held*, the deed should be set aside as made upon a grossly inadequate consideration, and as obtained by the undue influence and fraud of grantee.—*McHarry v. Irvin's Ex'rs.* (Ky.) 374.*

3. A deed executed only six months after the grantor had attained her majority, conveyed a two-thirds interest in her property to her half brother and sister. She was ignorant of her rights, and acted without legal advice; and the influence of her guardian and his wife, with whom she lived, though it did not amount to actual duress, was such as to destroy her free agency. *Held*, that the deed was properly set aside, notwithstanding the beneficiaries were infants, to whom no fault or fraud could be imputed.—*Kraft's Guardian v. Koenig.* (Ky.) 803.*

FRAUDS, STATUTE OF.

Contract not to be performed within one year.

1. A verbal subscription to the stock of a company, to be paid when the company is incorporated, is not within the statute of frauds. (Gen. St. Ky. c. 22, § 1,) providing that no action shall be brought to charge any one upon any agreement which is not to be performed within one year, unless the agreement is in writing. The statute refers to such contracts as are not to be performed within a year from the making of them, not to such as *may be* performed within that time.—*Bullock v. Falmouth & Chipman Hall Turnpike Road Co.* (Ky.) 129.

Part performance.

2. Part performance will not, at law, take a case out of the statute of frauds.—*Henry v. Wells.* (Ark.) 637.

FRAUDULENT CONVEYANCES.

By assignment for benefit of creditors, see *Assignment for Benefit of Creditors*, 1.

Execution against land fraudulently conveyed, see *Execution*, 1.

Gift to wife, see *Husband and Wife*, 13, 14.

Gift.

1. A voluntary settlement by a husband upon his wife of the whole of his property is void against a subsequent *bona fide* purchaser without notice, and the recording

of a deed containing a description so vague as to be void for uncertainty is not notice in such case.—*Adams v. Edgerton.* (Ark.) 628.

What amounts to fraud.

2. Where an insolvent person, who owns an equity of redemption, which is of no value to him or to any third party, conveys it at his father's request without consideration to the person to whom his father has already conveyed the tract of which it forms part, to enable the grantee to perfect his title, the conveyance will not, in the absence of actual fraud, be set aside as fraudulent in a suit at the instance of a subsequent creditor.—*Mittleburg v. Harrison.* (Mo.) 203.*

3. In a garnishment proceeding, it appeared that the garnishees had in their hands the proceeds of notes which were payable to the principal debtor, A., but they claimed that such proceeds belonged to the wife of A., from whom they had received the notes for collection. Plaintiff introduced evidence that the notes were given for a loan made by A. to the maker of the notes, a company of which he was president; that A. deposited the money loaned in a bank in his own name, and checked it out in the same way, and that he was then insolvent. The garnishees called A., who testified that the money belonged to his wife, being the proceeds of real estate transferred by him to his son, and by the latter to her, two years before the loan, when he was solvent; that he made the loan as her agent, and transferred the notes to her accordingly. *Held*, that the plaintiff's evidence made a *prima facie* case, and that it was not so far rebutted by that of the garnishee as to deprive him of the right of going to the jury.—*Boatmen's Sav. Bank v. Overall.* (Mo.) 64.

4. Defendant engaged in a mercantile business, sold out his stock, and conveyed all his visible property to his brother for an alleged debt due him. It appeared, among other things, that the brother could give no clear account of the debt alleged to be due him, and that the debtor, in justifying as surety on a bond after he had executed the deed, swore that he owned the property conveyed. *Held*, that the conveyance was fraudulent.—*Catchings v. Harcrow.* (Ark.) 884.

5. A sale by a failing debtor of all his available assets to a poor relation, upon consideration of the payment of a large and suspicious debt to himself, and the execution of the purchaser's unsecured notes payable in 6, 12, 18, and 24 months, for a sum equal to all the other debts of the vendor in amount, which notes were to be turned over to a trustee for the benefit of the vendor's creditors, *held*, fraud-

ulent and void. — *Robinson v. Frankel*, (Tenn.) 652.

What amounts to fraud—Intent.

6. A conveyance without consideration being void as to subsequent creditors only when made with intent to hinder, delay, or defraud them, an instruction, in a suit at the instance of subsequent creditors, that certain property "could not be lawfully assigned to the grantor's wife while he was insolvent," is erroneous, and ground for reversal. — *Boatmen's Sav. Bank v. Over-all*, (Mo.) 64.

— Conveyance between father and son.

7. A conveyance made by a father to his son, when insolvent, in consideration of improvements previously made on the land by the latter, and of an agreement for support, in pursuance of an oral contract to do so, made when the grantor was solvent, is not fraudulent. — *Dougherty v. Harrel*, (Mo.) 588.

8. In an action by an executor against the testator's son to enforce a note due the estate by the son, and to set aside a deed to land made by the son to his children as voluntary and fraudulent, it appearing that the grandchildren had paid about what the land was worth, that their grandfather had said to them that he did not look to the land for the payment of the note, but intended it to be, before they bought, charged against their father as an advancement, *held*, that there was not sufficient evidence to set the deed aside as voluntary or fraudulent. — *Garvey v. Garvey*, (Ky.) 584.

9. A father conveyed land to his sons in consideration that they would support him and his wife, and pay off a mortgage on the land, which the sons did, and, one of the sons (the older) having conveyed the land to the younger, he sold it to a third party, and paid part of the purchase money to his mother, (the father having died in the meantime.) *Held*, that the deed from the father could not be set aside as without consideration, or the deed between the sons, and from the younger son to the third party, be set aside as fraudulent, even at the instance of creditors of the father whose claims existed at the time the first deed was made. — *Muenks v. Bunch*, (Mo.) 63.

Change of possession.

10. A husband, being indebted at the time, had his wife empowered to trade as a *feme sole*, and thereafter transferred his business to her, conducting it afterwards as her agent, but she had nothing to do with the management, bought no supplies, made no sales, the entire management and control being left to him. Out of the prof-

its a lot was bought, which was conveyed to her. *Held*, that his creditors might set aside his conveyance to the wife as in fraud of their rights, and subject the land to their debts. — *Gross v. Eddinger*, (Ky.) 1.

Trust property.

11. Where a husband receives his wife's money, not by virtue of his marital rights, but as her trustee, evidencing the trust by entries made in a memorandum book produced at the trial, and uses it to buy lands, taking the deed to her, his creditors cannot set aside the deed as fraudulent, and subject the property to the payment of their debts. — *Cox v. Cox*, (Mo.) 585.

Evidence.

12. In an action between an attaching creditor and one claiming property as a *bona fide* purchaser from the debtor, the issue between them being as to whether the sale was made in good faith, evidence of collusion between the debtor and another creditor, by which an attachment was fraudulently obtained, is inadmissible, it not appearing that there was any connection between that transaction and the transaction which formed the basis of this suit. — *Boehm v. Calisch*, (Tex.) 293.

Remedies.

13. A creditor who has brought an action to set aside the debtor's fraudulent conveyance, before levying an execution on the land, cannot hold the land, as against another creditor who had previously levied on it, without first suing to set aside the fraudulent conveyance. — *Scott's Ex'x v. Scott*, (Ky.) 596.

14. Under a prayer for general relief, where facts are alleged to show that deeds were made without consideration, or in fraud of creditors, the creditors are, upon proof of these facts, entitled to have the deeds canceled, but not to have them treated as mortgages, or to be substituted to the vendor's lien of the debtor for the unpaid purchase money. — *Muenks v. Bunch*, (Mo.) 63.

GAMING.

Dealing in "futures," see *Contracts*, 6; *Evidence*, 20.

Indictment.

Under Gen. St. Ky. c. 47, art. 1, § 6, punishing any one who shall set up, exhibit, or keep for himself any faro-bank, gaming table, or contrivance used in betting, an indictment averring that the contrivance by which or upon which the money was won or lost was commonly called a "crap-board," without alleging that such a contrivance was ordinarily used for purposes of gaming, is not sufficient. — *Jones v. Commonwealth*, (Ky.) 128.

GARNISHMENT.

Practice and pleading.

1. Section 224 of Arkansas Code of Civil Procedure, as amended in 1871, (Mansf. Dig. § 817) gives the right to sue out a writ of garnishment on a judgment, but directs that the debt shall be collected from the garnishee as in other cases of garnishment, (Id. § 817;) and that can be done only by suing the garnishee as other defendants are sued.—*St. Louis, I. M. & S. Ry. Co. v. Richter*, (Ark.) 56.

2. Under Code Civil Proc. Ark. § 224, as amended in 1871, (Mansf. Dig. § 817,) giving the right to sue out a writ of garnishment on a judgment, and directing (Id. § 817) that the debt shall be collected from the garnishee as in other cases of garnishment, a personal judgment can be had against such garnishee only upon summons and trial.—*Wingfield v. McLure*, (Ark.) 439.

Gift.

See *Husband and Wife*, 13, 14.

Grand Jury.

Indictment by less than requisite number, see *Bail*, 6.

—effect of excusing member, see *Indictment and Information*, 1.

GRANT.

Claim of title, see *Limitation of Actions*, 7.

Boundary.

1. On account of the difficulty of establishing the line called for in *Power & Hewitson's* colonial contract, to "run parallel with the coast," titles fairly granted by the Mexican or colonial authorities cannot now be disturbed by showing that the land granted may be two or three miles within or without the true boundary.—*Sydeck v. Duran*, (Tex.) 264.

Abandonment.

2. Although title to land obtained by a settler under Mexican law was not, under articles 26 and 27 of the decree of March 24, 1825, perfected until after a certain period of occupation or cultivation, yet the title would not lapse of itself upon failure to perform such condition, but could only be forfeited at the instance of the government, through its proper authorities.—*Sydeck v. Duran*, (Tex.) 264.

3. A settler under Mexican law, however, lost his title when he ceased to occupy, with the intention of relinquishing his claim.—Id.

4. A settler, S., under Mexican law, in 1832, after receiving a grant from an alcalde

of land supposed to be without the limits of a concession to a certain colony, discovered, as he thought, that it was within such limits, whereupon he applied to the commissioner of the colony for another grant, basing his application on the nullity of the first grant, but using the expression "saving my right to claim [*reclamas*]" that which was given to me by mistake." The commissioner thereupon granted him another tract, and two days later granted the first-named tract to another settler, B., who in his application described the land as that relinquished by S. Although B.'s title was of record, S. neither set up any claim to the land thus granted to B., nor exercised any acts of ownership over it, nor paid any taxes on it for a period of more than 30 years. *Held*, that the facts showed an intention on the part of S. to abandon the title to the tract; the expression in the application for the second tract being susceptible of the construction that he wished to retain the first grant only in case he did not get another.—Id.

GUARDIAN AND WARD.

Fees of guardian *ad litem*, see *Costs*, 2.

Service of process after substitution of guardian as plaintiff, see *Writs*, 5.

Witness, competency of, in action against guardian, see *Witness*, 3.

Liability of guardian.

1. A person indebted to an infant's estate, and thereafter being appointed and accepting the guardianship of the estate, as he cannot sue himself, must, in legal contemplation, be considered as having paid the debt to himself, and both he and his sureties are answerable therefor as for money actually received.—*Sargent v. Wallis*, (Tex.) 721.

Accounting — Expenditures on ward's behalf.

2. The general rule governing settlements by guardians is that they can only be allowed for expenditures to the extent of the income of the ward's estate, unless proof be made of an order of court authorizing them, and a mere verbal direction of the judge is not a legal order for this purpose.—*Jones v. Parker*, (Tex.) 222.

3. A guardian should be allowed credit in his settlement for a fine against his ward, paid by him in order to obtain his release, and also for money paid for a watch, if deemed necessary or proper to one occupying his station in life; especially if the ward retained it after his majority and failed within a reasonable time to return it.—Id.

4. Where a guardian pays money to his ward to enable him to engage in business,

upon his representation, relied on by the guardian, that he has become of age, the money so paid should be allowed the guardian as a credit in the final settlement of his accounts.—*Id.*

5. A representation made by a ward to his guardian that he would soon be 21 years of age, and a promise that the guardian should be allowed credit in his final settlement for goods sold him, will not be binding upon the ward either as an estoppel or as a contract.—*Id.*

6. Where the wards are owners of a cotton plantation on which is a gin-house, at which the cotton of tenants and neighboring planters is ginned, repairs, which are necessary and proper, made by the guardian on the machinery, will be allowed in his account, though he may not have received the authority of the probate court to make them.—*Waldrup v. Tully*, (Ark.) 192.

Guardian's bond.

7. In an action against a surety on a guardian's bond, where the principal is dead, the fact that the claim was not presented for allowance against the principal obligor's estate within the two years limited, and therefore an action to charge such guardian's estate would be barred, does not discharge the surety.—*Smith v. Smithson*, (Ark.) 49.

8. In an action against a surety on a guardian's bond, where the principal is dead, the fact that the probate court, in settling the guardianship accounts, has not directed the payment of the amount found due to any one, cannot be taken to prove that there has been no breach of the bond, where a new guardian has been appointed, but the surety's obligation is fixed without a formal judgment of the probate court against him, or his principal's administrator.—*Id.*

Guardian ad litem.

9. In a suit for partition and sale of land, the court has no jurisdiction to appoint a guardian *ad litem* for infants, living out of the county, who are entitled to be served with a copy both of the writ and petition, but who are only served with a copy of the writ.—*Kremer v. Haynie*, (Tex.) 676.

HABEAS CORPUS.

Jurisdiction.

Under Const. Ark. art. 7, § 4, authorizing the supreme court, "in aid of its appellate and supervisory jurisdiction, to issue writs of *certiorari*, *habeas corpus*," etc., it has jurisdiction by the writ of *habeas corpus*, in connection with the writ of *certiorari*, to review the proceedings of the chancery court refusing to grant the writ of *habeas*

corpus, in order to liberate a person unlawfully imprisoned.—*State v. Neel*, (Ark.) 631.

HIGHWAYS.

See, also, *Turnpikes*; *Ways*.

Mandamus to compel removal of obstruction, see *Mandamus*, 1.

Toll-gate as obstruction, see *Turnpikes*, 7.

Dedication.

1. Before a city can set up any right of control over property, it must show that it has accepted the dedication of the property. Such acceptance may be express, or may be implied from long-continued use by the public; though in a state (such as Texas) where much of the land is vacant both in town and country, and where every one feels at liberty to pass at will over any uninclosed premises, the presumption ought not to be generally indulged that a city has adopted a street from the mere fact of its long use as such by the public.—*Gilder v. City of Brenham*, (Tex.) 309.*

2. Where it appears that a strip of land in a city has never been worked by the city; has not been delineated as a street upon the city map; that it has been passed over by the public by paths crossing it diagonally in different directions; that the city has never exercised any ownership over it except to authorize the mayor to relinquish all claim to it upon plaintiff releasing all claims to another street: *held*, this was not sufficient to constitute an acceptance of the strip as a street.—*Id.*

Statutory proceedings.

3. Gen. St. Ky. c. 94, art. 1, § 17, provides that, upon an application to open a new public road, the county court may require the applicant to pay part or all of the costs, or the county to pay part or all of such costs. *Held*, that the county judge is vested with a large discretion in such cases, and, in determining the question, may look to the financial ability of the county as well as that of the applicant, and the justice of requiring the applicant to pay the whole cost when the opening of the road is as beneficial to others as to the party applying.—*Rawlings v. Biggs*, (Ky.) 147.

Notice.

4. Under Rev. St. Mo. § 6936, the notice of the presentation of a petition to establish a public road is not required to be signed.—*Dougherty v. Brown*, (Mo.) 210.

5. Upon a petition to establish a public road, the county court entered an order, reciting the presentation of the petition, and that it had been proved to the satisfaction of the court that due legal notice had been given of the intended application, etc. *Held*, on appeal, that, under the facts appearing in the record, the county court

had jurisdiction to establish and open the road.—*Id.*

—**Report of commissioners.**

6. In Missouri, proceedings under the act of 1883, (Sess. Acts, 157,) to open a public road through the lands of several persons, will be held void, where the commissioners do not, as required by the statute, make their report on or before the first day of the term of the county court next after their appointment, or make a report that does not contain, as required, a description of the land or property taken, and for which damages are assessed; following *Anderson v. Pemberton*, 1 S. W. Rep. 216. —*Rose v. Garrett*, (Mo.) 828.

7. Where a report of commissioners appointed by the county court to assess damages caused by opening a road has been filed in time, the court may order it to be amended, and, on the amended report being filed, may approve it.—*Long v. Talley*, (Mo.) 389.

—**Damages.**

8. Where the action of the county judge, upon an application to open a new public road, is appealed from to the circuit court, the latter court cannot pass on the amount of damages as fixed by the jury in the county court.—*Rawlings v. Biggs*, (Ky.) 147.

9. Gen. St. Ky. c. 94, art. 1, §§ 8, 9, provides that, where any person shall make application to the county court to have a new road opened for the benefit of the public, a writ of *ad quod damnum* shall be awarded, if desired by the owner of the land, and a jury impaneled to fix compensation for the land taken. *Held*, that the inquest as to the value is binding on all parties, the county as well as the owner, and cannot be assailed except for some irregularity that would render the proceeding erroneous; if the proceeding is regular, the value and damages as fixed by the jury are conclusive.—*Id.*

—**Appeal.**

10. Where remonstrators against the order of a county court opening a road file exceptions to the award of damages, and request a jury, and subsequently appeal to the circuit court, where, on trial anew, the same result is reached, but at such trial the remonstrators do not insist upon their exception, or on their demand for a jury, they cannot rely on these points, on an appeal from the circuit court.—*Long v. Talley*, (Mo.) 389.

—**Repairs.**

11. Under the general power conferred on a road overseer by section 6041, c. 147, Revision Mo. 1879, "to keep the roads in his district in good repair," it is his duty to accept the actually existing and recognized public roads in his district at the

date of his appointment, or that may thereafter be established during his term of service, as the roads committed to his care, and which, under the law, he is bound to keep in good repair, as provided by the statute.—*State v. Buhler*, (Mo.) 68, 72.

HOMESTEAD.

Waiver of, by claim under will, see *Will*, 2.

Right of widow.

1. A devise by a husband to his wife is not to be considered as in lieu of her right to homestead; Rev. St. Mo. § 2693, expressly providing that the power of devise shall not extend to homestead, and section 2199 providing that a devise shall be in lieu of dower, but omitting any such provision as to homestead.—*Kaes v. Gross*, (Mo.) 840.

Reassignment.

2. Where a homestead has been set aside to a debtor, and, in course of time, it increases in value so as to be worth more than the statutory limit, it may be reassigned, and the excess applied to the payment of his debts.—*Beckner v. Rule*, (Mo.) 490.

Loss of homestead.

3. After the death of the testator, his wife executed a deed to the executor, releasing, remising, and quitclaiming all her right, title, and interest in the testator's estate, whether of dower or otherwise, and all claims and demands against said estate, whether under the will or under the law. *Held*, that it passed the widow's right of homestead.—*Mack v. Heiss*, (Mo.) 80.

4. If a creditor of a husband levies upon and sells a part of the husband's land, leaving enough land, however, for a homestead, and the wife subsequently joins her husband in a conveyance of the homestead, she cannot afterwards claim homestead in the part previously levied upon.—*Rayburn v. Norton*, (Tenn.) 645.

5. Where a widow remarried, and removed with her children and household goods from the homestead which she occupied as widow, to the home of her second husband, in another county, and resided there four years, with no special intention of returning, *held*, that she could not afterwards claim the homestead.—*Kaes v. Gross*, (Mo.) 840.

6. B. acquired land in 1855 and 1859, which he claimed as his homestead, but the deeds were not recorded until 1871. In 1882 a judgment against B. was obtained on a bond given by him in 1860, with E. as surety. E. was compelled to pay \$1,000, for which he obtained judgment, and levied on the alleged homestead. *Held*, that, when E. signed the bond, this created an existing

cause of action contingent upon B.'s default, and that the payment by E. related to the date of the bond, which rendered the land liable to the execution, under the provisions of Rev. St. Mo. 1879, § 2695, providing that a homestead shall be subject to execution on all causes of action existing at the time of acquiring it.—*Berry v. Ewing*, (Mo.) 877.*

HOMICIDE.

I. MURDER.

II. MANSLAUGHTER.

III. JUSTIFIABLE HOMICIDE.

Assault with intent to kill, see *Assault and Battery*, 2.

Bail, admission to, see *Bail*, 3.

— when allowable, see *Bail*, 2.

Evidence of experts, see *Evidence*, 13.

Former jeopardy, conviction for aggravated assault as bar, see *Criminal Practice*, 9.

Insanity as defense, see *Insanity*.

I. MURDER.

Degrees of.

1. With respect to the doctrine of reasonable doubt as applied to murder of the second degree, the rule is that the evidence must show beyond a reasonable doubt the absence of facts which will reduce, excuse, or justify the killing.—*White v. State*, (Tex.) 710.*

2. Charge of the court is properly confined to murder of the first degree, when the evidence shows only a killing upon express malice, and negatives a homicide of a lower degree.—*May v. State*, (Tex.) 781.

3. A former conviction of murder in the second degree operates as an acquittal of the higher grade, and should limit the charge on a subsequent trial to murder in the second degree, and such inferior grades as may be indicated by the evidence.—*Smith v. State*, (Tex.) 684.

Indictment.

4. An indictment for the offense of murder must charge, not merely that the accused murdered, but that he *killed*, the deceased.—*Pierce v. State*, (Tex.) 111.

5. An indictment charging, in substance, that the accused, of his malice aforethought, contriving and intending to deprive one A. of her life, made an assault upon the body of A., and discharged and shot off against her a pistol loaded with powder and ball, "and so the grand jurors upon their oaths do say that the said" accused, "in manner and form aforesaid, feloniously, willfully, and of his express malice aforethought, did kill and murder the said" A., sufficiently charges murder in the first degree.—*McConnell v. State*, (Tex.) 699.

Evidence.

6. Evidence of threats made by deceased, and known to defendant, is not admissible in behalf of the latter, when he does not claim to have committed the homicide in self-defense.—*State v. Clum*, (Mo.) 200.

7. On a trial for murder, evidence is inadmissible for defendant that the deceased had in her possession articles formerly belonging to the defendant's deceased wife, or that the death of the latter was caused by medicine administered by deceased. The existence of those facts could in no possible way justify defendant in his act.—*Id.*

8. Evidence that deceased went to town with the intention of provoking a quarrel; that he grossly insulted deceased, and then consulted with another person; that afterwards such person got into a fight with deceased, and killed him, while the accused stood by with a shotgun,—is sufficient to sustain a conviction for aiding and abetting a murder.—*Johns v. Commonwealth*, (Ky.) 369.

9. On a trial for murder, two witnesses having testified, for the state, to the condition of the exhumed body, *held*, that it was not error to allow the state to afterwards call two other witnesses, one of whom was a physician, to testify upon the same matter.—*McConnell v. State*, (Tex.) 699.

10. Upon a question as to the commencement of an affray, where it appears that one party to the affray had made threats which were communicated to the other, the presumption is at least as great that it was commenced by the party threatened as that it was commenced by the party making the threats.—*Patillo v. State*, (Tex.) 766.

— Res gestæ.

11. Where the wife of a defendant, charged with murder, was a party to the altercation resulting in the homicide, *held*, that her acts and language during the altercation were admissible against the husband.—*Cook v. State*, (Tex.) 749.

— Insanity—Burden of proof.

12. Where insanity is set up as a defense to a charge of murder, the burden of proof is on the accused.—*Leache v. State*, (Tex.) 539.

Instructions.

13. The court need not instruct the jury as to the crime of manslaughter, when that issue is not presented by the evidence.—*Jones v. State*, (Tex.) 280.

14. The charge of the court must make a pertinent application of the case, covering every theory arising out of the evidence; and a conviction for murder will be reversed when there was evidence, however weak, supporting the theory for manslaughter, and no instruction was given

upon that view, although no exception was taken by defendant.—*Liskossi v. State*, (Tex.) 696.

15. So, also, the judge, having instructed the jury upon the theory that defendant and A. acted together in the commission of the homicide, should also have instructed them upon the alternative theory, arising out of the evidence, viz., a homicide in which A. acted alone.—*Id.*

16. An instruction to the effect that a person attacked may take the life of his assailant, "if there is danger, or apparent danger," of losing his own life, *held* open to exception on the ground of not sufficiently instructing the jury that they should consider the apparent danger as it appeared to defendant, in a case where defendant claimed that the deceased threw his hand behind him at the time of the affray, although the evidence showed that he had no weapons upon him at the time.—*Patillo v. State*, (Tex.) 766.

17. Upon a prosecution for murder in the first degree, it is erroneous to charge as to murder committed by poison, starving, torture, or in the perpetration of certain other crimes, although the statute makes such cases murder in the first degree, if the case tried is none of them; but such error is cured by subsequent instructions applying the law to the facts.—*Steagald v. State*, (Tex.) 771.

18. In the absence of testimony tending to inculpate a state's witness as an accomplice, the trial court properly refuses a special charge upon the law of accomplice testimony.—*May v. State*, (Tex.) 781.

19. The general charge of the court should always include the instruction that, if the jury do not believe the defendant guilty, they should acquit.—*Steagald v. State*, (Tex.) 771.

20. Upon a trial for the murder of an infant, the theory of the defense, supported by defendant's statement, was that the child was killed by the overturning of a buggy, although the body, on being exhumed, showed a pistol shot in the head. *Held*, that the defendant was entitled to have an instruction given upon the law of negligent homicide.—*McConnell v. State*, (Tex.) 699.

21. Upon a trial for murder, conduct of the accused towards his wife, which might be readily accounted for as the result of rage and excitement produced by knowledge of his wife's infidelity, and by the free use of intoxicants, *held*, not to call for a charge on the law of insanity.—*Id.*

22. The rule does not obtain in Texas that the law presumes insanity to continue after it is once shown to exist, and a special instruction to such effect is properly refused where the evidence is to the effect that the insanity with which the accused

was afflicted was recurrent.—*Leache v. State*, (Tex.) 589.

23. Omission on a trial for murder to charge the law of self-defense, in the absence of any evidence tending to raise that issue, is not error.—*Cook v. State*, (Tex.) 749.

Sentence.

24. Since the adoption of the Texas Revised Statutes, it is no longer necessary that the final judgment in a capital conviction for murder shall recite the mode of execution.—*Steagald v. State*, (Tex.) 771.

New trial and appeal.

25. Language of the prosecuting attorney in argument, upon a trial for murder, as follows: "The defendant in this case has stooped so low as to drag before you * * * the infidelity of his dead wife, and publish her before the court-house as a prostitute,"—although reprehensible, *held* not sufficient ground for reversal.—*McConnell v. State*, (Tex.) 699.*

26. Objections to charges given, or to the refusal of special instructions, should be perpetuated by a bill of exceptions. When such errors are raised for the first time in the motion for new trial, the court of appeals will interfere only when it is manifest that they were calculated to injure the rights of the accused.—*Leache v. State*, (Tex.) 589.

27. Under Code Civil Proc. Tex. art. 779, providing that a new trial shall be applied for within two days after conviction, but, for good cause shown, the motion may, in felony cases, be considered at any time during the trial term, a supplementary motion for a new trial, made at a subsequent term after an appeal has been dismissed, is properly overruled.—*Id.*

28. Charge of the court, in the absence of a proper bill of exceptions, will be examined only with reference to fundamental errors, or such as, under all the circumstances of the case, were calculated to injure the rights of the accused. A bill of exceptions taken generally to the charge of the court, specifying no particular error, has no standing in this court.—*Smith v. State*, (Tex.) 684.

29. A special *verdict* being required in Texas in a capital case, the record on appeal should show *affirmatively* that it was ordered.—*Steagald v. State*, (Tex.) 771.

30. A motion for a new trial, in a capital case, alleged, in substance, the making of threats and determined attempts to lynch defendant by mobs in the county where the case was pending; that no one dared to move for a change of venue; that the trial judge, upon being applied to personally to order a change on his own motion, refused to do so, giving no reason, although he had full knowledge of the facts; that defend

ant was obliged to go to trial without time for preparation, and with a prejudiced jury, for fear of the mob, and only obtained an attorney to defend him by the court's compelling an attorney, against his will, to do so. *Held*, that the refusal of a new trial, upon such motion, without taking evidence upon the matters alleged, was error.—*Id.*

II. MANSLAUGHTER.

What constitutes.

81. Where a man and his wife had a fight, and, on his starting for his knife and threatening to cut her throat, she fled from the house, and the next morning was found in the snow frozen to death, the question whether, taking into consideration the previous conduct of the deceased, her disposition and ability to fight with her husband, their comparative physical powers, and all circumstances proved in the case, her fear was well grounded or reasonable, ought to be sent to the jury, with instructions that, if her fear was unreasonable, they must acquit.—*Hendrickson v. Commonwealth, (Ky.) 166.*

Evidence.

82. Where there is doubt as to whether the killing was done from malice or from a sense of real danger, and there is evidence that deceased commenced the attack, testimony of the turbulent character of the deceased is admissible.—*State v. Downs, (Mo.) 219.*

83. Where there is evidence to show an actual assault by deceased upon defendant, evidence of previous threats by deceased, whether communicated to the defendant or not, is admissible; but not so where the assault is made, not on defendant, but on his son.—*Id.*

84. Testimony by defendant that he believed deceased was about to do his (defendant's) son some great personal injury is inadmissible, as it can have no bearing on the question whether there was reasonable ground for such belief.—*Id.*

Instructions.

85. Where it appears that deceased was in the act of attempting to strike defendant's son, of 11 years of age, when defendant seized a bottle out of which deceased and others were drinking whisky, and struck him a fatal blow on the head, it is error to instruct the jury on manslaughter in the first degree, under Rev. St. Mo. 1879, § 1238, in which that crime is defined as the killing of a human being while the accused is attempting to commit a crime less than felony, when such killing would be murder at common law.—*State v. Downs, (Mo.) 219.*

86. Where there are facts in proof which show that the killing happened through the defendant recklessly discharging his pistol

in a public place, the court ought to instruct the jury as to negligent homicide in the second degree.—*Curtis v. State, (Tex.) 86.*

87. Where the accused is on trial for manslaughter, it is error for the court to instruct the jury in regard to the crime of murder in the first and second degrees, especially if they are told if they find the accused guilty of murder in the first or second degree to return a verdict for manslaughter.—*Parker v. State, (Tex.) 100.*

88. Under Pen. Code Tex. art. 593, defining manslaughter to be "voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause," etc., and article 597, par. 4, providing that "insulting words, etc., of the person killed towards a female relation of the party guilty of the homicide" are deemed an adequate cause, and article 598, providing that, when it is sought to reduce the homicide to manslaughter by reason of this character of provocation, it must appear that the killing took place, if defendant was not present, or did not hear the words, so soon thereafter as the defendant may meet the person killed, after being informed of such insults, it is error on the trial of an indictment for murder, when the killing was claimed to have resulted from such insults, not heard at the time by the accused, to charge that the killing must have been "done under the immediate influence of sudden passion," to reduce it to manslaughter.—*Orman v. State, (Tex.) 468.*

III. JUSTIFIABLE HOMICIDE.

Self-defense.

89. Although one committing a homicide may have provoked the combat, or produced the occasion by his own wrongful acts, yet, if those acts were not clearly calculated or intended to have such effect, his right of self-defense would not be thereby compromised.—*White v. State, (Tex.) 710.*

40. If the evidence upon a trial for murder discloses the homicidal act to have been performed in the presence of actual danger to the slayer, the charge properly omits to instruct the jury with respect to imaginary danger.—*Id.*

41. Where, on the trial of an indictment for murder, it appears from the evidence that, if the deceased made an attack upon the person of the accused, it was a murderous attack, coming clearly within the provision of Pen. Code Tex. art. 568, it is error to charge, on the subject of self-defense, unqualifiedly that, if the killing was done to protect the person against an unlawful and violent attack, and such unlawful and violent attack was not mutual, or was not such as is described in article 568, Pen. Code, then the party must have re-

sorted to all other means to prevent the injury, and the killing must have taken place while the person killed was in the very act of making such unlawful and violent attack.—*Orman v. State*, (Tex.) 488.

Justification.

42. A peace officer, having arrested one upon a warrant for bastardy or other misdemeanor, may not, in order to prevent the offender's escape, kill him when fleeing.—*Head v. Martin*, (Ky.) 622.

HUSBAND AND WIFE.

See, also, *Divorce*; *Dower*; *Homestead*.

Action by husband as wife's attorney, see *Landlord and Tenant*, 4, 5.

Community property, *bona fide* purchaser of, see *Vendor and Vendee*, 8.

Contract, wife's power to make, see *Conflict of Laws*.

Custody of children, see *Parent and Child*.
Estoppel, see *Judgment*, 7.

Fraudulent conveyances between, see *Fraudulent Conveyances*, 1, 10, 11.

Mortgage, fraud in obtaining wife's signature, see *Mortgages*, 8, 9.

Will, wife's capacity to make, see *Will*, 1.

Community property.

1. As, in Texas, the revenue of the wife's separate estate is community property, which the husband may use without liability to the wife, in an action by her against his executor to recover the value of the separate estate diverted by her husband, interest is recoverable only from the date of his decease.—*Richardson v. Hutchins*, (Tex.) 276.

2. If a husband diverts his wife's separate estate, and uses it in the community business, no express promise to repay its value need be proved to enable the wife to recover the amount from the husband's executor.—*Id.*

3. Where the main issue is as to whether certain land was at the date of a title deed separate or community property, evidence that B., the husband, owned, as separate property, certain land certificates; that 35 years before the suit he conveyed them to one M.; that on the same day M. executed a mortgage to B. of said certificates, and the land to be conveyed thereunder, reciting that M. had conveyed to B. the land in controversy, and providing that the mortgage should be void on condition that M. should make a good and valid title to B. of said land, and keep him and his heirs in possession; and evidence of a deed from M. to B. of the land in controversy for the same consideration as that for the certificates,—justifies the jury in finding that the conveyances were in fact an exchange, and that the land so conveyed to B. was his

separate property, the deeds being ancient, and the parties thereto being dead.—*Word v. Box*, (Tex.) 93.

4. The half interest of the husband in community property passes to his heirs on his death, and is subject to sale for the debts of the heirs, but a purchaser of their interest acquires no right to the possession of any part of the property until the death of the wife.—*Harris v. Seinsheimer*, (Tex.) 307.

Charges upon wife's separate property.

5. Where a married woman bid in her husband's law-books at an execution sale, and gave her promissory note for the amount of his claim to the judgment creditor, in an action to subject the wife's separate estate to the payment of said note, held that, as the note itself did not charge the wife's separate estate, and as the law-books were never conveyed to the wife's sole and separate use, and were never settled upon her in any way, her separate estate could not be charged with the payment of the note.—*Jordon v. Keeble*, (Tenn.) 511.

6. A promissory note in the usual form, made by a married woman, which contains nothing about the separate estate of the wife, does not constitute a charge upon the wife's personal estate, and parol evidence is not admissible to prove that the note was intended as a charge.—*Id.*

7. Before a court of equity will decree the satisfaction of a judgment at law against a married woman out of her separate estate, it must be made to appear that the married woman has, by a valid promise or enjoyment, charged the payment of the debt, upon which the judgment was rendered, on her separate estate.—*Id.*

8. Where a married woman who owns land as her separate property, without restriction upon her power of enjoyment or alienation, executes a promissory note to the administrator of a decedent "for necessities furnished me by [the decedent] in his life-time, and I bind my separate estate for the payment of this note," held, that the note was a charge upon the land; the fact that the necessities for which it was given were furnished before the execution of the note being unimportant, when it appears they were furnished to the wife alone upon the credit of her separate estate. *TURNER, C. J.*, dissents.—*Warren v. Freeman*, (Tenn.) 518.

9. A charge upon the separate property of a wife is not a lien upon her land, and does not restrict her power of *bona fide* alienation.—*Id.*

10. Any contract which will authorize a court of equity to subject a wife's personal property to the charge of her debt will

warrant the subjection of her land held to the same uses; and a privy examination or authentication for registration is not necessary to make her contract a charge upon the land.—Id.

11. Lands of a decedent were sold to a married woman under a decree of a chancery court, and the title by the decree vested in her to *her sole and separate use*, free from all debts or contracts of her husband, and a conveyance was made by the heirs of the decedent of the lands to her, *without restriction or limitation upon her title*, a year after the decree. *Held*, that all the title the heirs had was divested by the decree of the court confirming the sale, and no title passed by their subsequent deed, and that the married woman had the right to charge the lands as her separate property for her debts.—Id.

Antenuptial contract.

12. By an antenuptial contract between the testator and his wife, the testator, in consideration of her agreement to release her claim of dower in his estate, bequeathed and gave to his future wife, in lieu of dower, the sum of \$1,000. There being no ambiguity, conflict, or obscurity in the words employed in the contract, *held*, that the only right released by the wife was the right of dower, and not the right of homestead.—*Mack v. Heiss*, (Mo.) 80.

Gift.

13. Where a husband surrenders an obligation for bonds, and takes in its place a new obligation in his wife's favor, and delivers this to a third person, with instructions to collect and hold the interest for the wife's benefit, and, although afterwards resuming possession of the obligation, and using its proceeds, repeatedly declares, before and afterwards, that he intended a gift to his wife, the fact of the gift is clearly established.—*Richardson v. Hutchins*, (Tex.) 276.

14. Property worth \$75,000 is not an unreasonable provision by way of gift for a husband owing \$150,000, but worth at the time, and always afterwards, not less than \$800,000, to make for his wife. His creditors cannot impeach such a gift.—Id.

Improvements.

Bona fide possessor, allowance for, see *Ejectment*, 5.

INDICTMENT AND INFORMATION.

See, also, *Burglary*, 1; *Disorderly Houses*, 1; *Embezzlement*, 4; *Extortion*; *False Pre-*

tenses, 2, 3; *Gaming*; *Homicide*, 4, 5; *Larceny*, 4, 5; *Rape*, 1; *Receiving Stolen Goods*, 1.

Ambiguity in, see *False Pretenses*, 3.

Competency of, as evidence, see *Criminal Practice*, 17, 18.

Description of property, see *Burglary*, 2.

Larceny, allegation of ownership in minor, see *Larceny*, 4.

Severance, see *Criminal Practice*, 8.

Variance, see *Larceny*, 5.

Verdict, general verdict on indictments for different offenses, see *Criminal Practice*, 45.

Finding.

1. In Texas, the validity of an indictment is not affected by the fact that the grand jury, before the presentment of the indictment, excused one of its members, leaving only 11 members present.—*Watts v. State*, (Tex.) 769.

Description of offense.

2. The Illustrated Police News and the Police Gazette being publications specially enumerated in article 4663, Gen. Laws Tex. (17th Leg. Sp. Sess. 18,) as among those the sale of which cannot be pursued as an occupation without the payment of the tax levied therefor, it is not necessary that the indictment should further describe them than by name.—*Baldwin v. State*, (Tex.) 109.

3. If, eliminating surplusage, an indictment so avers the constituents of the offense as to apprise the defendant of the charge against him, and to enable him to plead the judgment in bar of another prosecution, it is good, in substance, under Texas Code.—*McConnell v. State*, (Tex.) 699.

Description of property.

4. An indictment for fraudulently removing from the state "a chestnut sorrel pony," and one "Studebaker two-horse wagon," which were mortgaged, is not sustained by proof of a sorrel pony, or by proof of a wagon which is not a Studebaker, and not a two-horse wagon.—*Loyd v. State*, (Tex.) 670.

5. Under an indictment for fraudulently disposing of mortgaged property described as four bales of cotton, a mortgage of "crop of cotton to be raised during the year 1886" is not admissible in evidence.—*Honeycut v. State*, (Tex.) 716.

Allegation of date.

6. An indictment for forgery, which charges the offense to have been committed upon a date subsequent to its presentment, is fatally defective.—*Lee v. State*, (Tex.) 89.

7. Under Code Crim. Proc. Tex. § 490, subsec. 6, providing that an information "is sufficient if * * * the time of the

commission of the offense be some date anterior to the filing of the information, and that the offense does not appear to be barred by limitation," an information presented and filed on the day the offense is alleged to have been committed is fatally defective, notwithstanding the complaint shows that it was filed subsequent to the commission of the offense.—*Kennedy v. State*, (Tex.) 480.

INFANCY.

Guardian *ad litem*, see *Guardian and Ward*, 9.

Conveyance by infant.

1. Under the Arkansas statute, authorizing the probate court to remove the disability of minors "to transact business in general or any particular business specified," a probate court has no jurisdiction to remove the disabilities of minors, respectively 7, 10, and 12 years of age, so as to empower them to sell and convey a valuable tract of land.—*Doles v. Hilton*, (Ark.) 198.

2. An infant having executed a bond to convey land when he should come of age to A., subsequently, and while still an infant, executed a deed for the same land to B., who purchased in ignorance of the prior bond to A. *Held*, that the deed of an infant being voidable, and the infant having executed a deed to A. after he came of age, this was a disaffirmance of his deed made while a minor to B., and vested title in A., though the purchase money received from B. was not returned.—*Vallandigham v. Johnson*, (Ky.) 173.*

Avoidance of deed by infant.

3. An officer, taking the acknowledgment of an infant to a deed, inquired if she was of age, and one of the other grantors answered, ahead of her, that she was; the infant remained silent, and signed the deed, which was afterwards delivered to the grantee. The grantee was not present when the acknowledgment was taken, and received the deed in ignorance of what had then been said to the officer, and without making any inquiry as to the age of the infant. *Held*, that the infant might avoid the deed, as the grantee could not be regarded as taking the property upon the implied representation that she was of age; nor could the officer be regarded as his agent, so as to charge him with notice of grantor's minority from what occurred at the acknowledgment.—*Vogelsang v. Null*, (Tex.) 451.

4. In an action by one to set aside a deed made while she was an infant, and to recover the property conveyed, it appearing that the grantee had paid the purchase money to the infant's agent, but the agent

had never paid it over to her, *held*, that the infant was not bound to restore the purchase money before rescinding the deed, as her appointment of the agent was not binding on her, but voidable, and her act, in bringing suit to recover the property, was an avoidance of the appointment.—*Id.*

INJUNCTION.

Dissolution, see *Appeal*, 1.

Judgment, to restrain execution, see *Judgment*, 12.

Tax, to restrain collection of school tax, see *Schools and School-Districts*.

— in aid of tax collection, see *Taxation*, 5.

Right to injunction.

1. Where the boundary line is in dispute, an injunction to restrain the defendants from entering upon a "disputed strip of ground" upon which there is a mine, will not lie as an original and independent suit to try the title to the disputed ground, held and possessed by the defendants under claim of right and color of title.—*Smith v. Jamison*, (Mo.) 212.

2. A complaint seeking to enjoin an execution on a judgment at law is demurrable, unless it show that complainant has no full and adequate remedy at law, by appeal, *certiorari*, or application to the court which rendered the judgment.—*Wingfield v. McLure*, (Ark.) 439.

Dissolution.

3. Where an injunction is granted enjoining execution upon a void judgment, damages will not be assigned on dissolving the injunction.—*Wingfield v. McLure*, (Ark.) 439.

INSANITY.

Burden of proof, see *Homicide*, 12.

Presumption of continuance, see *Homicide*, 22.

Criminal responsibility.

The law does not require, as the condition for criminal responsibility, the possession of one's faculties in full vigor, or a mind unimpaired by disease or infirmity. The mind may be weakened by disease, or impaired, and yet the accused be criminally responsible. He can only discharge himself from responsibility by proving that his intellect was so disordered that he did not know the nature and quality of the act he was doing, and that it was an act which he ought not to do.—*Leache v. State*, (Tex.) 589.

Insolvency.

See *Assignment for Benefit of Creditors*, *Bankruptcy*.

INSURANCE.

- I. FIRE INSURANCE.
- II. MUTUAL BENEFIT SOCIETIES.
- III. INSURANCE COMPANIES.

I. FIRE INSURANCE.

Conditions—Transfer of interest.

1. A transfer of the legal title to property to another for the mere purpose (not, however, accomplished) of having him negotiate a loan upon it for the grantor does not show a breach of a condition in an insurance policy against sale, transfer, or change in title, or that the interest of the insured is not the entire unconditional and sole ownership for the benefit of the assured.—*New Orleans Ins. Co. v. Gordon*, (Tex.) 718.

—Waiver of.

2. The fact that an insurance is obtained upon the stock of merchandise in a country store, and that gunpowder is usually kept and sold or classed with the articles comprising such merchandise, will not authorize the sale of gunpowder, if by the terms of the contract it is prohibited, and the policy declared void if violated in that particular.—*Western Assur. Co. v. Rector*, (Ky.) 415.

3. A policy of insurance on a country store-house, and the stock of dry goods, clothing, hardware, and groceries contained therein, provided that, if gunpowder were kept, the policy should be void. The insured had gunpowder in the store at the time the building and stock were destroyed by fire. *Held*, there could be no recovery on the policy, although it appeared that the agent of the company knew, when the application for insurance was made, that the insured kept gunpowder in stock, and intended to keep it, and the agent represented that the provision in the policy did not prevent the insured from keeping the powder.—*Id.*

4. Where a policy of fire insurance provided that the company should not be liable for any loss or damage under the policy if default should be made in the payment of any premium, and that the policy should be void if the assured should neglect to pay the premium, *held*, the fact that an agent of the company made demand for the premium after default by the insured, and threatened to sue for it if it were not paid by a certain day, did not constitute a waiver of the forfeiture, so as to make the company liable for a subsequent loss; especially as it appeared that the agent who acted in the matter had authority to receive applications and to collect premiums only, and not to make contracts of insurance.—*Cohen v. Continental Fire Ins. Co.*, (Tex.) 296.

5. Where a policy of insurance provides for a forfeiture upon failure to pay premiums which are to fall due, but does not stipulate that upon such failure the overdue premium shall be considered as earned, a demand and payment of such premium constitutes a waiver of the forfeiture. But such is not the case when the policy provides that, upon default in any installment, the insurance shall cease, and the installment be considered as earned; for then the insurer has the right to the premium although the insurance is forfeited, and hence demand and payment of the premium is no waiver.—*Id.*

Renewal.

6. An insurance company, through its authorized agent, may contract by parol for the renewal of a fire insurance policy, although it may be stipulated on the face of the existing policy that it shall not be renewed in that manner.—*Cohen v. Continental Fire Ins. Co.*, (Tex.) 296.

Action on policy.

7. Where the insured assigns his policy to a creditor as collateral security for the debt due the creditor, suit on the policy may be in the name of the creditor alone as assignee, or in the name of the insured for the use of the creditor.—*New Orleans Ins. Co. v. Gordon*, (Tex.) 718.

II. MUTUAL BENEFIT SOCIETIES.

Beneficiaries.

8. A member of a mutual benefit association requested that his benefit certificate be issued payable to his children, *naming them*, upon his death. The certificate as issued was payable to his children *generally, without naming them*. *Held*, that the certificate included children born after its issuance, it appearing that one of the main objects of the association was to provide a fund for the benefit of the entire family of a member, and not to restrict it to a portion, and that the charter contained no provision allowing an applicant to designate the beneficiary.—*Thomas v. Leake*, (Tex.) 708.

9. Where the charter of a mutual benefit society provides that the funds shall be for the relief of the member's family, and shall be exempt from seizure under legal process to pay any debt of the deceased member, a certificate of membership, payable to the widow of the member, is for the benefit of the member's family, and cannot be seized, upon the death of the member, by the widow's creditors.—*Schillinger v. Boes*, (Ky.) 427.

10. A. had certificates of membership in several mutual benefit associations, all payable to his wife, she being empowered to trade as a *feme sole*. Becoming indebted, he in his last illness canceled those certifi-

cates, and took out new ones, payable to his wife in trust for herself and children. *Held*, this was no fraud on the wife's creditors, as she had no vested rights under the original certificates that the husband could not control; it appearing from the charters of the associations that their chief object was to provide a fund for the families of deceased members, and that the member, after designating in his certificate who should receive the benefit on his death, might surrender that, and obtain a new certificate payable to some other person.—*Id.*

III. INSURANCE COMPANIES.

Conduct of business.

11. Since the amendments introduced into the fire and marine insurance laws by the act of 1877, providing, among other things, (Rev. St. Mo. 1879, § 5968,) that any mutual fire and marine insurance company may, upon a majority vote of its members, "charge and receive for the mutual benefit of all its policy-holders cash in payment of premiums on such of its policies" as shall be determined on, a company organized as a mutual company does not expose itself to the charge of doing business upon the joint-stock plan by receiving all-cash premiums on all policies running less than six years; nor is there any objection to its issuing policies for less than six years, except policies issued on account of notes given at the organization of companies organized without a guaranty fund, which are expressly required to run for not less than six years.—*State v. Manufacturers' Mut. Fire Ins. Co.*, (Mo.) 833.

INTEREST.

See, also, *Usury*.

For use of wife's separate estate, see *Husband and Wife*, 1.

On claims against decedents, see *Executors and Administrators*, 5.

Usury in loan of United States bonds, see *Usury*.

Allowance and computation.

1. Interest is payable upon an account for goods sold, after an account stated, as damages for detention of the money.—*Heidenheimer v. Ellis*, (Tex.) 666.

2. An advancement will bear interest from the death of the ancestor.—*Steele v. Friarson*, (Tenn.) 649.

INTOXICATING LIQUORS.

Constitutionality of local-option law, see *Constitutional Law*, 12.

Illegal sale, contract for, see *Contract*, 5.

— action for penalty, see *Witness*, 8.

Construction of statutes regulating.

1. Under a statute prohibiting "knowingly" selling liquor to a minor it must be shown that the seller knew the purchaser to be a minor.—*Williams v. State*, (Tex.) 661.

2. The Tennessee revenue act of 1888, providing that the "provisions of the act should apply to all druggists," did not subject a druggist to the payment of the tax imposed upon retail liquor dealers unless he sold liquors contrary to the provisions of the act of 1870, for other than communion purposes, or for medicinal purposes upon a physician's prescription.—*State v. Wharton*, (Tenn.) 490.

3. Under the Tennessee act of 1885, it is not lawful for a druggist to sell spirituous or vinous liquors without a license, for any purpose whatever, "except wine for sacramental purposes."—*Id.*

Levy of tax.

4. An order of a county commissioners' court, that there shall be levied on all occupations in the county, not specially provided for by the laws of the state, "a tax of one-half of the state occupation tax, as levied by the laws of the state," is a sufficient levy of a tax upon the occupation of a liquor dealer, a state statute taxing such occupation at a specified sum.—*Wade v. State*, (Tex.) 786.

Licenses.

5. Under the provisions of the Tennessee act of 1870, (Code, § 696,) no druggist could sell vinous or alcoholic liquors without taking out a license therefor, except for communion purposes, or for medicinal purposes upon a physician's prescription.—*State v. Wharton*, (Tenn.) 490.

6. The failure to take out a license by a druggist selling vinous or spirituous liquors, contrary to the acts of Tennessee of 1870 and 1885, subjects him to the payment of the tax at the suit of the state, as well as to an indictment for each sale; but the right to this penalty can only be enforced by strict pursuance of the statutory remedy given for its collection; and where the state has elected to sue for the tax imposed by law upon a retail liquor dealer, as a debt in the chancery court, it cannot recover the penalties which might have been recovered by pursuing the statutory remedy of distress.—*Id.*

7. The proprietor of a hotel and restaurant, having procured a license to keep a dram-shop at No. 111 North Fourth street, which was the main street entrance to the hotel, kept three separate bars where liquors were sold on the ground floor of the hotel, screened off by partitions, having direct and immediate connection by doorways, all of which were accessible to the guests without going out of the hotel, and all of which bars were located on the prem-

ises occupied for hotel purposes. *Held*, that keeping the three bars did not violate an ordinance of a city providing that no person to whom a license should issue should keep a dram-shop at any other place than the place designated.—*City of St. Louis v. Gerardi*, (Mo.) 408.

Evidence.

8. That defendant's son, while in charge of defendant's bar-room, sold medicated bitters, is admissible as a circumstance tending to prove that defendant was engaged in the occupation of selling medicated bitters.—*Wade v. State*, (Tex.) 786.

JAIL AND JAILER.

Hiring out convicts.

The lessee of the Arkansas penitentiary, who, by Mansf. Dig. Ark. §§ 4881, 4884, 4890, is required to "keep" the prisoners until the expiration of their terms, and upon whom is imposed duties requiring his personal care and supervision, cannot hire out the convicts to others.—*State v. Neel*, (Ark.) 631.

JUDGE.

Appointment.

1. Section 9 of the Kentucky act of March 26, 1872, creating the vice-chancellor's court, (afterwards called the Louisville law and equity court,) providing that "until the next general election the vacancy existing, as well as all vacancies hereafter occurring, shall be filled by appointment by the governor," and the act of May 15, 1886, providing "that vacancies in the office of judge of the Louisville law and equity court shall be filled at the same time, and for the same period, and in like manner, and on like occasions, as vacancies in the office of the Jefferson circuit court," authorizes the governor to fill a vacancy in the office, not merely until an election can be held to fill it, but for the balance of the unexpired term, and the acts are so far unconstitutional. The constitution having made a radical change in the mode of filling judicial offices by making them elective, instead of appointive, it must be presumed that it was intended that the governor should have the power to appoint temporarily only, until an election can be had, and not for the balance of the unexpired term.—*Toney v. Harris*, (Ky.) 614.

2. Where the governor, having constitutional authority to appoint one to fill a vacant judgeship *only* until a special election can be held, undertakes to make the appointment for the whole of the unexpired term, the appointee will be judge *de jure*, and his acts valid, until his successor is elected and qualified.—*Id.*

Disqualification.

3. The Texas constitution not forbidding suits in which the county judge is disqualified to be brought in the county court, but giving the district court jurisdiction of such cases, when such an action is brought in the county court it should be transferred to the district court; it is not necessary to dismiss it, and begin anew in the district court.—*Smith v. Harden*, (Tex.) 453.

JUDGMENT.

See *Equity*, 11.

By default against garnishee, see *Garnishment*, 2.

Ejectment opening judgment to let in defendant in interest, see *Ejectment*, 3.

Equity relief against, see *Equity*, 4, 5.

Estoppel by, see *Estoppel*, 3, 4.

Garnishment of, see *Garnishment*, 1.

Injunction to restrain execution of, see *Injunction*, 2.

Jury, assessment of damages by, after default, see *Jury*, 18.

Lien of, on married woman's separate estate, see *Husband and Wife*, 7.

Limitation of, see *Limitation of Actions*, 6, 20.

Sale under judgment reversed on appeal, see *Judicial Sales*, 9.

Satisfaction of, by note of third party, see *Accord and Satisfaction*.

— deed in, see *Estoppel*, 1.

Vacating, see *Judicial Sales*, 3.

Rendition and entry.

1. There is no material variance where a judgment is entered in favor of "Laura Wilcox, guardian of W. L. Wilcox," when the correct name of the infant is W. B. Wilcox.—*Crawford v. Wilcox*, (Tex.) 695.*

2. In an action to recover possession of land, plaintiff failing altogether to make out his title, the court adjudged that he take nothing, and added that "plaintiff's claim upon the land was removed as a cloud upon defendant's title, and that defendant be forever quieted in his right." *Held*, the addition was immaterial, as the judgment would have had that effect anyhow, without expressly so declaring.—*French v. Olive*, (Tex.) 568.

3. Under the Texas statutes providing that there shall be but one final judgment in any case, although there may be several defendants to an action, no final judgment can be rendered against one of them until it is rendered against all, however independent of each other their respective defenses may be; so, where the court declined to enter judgment as to one defendant, and continued the case as to him, this made the judgment entered against the other defendant void.—*Wooters v. Kauffman*, (Tex.) 465.

4. In an application for a *mandamus* to compel the commissioners' court of a county to issue a warrant for the payment of a school voucher, it was alleged that the claim had been audited and allowed by the commissioners' court, but the only evidence of the allowance was an indorsement on the warrant that "the court finds a certain sum (naming it) due on this claim," signed by the county judge. *Held*, under Rev. St. Tex. art. 1527, which provides that the proceedings of the commissioners' court shall be recorded by the clerk in a suitable book kept for the purpose, and shall be signed by the county judge at the end of each term, and be attested by the clerk, the best evidence of a judgment of that court is either the record itself, or a certified copy, as provided for by the statute, under the seal of the clerk; and there being no authority for this indorsement by the judge, it is not evidence for any purpose, in a proceeding of this character, and should not have been admitted.—*Brown v. Reese*, (Tex.) 292.

Amendment.

5. Under Mansf. Dig. Ark. St. § 2435, which authorizes the rendition of judgment in appeals from justices of the peace in criminal causes, in case of conviction, against the principal and sureties on the bond without further notice, where judgment has been rendered against a defendant and his sureties on a *superseas* bond on appeal from a justice of the peace in a criminal case, and entered by a clerical misprision against the principal only, and at the next term amended by the court by a *nunc pro tunc* entry, so as to show a judgment against the sureties as well, a bill in equity will not lie to enjoin execution against the sureties.—*Shaul v. Du-prey*, (Ark.) 366.

Operation and effect.

6. Where one, after he had sold and conveyed land with general warranty, brought an action in his own name to quiet the title, the decree rendered in the action in his favor inures to the benefit of his vendee, although the vendee was not a party to the action.—*Kramer v. Breedlove*, (Tex.) 561.

Res adjudicata.

7. A writ of *habere facias possessionem* having been awarded against the mortgagor in a foreclosure proceeding, he moved to quash the writ on the ground that he was entitled to, but had not been allowed, a homestead in the mortgaged land. The motion to quash was overruled, and he and his wife thereupon brought an action to enjoin the execution of the writ, and to have homestead allotted. *Held*, that the judgment upon the motion to quash the writ was a bar to any further claim to

homestead, and that it was immaterial that the wife was not a party to that proceeding.—*Phillips v. Queen*, (Ky.) 146.

8. Where the trial court quashed the affidavit of a claimant filed for the purpose of trying a right to property which had been levied on, and the claimant took no appeal from the order, the judgment upon the sufficiency of the affidavit is *res adjudicata*, and cannot subsequently be reopened.—*Zadek v. Dixon*, (Tex.) 247.

Collateral attack.

9. It must be presumed that a court rendered its decree after it had acquired jurisdiction over every person to be affected by it; and, in a collateral attack upon the decree, the fact that the record is silent upon some matter touching the jurisdiction over some of the defendants does not affect that presumption.—*Kramer v. Breedlove*, (Tex.) 561.

10. When a court of record, having jurisdiction over all matters relating to the administration of the estates of decedents, assumes to exercise it in a given case, all presumptions are in favor of the validity of its proceedings, and if the record of such a court shows that the steps necessary to clothe it with power to act in the given case were taken, or if the record be silent upon this subject, then its judgment must be held conclusive in any other court of the same sovereignty when collaterally called in question.—*Martin v. Robinson*, (Tex.) 550.

Satisfaction.

11. Satisfaction of a judgment or decree cannot be set aside in a suit between parties not embracing all those affected by the judgment or decree.—*Blackburn v. Clarke*, (Tenn.) 505.

12. A judgment having become dormant from the failure of the judgment creditor to issue execution within a year, an injunction will issue against an execution issued after the expiration of the year, because it is presumed, from the delay in taking out execution, that the judgment has been paid. But if it appears that the judgment had in fact not been paid, in accordance with the principle that he who seeks equity must do equity, the injunction will be dissolved, and any money which had come into the hands of the sheriff under the execution will be applied to the judgment, under a proper prayer therefor on the part of the creditor.—*Seymour v. Hill*, (Tex.) 313.

Revival.

13. Rev. St. Tex. art. 8210, providing that "a judgment in any court of record within this state, where execution has not issued within twelve months after the rendition of the judgment, may be revived by

soire facias, or action of debt brought thereon, within ten years after the date of such judgment, and not after," applies to an action to revive a judgment upon which execution has already issued, and requires that such action shall be brought in 10 years from the issuance of the last execution.—*Willis v. Stroud*, (Tex.) 732.

JUDICIAL SALES.

Damages on reversal, see *Damages*, 9.

Effect of decree, see *Husband and Wife*, 11.

Fraud in, *bona fide* purchasers, see *Executors and Administrators*, 11.

Mortgage, sale under foreclosure, see *Mortgages*, 11.

When ordered.

1. Judgment being entered for the sale of land to satisfy a mortgage upon it, it was agreed between the parties that no sale should be made for a year, if the defendant should, within 90 days, assign to the plaintiff a certain other mortgage. The defendant failed to comply with this agreement. *Held*, that a sale of the land might be ordered, and the court's commissioner was vested with no power to reserve the defendant's right to redeem the land after the sale had been made. — *Kincheloe v. McCain's Ex'rs*, (Ky.) 8.

Validity.

2. Error or mistake of judgment on the part of appraisers, appointed to fix the value of land to be sold at judicial sale, is no ground for setting aside the sale. — *Kincheloe v. McCain's Ex'rs*, (Ky.) 8.

3. Civil Code Ky. § 531, (Myers' Code, 582,) providing that a judgment shall not be vacated until it be adjudged that there is a valid defense to the action in which the judgment is rendered, is not intended to make the power of the court to vacate, after the expiration of the term, an order confirming a judicial sale dependent upon the existence of a valid defense to the cause of action or claim sued on. The judgment and order confirming the sale are distinct and independent of each other; the one may stand, although the other is set aside. — *Bean v. Hoffendorfer*, (Ky.) 188.

4. The reversal of a judgment does not affect the validity of a sale made under it, although the plaintiff in the action was the purchaser, and no deed had been made to him at the time of reversal, the sale having been confirmed, and no appeal taken from the order of confirmation. — *Dunn v. German Security Bank*, (Ky.) 425.

5. Under Civil Code Ky. § 696, providing that every sale under an order of court must be public, and shall be made after such notice of time, place, and terms of sale as the order may direct, *held*, that a judgment directing commissioner, before

making sale, "to post notices of the time, place, and terms of sale, as sheriffs are required to do before selling land under execution," is sufficient; the duties of the sheriff in selling land under execution being specifically prescribed by statute. — *Barnes v. Jackson*, (Ky.) 601.

6. It is the policy of the law to uphold judicial sales; and, where the return of the officer upon the execution is of doubtful meaning, the law will so construe it as to uphold his action. — *Scott's Ex'x v. Scott*, (Ky.) 598.

7. Before the creation of the Louisville law and equity court, the vice-chancellor having had jurisdiction of such matters as the chancellor of the Louisville chancery court submitted to him, an order of the chancellor, confirming a sale decreed by the vice-chancellor, is not void as *coram non judice*. — *Dunn v. German Security Bank*, (Ky.) 425.

— Adequacy of price.

8. Even if it be a true rule that, when time is allowed to redeem land sold at judicial sale, mere inadequacy of price is no ground of exception to the sale, yet the rule does not apply where two lots are improperly sold, when either may be worth, and at a fair sale would bring, more than enough to satisfy the judgment, leaving the other lot unincumbered. — *Bean v. Hoffendorfer*, (Ky.) 188.*

Title acquired.

9. A judgment directing land to be sold free of lien was appealed from, and reversed, but, no *superseatas* having been executed, the land was sold in the mean time. *Held*, as the judgment was reversed because erroneous, but not void, the purchaser at the sale acquired good title, and the successful appellant, who was claiming a lien on the land, was not entitled to it, even though the plaintiff in the action was the purchaser, but he was entitled to a personal judgment against the plaintiff (*as such*, but not *as purchaser*) for the amount of his claim. — *Stewart v. Hoskins*, (Ky.) 134.

10. The rights of a purchaser at a judicial sale, made in a suit to enforce a lien for a street improvement assessment, are not affected by the failure of the owner of the warrants to aver in his complaint that the provisions of the city charter, with respect to the publication of the ordinance ordering the improvement, had been complied with, where the court which decreed the sale had jurisdiction of the parties and the subject-matter. — *Dunn v. German Security Bank*, (Ky.) 425.

JURY.

Constitutional right to trial by, see *Constitutional Law*, 9.

Custody and conduct, see *Criminal Practice*, §6, 46.

New trial, impeachment of verdict by juror, see *New Trial*.

Province of court and jury, see *Eminent Domain*, 2; *Homicide*, §1; *Malpractice*, 2; *Negligence*, 4; *Trial*, 7.

Competency.

1. One subpoenaed as a witness in a case by one of the parties, and who had been in the party's employ a year before, is not thereby disqualified to sit as a juror in the case.—*East Line & Red River R. Co. v. Brinker*, (Tex.) 99.

2. Second cousins are related to each other within the third degree; and, under Code Crim. Proc. Tex. art. 686, subd. 10, disqualifying as jurors those related within the third degree to the person injured by the commission of the offense, a second cousin of the owner of stolen property is disqualified to sit as a juror on the trial of one charged with the larceny.—*Page v. State*, (Tex.) 745.

3. A juror is qualified, although he has formed an opinion which it will require evidence to remove, if he states that the opinion was formed upon hearsay, which he values little, and that he can render an impartial verdict.—*Steagald v. State*, (Tex.) 771.

4. The unorganized county of H., in Texas, is attached to the organized county of W. for judicial purposes. *Held* that, for all judicial purposes, the two counties of H. and W. are one and the same, and a resident of H. county is a competent juror for jury service in the county of W.—*Groom v. State*, (Tex.) 668.

Summoning and impaneling.

5. Special venire which shows the style and number of the case, and which, though in its preliminary recitals it omitted the name of the court or county in which the case was pending, distinctly stated in the mandatory part that the persons named were to be summoned "to be and appear before the honorable district court of Williamson county, Texas, at the court-house thereof, in Georgetown, on the nineteenth day of January, A. D. 1886, then and there to serve as special jurors, as aforesaid, in the above-stated cause," etc., is not obnoxious to the objection that the writ does not show in what case the same was issued, nor in what court the proceedings were pending, as required by Code Crim. Proc. Tex. arts. 605, 608.—*Murray v. State*, (Tex.) 104.

6. Under Code Crim. Proc. Tex. art. 617, which requires that the names of *all the jurors summoned* under a special venire shall be served on the defendant more than one day before the trial, it is not necessary, on amendment of the return, to serve a copy

of the special venire as amended, before proceeding to trial, if the accused has received a copy before the amendment, which contained the names of all the jurors summoned.—*Id.*

7. And the copy served is not vitiated by the fact that it contains the names of other jurors not summoned, which have been obliterated by having a pencil mark drawn through them.—*Id.*

8. Where the sheriff's return on a special venire facias shows that the names of several of the jurors had been stricken from the list by him, but fails to state why this was done, and, if because they had not been summoned, the reason therefor, as required by Code Crim. Proc. Tex. art. 614, the return may, on motion to quash the venire, be amended, if no prejudice is caused to the accused.—*Id.*

9. Code Crim. Proc. Tex. §§ 618-621, which require the court, in proceeding to impanel a jury out of a special venire for the trial of an indictment for a capital crime, to have the names of those summoned as jurors called at the court-house door, and require such as are present to be seated in the jury-box; to grant attachments for those not present; and to call up and swear all those present, and test their qualifications, or hear their excuses,—are merely directory; and where the jury are not impaneled thereunder, but are selected in conformity with Code Crim. Proc. Tex. art. 640, which is the mode prescribed for the final trial of the case, and are taken from the original special venire, which was not exhausted, the accused is not prejudiced, and the verdict will not be reversed.—*Id.*

10. Affidavits being filed in a criminal prosecution stating that the sheriff would not summon fair, competent, and impartial jurors to try the case, the court had authority to appoint another person to summon jurors, under Crim. Code Ky. § 198, providing that the court may for sufficient cause designate some other officer or person than the sheriff to summon petit jurors. And under this section the appointment may be made at the instance of either party,—either the prosecution or the accused.—*Johns v. Commonwealth*, (Ky.) 869.

11. Under Code Crim. Proc. Tex. arts. 595, 646, a jury in the county court is composed of six men, and is formed by drawing from the box the names of twelve jurors, "or so many as there may be," etc. In this case there were but six regular jurors, and the defendant was required to pass upon them before others were summoned and placed in the box. *Held* correct, and that the court could not be required to have the panel filled to twelve unless there were twelve regular jurors, nor could it be

required to fill the panel to twelve before passing on the six in the box.—*Goforth v. State*, (Tex.) 832.

When entitled to jury.

12. The Tennessee act of 1875, (M. & V. Code, 3602,) providing that "either party desiring a jury must make the demand in his first pleading tendering an issue triable by jury," etc., applies to pleadings alike at common law and under the Code, and requires a party, in terms, to make the demand, if he desires the issue tendered to be tried by a jury. A conclusion to the plea, "and of this he puts himself upon the country," is not equivalent to such demand.—*Gleaves v. Davidson*, (Tenn.) 448.

13. Under Rev. St. Tex. arts. 1284-1286, providing for a jury for defendants in case judgment is rendered by default, but not expressly giving the same right to plaintiff, *held* that, where the cause of action is not liquidated, plaintiff is entitled, as at common law, to a jury to assess damages when judgment is entered by default; and that, as the bill of rights, (section 15,) preserves to all parties the common-law right of trial by jury, it is immaterial that the sections above do not expressly confer the right on plaintiff.—*Central & M. R. Co. v. Morris*, (Tex.) 457.

14. The attaching creditor, in answer to an interplea, claiming the attached goods by virtue of a chattel mortgage, set up that the mortgage was executed by the debtor to defraud and hinder his other creditors. *Held*, that the issue was properly triable by a jury, and did not require a transfer of the case to equity.—*Caruth-Byrnes Hardware Co. v. Wolter*, (Mo.) 865.

JUSTICE OF THE PEACE.

See *Appeal*, 2, 3, 4.

Acknowledgment, certificate of, see *Acknowledgment*, 4.

Appeal, limitation of amount in controversy, see *Appeal*, 3.

—record on, see *Appeal*, 2.

Jurisdiction.

1. Under Const. Ark. 1874, art. 7, § 40, which restricts the civil jurisdiction of justices to actions arising on contract, actions of replevin, and actions for injuries to personal property, a justice has no jurisdiction over an action for the recovery of a statutory penalty.—*Baltimore & Ohio Tel. Co. v. Lovejoy*, (Ark.) 183.

2. Justices of the peace in Tennessee have no jurisdiction to try and punish for the offense of unlawfully carrying a pistol.—*Foust v. State*, (Tenn.) 657.

3. The civil jurisdiction of a justice of the peace is entirely statutory, and, being an inferior court, he takes nothing by im-

plication except what is necessary to make effective his express powers. He has no authority to set aside a sale made under execution.—*Dunnagan v. Shaffer*, (Ark.) 522.

4. Const. Ark. art. 7, § 40, conferring upon justices of the peace jurisdiction in all matters of damage to personal property, where the amount in controversy does not exceed \$100, includes all injuries which one may sustain in respect to his ownership of personal property, and therefore embraces damages for trover and conversion.—*Parkes v. Webb*, (Ark.) 521.

Pleading.

5. Rev. St. Tex. art. 1573, provides that pleadings in a justice's court may be oral, and that a brief statement thereof shall be noted on the docket, and article 1575 provides for amendments in accordance with the rules governing the district and county courts so far as the same may be applicable. *Held* that, under these sections, pleadings are essential to the formation of issues to be tried in those courts.—*Moore v. Jordan*, (Tex.) 817.

LACHES.

Bar to injunction against collection of tax, see *Schools and School-Districts*.

Bar to proceeding for failure to list property, see *Taxation*, 7.

What is.

It appearing that the infringement or simulation of plaintiff's trade-mark complained of began in November, 1874, but was not made complete until some time in 1879, and that plaintiff's action for an injunction and for damages was brought within five or six months thereafter, *held*, there was no such laches as would bar plaintiff's right to relief.—*Avery v. Meikle*, (Ky.) 609.

LANDLORD AND TENANT.

See, also, *Forcible Entry and Detainer*.
Lease on shares, see *Crops*.

Relation.

1. An agreement, by which the owner of land agrees to furnish team, utensils, and supplies to make a crop on his land, the crop to be his, but, in consideration of the labor of the other party, such party to have what remains after deducting half for the use of the land, etc., and enough to pay for supplies furnished by the land-owner, creates no relation of landlord and tenant; and the party to the agreement with the land-owner has no title to any part of the crop until it is divided, and the share contracted for set off to him.—*Hammock v. Creekmoore*, (Ark.) 180.*

Estoppel to deny landlord's title.

2. A tenant cannot repudiate the title of the landlord under whom he originally entered, and claim to hold the premises under another, until he has first surrendered possession to his original landlord. It is not enough that he has abandoned the premises for a time, and afterwards entered under the new title, unless he has given notice of such abandonment to the original landlord.—*Juneman v. Franklin*, (Tex.) 562.

Holding over.

8. In Kentucky, where one rents a stable for a year from a certain date, and at the expiration of the year continues in possession for *two months*, paying rent for that time, which the landlord accepts, and also takes in, with the knowledge of the landlord, a stock of provender sufficient to last him for another year, the tenant is entitled to occupy the premises for another year, the landlord being estopped by his acceptance of rent, and allowing the tenant to store the provender, to evict him, notwithstanding Gen. St. c. 66, art. 4, § 1, which provides that, where a tenant is in possession under a lease for a year or more which is to expire on a certain day, and he holds over without the express consent of the landlord, he does not acquire any right to remain for *ninety days*, and may be evicted within that time.—*Irvine v. Scott*, (Ky.) 168.

Distress for rent.

4. One who leases his wife's land in his own name, and takes a note for the rent payable to himself as "attorney," can maintain a suit in equity to enforce the landlord's lien in his own name, under Mansf. Dig. Ark. § 4986, as "one with whom and in whose name a contract is made for the benefit of another."—*Dickenson v. Harris*, (Ark.) 58.

5. And it is not necessary that such a suit should be in his own name, and the wife may therefore be joined in it, either originally or after the institution thereof.—*Id.*

6. A suit to enforce a landlord's lien on crops, for rent, may be maintained, although the contract shows that the amount claimed is for rent and hire of personalty combined, without separating the two; especially if the bill alleges that the hire of the personalty was worth nothing.—*Id.*

7. In Kentucky, a landlord cannot acquire a superior lien for rent, which has been due less than six, but more than four, months, by the suing out and levy of a distress warrant upon the tenant's property, upon the leased premises, but after the making of a deed of assignment by the tenant for the benefit of his creditors.—*Petry v. Randolph*, (Ky.) 420.

Recovery of possession.

8. A statute giving the landlord a summary remedy to recover possession of the premises by writ of forcible entry and detainer, issuing from a justice's court, does not deprive him of his right to sue in the district court to recover possession. The statutory proceeding is cumulative, not exclusive of the right of action.—*Juneman v. Franklin*, (Tex.) 562.

LARCENY.

See, also, *Receiving Stolen Goods*.

Former jeopardy, see *Constitutional Law*, 11; *Criminal Practice*, 12.
Venue, proof of, see *Criminal Practice*, 16.

What constitutes.

1. If the defendant took the lumber he is charged with stealing openly and without any effort at concealment or intent to steal, he is not guilty of theft.—*Williams v. State*, (Tex.) 226.

2. In Texas, under an indictment for felonious larceny, it devolves on the state to select a particular transaction, and prove value of \$20 or more. The averment of value is not proved by evidence of two separate acts of theft, each of property less than \$20 in value, but together amounting to more.—*Lacey v. State*, (Tex.) 843.

8. A defendant cannot be convicted of the theft of A.'s property if he obtained possession of it from some third person, whether in good or bad faith, and even although knowing it to be stolen; but, if he obtained possession directly from A., it will be of no avail for him to rely upon a purchase from a third person, who had, as he knew, no right to sell.—*Hart v. State*, (Tex.) 741.

Indictment.

4. In an indictment for the larceny of clothing from a room, it is proper to charge the ownership of the clothing in a woman though a minor, she being 18 years of age, and owning and using the clothing as her own.—*Phillips v. State*, (Tenn.) 484.

5. An indictment for the larceny of a horse alleged both the ownership and possession of the animal to have been in the same person at the time it was stolen. The evidence sustained the ownership as alleged, but proved that the animal was stolen from the possession of a different person, who was holding the same for the owner. *Held*, a fatal variance between the allegation and the proof of the possession.—*Hall v. State*, (Tex.) 838.

Evidence.

6. In Texas, on the trial of an indictment for the larceny of a horse, parol evidence is not admissible to show that the

brand of the alleged owner was recorded; the record itself, or a copy of it, being the best evidence under Rev. St. Tex. art. 4561, providing that "no brands, except such as are recorded, * * * shall be recognized in law as any evidence of ownership of the horses * * * upon which the same may be used."—*Elsner v. State*, (Tex.) 474.

7. On trial for theft of a horse, it appeared that the owner of the horse had lost several at one time, branded with a figure "6," and had found all but the one in the possession of defendant. There was testimony that defendant obtained possession of all of them under directions from his brother, who, at one time owned some horses branded "6," to gather up all horses so branded. *Held*, upon all the evidence, that the conviction was unwarranted, and that the judgment should be reversed.—*Phipps v. State*, (Tex.) 761.

8. Upon trial for the larceny of cattle, evidence of the record of a brand recorded by one to whom it was assigned, after the alleged date of the larceny, *held* inadmissible.—*Groom v. State*, (Tex.) 668.

9. Upon trial for larceny of cattle, if there is evidence that the cattle stolen had the brand "P. O." on the left hip, and a lateral "P." on the left side, and the person whose cattle are alleged to have been stolen testifies that he had the management of the cattle in the "P. O." brand, it is not to be inferred that the witness refers to the before-mentioned brand, and a conviction upon such testimony cannot be sustained.—*Id.*

10. To warrant an inference of guilt from the recent possession of stolen property, the possession must be exclusive, and there must be a distinct and conscious assertion of property by defendant.—*Robinson v. State*, (Tex.) 786.

11. If a defendant charged with theft gives a reasonable, natural, and probable explanation of his possession of the stolen property, it then devolves upon the state, if it relies and solely on such possession as evidence of defendant's guilt, to show the falsity of the explanation.—*Clark v. State*, (Tex.) 744.

Instructions.

12. It is not necessary that, in instructing the jury upon the rule as to the recent possession of stolen property being presumptive evidence of guilt, the court should make a direct application of the rule to the facts of the case.—*Hart v. State*, (Tex.) 741.

13. On the trial of a joint indictment of two persons for the larceny of a cow, which was butchered and sold, where there is evidence tending to show that one of the accused simply acted as the hired man of the other, and assisted him in driv-

ing and butchering the cow, under the belief that it was his, and in ignorance of the fact that it had been stolen, it is error to refuse an instruction to the effect that if the jury believe that evidence, that defendant should be acquitted.—*Wiley v. State*, (Tex.) 570.

14. A conviction of larceny will be set aside where there is evidence tending to establish a purchase by the accused of the property alleged to have been stolen, and the charge of the court fails to present that phase of the case.—*Ryan v. State*, (Tex.) 547.

15. On the trial of an indictment for the larceny of a cow, the court instructed the jury that, "upon the trial of any person charged with the theft of any animal of the horse, ass, or cattle species, the possession of such stolen animal by the accused, without a written transfer or bill of sale containing a description of such animal, shall be *prima facie* evidence against the accused, and that such possession was illegal." *Held* erroneous, as being a charge upon the weight of evidence.—*Wiley v. State*, (Tex.) 570.

16. Where the evidence fails to establish a fraudulent taking by the accused, and ownership as alleged in the indictment, the judgment should be reversed.—*Ryan v. State*, (Tex.) 547.

LICENSE.

See, also, *Intoxicating Liquors*.

Constitutionality of license law enacted at special session, see *Constitutional Law*, 3. Indictment for selling without, see *Indictment and Information*, 2.

Municipalities, power to exact licenses, see *Municipal Corporations*, 1.

Tax in form of license.

1. The charter of the city of Owensborough, (1 Acts Ky. 1881, p. 817,) § 26, provides that the common council shall have power to grant a license to the following persons, and to provide by ordinance adequate penalties for doing business without license, viz., tavern keepers, concerts, menageries, and express companies; and section 27 provides that, upon granting such license, the city council shall charge such sum as they shall deem fit and reasonable. *Held*, that although the power given municipal corporations to require a license of useful trades does not, generally speaking, confer power to tax such trades with a view to revenue, but gives power to require only a reasonable fee for the license, and labor attending the issue of the license, yet the last section in the foregoing charter, enlarging the power given in the preceding section, shows that it was the legislative intent to confer upon the city council full power

over the subject, and to authorize them to use the power to license express companies as a means of taxing such companies if they saw proper to do so.—*Adams Exp. Co. v. City of Owensborough*, (Ky.) 870.

2. The act of March 2, 1870, (1 Acts Ky. 1869-70, p. 83.) imposes a tax on *foreign* express companies, and provides that they shall not be required by any county, city, or other corporation to take out any other or additional license, or pay any other or additional tax for the right or privilege of conducting business in or through such county or city. *Held*, this act was not expressly or impliedly repealed by a subsequent act (1 Acts Ky. 1881, p. 817, §§ 86, 87) conferring on a particular city the power to license *express companies*. The act of 1870 shows an intention upon the part of the state to exempt *foreign* express companies from local taxation upon the payment of the state tax, and that intent is not to be reversed in favor of a particular city by mere implication from the general terms of a subsequent act, so as to enable the city, under that act, to impose a license on a *foreign* express company that had previously paid the license to the state required by the act of 1870.—*Id.*

LIENS.

See, also, *Mechanics' Liens*.

Attachment, equitable interest, see *Attachment*, 1.

Attorney's lien for services, see *Attorney and Client*, 4.

Landlord's lien, see *Landlord and Tenant*, 4-7.

Vendor's lien, see *Sale*, 2.

LIMITATION OF ACTIONS.

Adverse possession, see, also, *Ejectment*, 2.
Guardian, limitation of suit on bond, see *Guardian and Ward*, 7.

Mortgage, limitation of power of sale, see *Mortgages*, 11.

Judgment, suit to revive, see *Judgment*, 13.
Retrospective effect of, see *Constitutional Law*, 6.

Taxation, suit for failure to list property, see *Taxation*, 10.

• Adverse possession.

1. A party claiming a tract of land under color of title given by a deed, which also gives him a good title to other land, will not be deemed in adverse possession thereof by his possession and occupation of that land included in the deed of which he has a good title.—*Word v. Box*, (Tex.) 98.

2. When actual possession of land by an adverse claimant ceases, the constructive possession of the legal owners revives, and

a renewed adverse possession will not receive aid from or be tacked to a former possession to piece out the time allotted by the statute for acquiring title by adverse possession.—*Brown v. Hanauer*, (Ark.) 27.

3. Adverse possession is not acquired by marking off a boundary around land, unless the claimant, or some one for him, reside on the land within such boundary, and claims up to the boundary adversely.—*Sanders v. Barbee*, (Ky.) 528.

4. Actual, continuous, adverse possession of land for any period of 15 years, whether the 15 years be *next before* the institution of the suit to recover the land, or *at any other time*, will confer a perfect title, and toll the right of entry under an elder patent.—*Id.*

Running of the statute—Personal rights.

5. The act of a town in making a contract *ultra vires*, and afterwards assessing the property, and continuing to assert its power to bind the property holders until the court decided that it had no such power, does not constitute fraud, actual or constructive, as against the contractor; and Gen. St. Ky. c. 71, art. 8, § 6, providing that in actions for relief for fraud the cause of action shall not be deemed to have accrued until the discovery of the fraud, does not apply.—*Hahn v. Town of Bellevue*, (Ky.) 192.

6. The probate allowance of a claim is a judgment within the meaning of the Arkansas statute fixing the period of limitation of judgments at 10 years; and, while the statute may not operate to bar such a judgment while the estate is in course of administration, yet, as to a cause of action which accrued upon the discharge of the administrator, the statute will run from that time, and bar the demand at the end of 10 years.—*Brown v. Hanauer*, (Ark.) 27.

— Real rights.

7. In case of a grant of land under Mexican law to a colony for the benefit of the citizens of a certain place, the statute of limitations will begin to run immediately upon a claim of one of such citizens to the tract, based upon an earlier grant to him.—*Sydeck v. Duran*, (Tex.) 264.

8. Under Gen. St. Ky. c. 71, art. 8, § 6, providing that "in actions for relief for fraud the cause of action shall not be deemed to have accrued until the discovery of the fraud, but no such action shall be brought ten years after making the contract or perpetration of the fraud," if a fraudulent or voluntary conveyance is permitted to stand for 10 years without attack, the grantee under it acquires a perfect title, which he can enforce by action against all persons.—*Brown v. Connell*, (Ky.) 794.*

9. A husband having instituted suit to set aside a will made by his wife, he subsequently agreed with his son to dismiss the suit in consideration that he should be allowed the use of the homestead which belonged to the wife and one-half the proceeds of the real estate during his life; the son and daughter to have the other one-half. The father and children having acquiesced in this agreement for over 20 years, *held*, neither the father nor the daughter, who had in the mean time married, could maintain an action to set aside the agreement.—*Riggs v. Riggs*, (Ky.) 423.

Disabilities and exceptions.

10. In proceedings to open an administrator's account, and for a further accounting, when it appears that the heir and distributee was an infant when the administrator settled his accounts, and died in infancy, and an administrator to such heir's estate was not appointed till 10 years afterwards, the statute of limitations does not begin to run in favor of the administrator of the ancestor until such appointment, and no laches can be imputed to the heirs of decedent in their action.—*Sorrels v. Trantham*, (Ark.) 198.

11. In an action to set aside and cancel certain deeds alleged to have been executed by a trustee contrary to the conditions of his trust, the property having been conveyed by the mother of the plaintiffs to the trustee in trust for all her children, when it appears that one of the plaintiffs was a married woman at the time of the conveyance by the mother to the trustee, and that she so continued until the institution of this suit, the statute of limitations could not run against her.—*Smith v. McElyea*, (Tex.) 258.

12. The averments of the petition that the trustee and his grantees, during the life-time of the grantor of the trust, induced the grantor and the plaintiff to believe that the trust would be carried out after the grantor's death, *held* to be sufficient to prevent the running of the statute of limitations as to plaintiff claiming under the trust.—*Id.*

13. Where the full legal title to property is vested in a trustee to be held for the sole use and benefit of another, and subject to no other condition than that it shall be conveyed to such other person upon demand, if the right of action of the trustee to recover the property is barred by limitation, the *cestui que trust* is also barred, although the latter may have been under disability at the time the cause of action accrued.—*Collins v. McCarty*, (Tex.) 730.

14. In an action by one to recover a portion of a sum of money received by another from a railroad as compensation for the railroad's right of way over a certain

tract of land, part of which plaintiff claims to own, defendant relied on the statute of limitations as a bar to the action. *Held*, that he was not estopped to plead the statute by the fact that he had previously misrepresented to plaintiff (innocently and without fraudulent intent) the true division line between their tracts, so that plaintiff was induced to believe that the right of way did not touch any part of his land, and did not discover otherwise until after two years from the date of payment of the money to defendant; and that the fact that plaintiff resided at a greater distance from it than did defendant did not excuse his want of knowledge about it.—*McFaddin v. Prater*, (Tex.) 306.

Acknowledgment.

15. Where the maker of a note, barred by the statute of limitations, writes upon it, "I hereby waive my right to rely upon or plead the statute of limitations as to the within note," this is a sufficient acknowledgment of the justice of the debt, and willingness to pay it, to imply a promise to pay, and will revive the debt, although there was no new consideration for such indorsement.—*Jordan v. Jordan*, (Tenn.) 896.*

16. A written waiver of the right to plead the statute of limitations is not contrary to public policy, but is valid, and will estop the maker from pleading the statute.—*Id.*

Taxes.

17. The statute of limitations will run against a municipal corporation, to operate as a bar to the collection of city taxes, when the defense thereunder is not expressly taken away by statute.—*Mellinger v. City of Houston*, (Tex.) 249.

18. The Texas act of July 4, 1879, (Sp. Sess. Tex. 1879, Gen. Laws, p. 15.), providing "that no delinquent tax-payer shall have the right to plead in any court, or in any manner rely upon, any statute of limitation by way of defense against the payment of any taxes due from him or her, either to the state or any county, city, or town," applies to a purchaser of property incumbered with a lien for taxes.—*Id.**

19. In an action to recover possession of land, upon the ground of plaintiff's use and occupancy and payment of taxes thereon for more than five years, evidence that the land was assessed for taxation against plaintiff, and the tax-roll marked "paid" for three years, and that it was the invariable custom of the tax collector, when taxes were paid, to so mark on the roll, did not show, but rather tended to repel, the fact of payment for the remaining two years.—*French v. Olive*, (Tex.) 563.

Evidence.

20. Where, in an action to subject lands to the payment of a probate judgment, the defense is set up that the cause of action did not accrue within 10 years of bringing suit, the burden is upon the plaintiff to show that he had commenced his suit within the statutory period.—*Brown v. Hanauer*, (Ark.) 27.

21. Where an action is brought in Kentucky, and both parties are non-residents, the statute of limitations of this state applies, and the burden of proof is on the party relying on Gen. St. c. 71, art. 4, § 19, (providing that where a cause of action arises in another state between residents of such state, and by the laws of that state an action cannot be maintained thereon, no action can be maintained in this state,) of showing that the cause of action accrued in another state between citizens of that state, and the statute there was no obstacle to recovery.—*First Nat. Bank of Cincinnati v. Thomas*, (Ky.) 12.*

LIS PENDENS.**Where rule applies.**

1. A pending action to enforce a mortgage is notice, to all purchasers who become such during the pendency of the action, of the mortgagee's rights. A husband and wife joined in mortgaging her land, and, she dying, her interest descended to her sons, from one of whom the husband bought his interest. *Held*, that the interest so purchased was liable, along with the husband's estate by curtesy, to the mortgage; especially as it appeared that the mortgage contained a clause of general warranty.—*Edmunds v. Leavell's Adm'r*, (Ky.) 124.

2. Plaintiff, in an action of ejectment, after his attorney had dismissed the action, filed in vacation a motion to have it reinstated. Afterwards, but before the defendant had notice of the motion to reinstate, the latter gave a mortgage on the premises sued for, the mortgagee accepting it in reliance upon the dismissal, and in ignorance of the motion to reinstate. *Held*, that the title under the mortgage was free from any lien created by the pendency of the action of ejectment, and that the subsequent reinstatement of the action would not affect it.—*Davis v. Hall*, (Mo.) 382.

Logs and Logging.

Damages for breach of contract relating to, see *Damages*, 3-5; *Evidence*, 10.

MALICIOUS PROSECUTION.**Attorney's liability.**

1. An attorney is not liable to an action for malicious prosecution unless, in con-

ducting the litigation complained of, he knew that there was no cause of action, and knew also that his client was acting solely from illegal or malicious motives; and, in forming his opinion upon these matters, he has a right to act upon such information as his client imparts, and is not bound to inform himself elsewhere.—*Peck v. Chouteau*, (Mo.) 577.

Malice.

2. Mere dislike or ill will towards one by another does not constitute malice in the legal sense. There must be some act done by defendant with intent to injure plaintiff, and such act must be wrongful, and done without legal justification or excuse.—*Peck v. Chouteau*, (Mo.) 577.

Pleading.

3. The declaration must aver want of reasonable or probable cause.—*Turner v. Turner*, (Tenn.) 121.

Evidence.

4. Plaintiff having been indicted, along with A., for a fraudulent conspiracy, was acquitted, and subsequently brought an action for malicious prosecution. In that action, *held*, that evidence of a previous indictment against A. for a similar offense was incompetent, as it did not tend to prove plaintiff guilty upon the indictment complained of, or disprove malice or show probable cause on the part of defendant.—*Peck v. Chouteau*, (Mo.) 577.

5. But A. having appeared as a witness in the action for malicious prosecution, evidence of the indictment found against him previously to the one complained of is admissible to affect his credibility, it appearing that he had entered a plea of guilty to that indictment, but the government had dismissed the proceeding without entering judgment on the plea.—*Id.*

MALPRACTICE.**Evidence.**

1. When, in an action for malpractice, the plaintiff is permitted to show the skill, reputation, and standing of one as a surgeon and physician, by the testimony of medical experts, who were then asked and permitted to give their opinions upon the material issues, on the assumption that his diagnosis of the case was correct, the defendant may show, by the same experts and witnesses, his own skillfulness and reputation in that behalf.—*Vanhooover v. Berghoff*, (Mo.) 72.

2. In an action against a surgeon for malpractice in the improper treatment of a dislocated bone, a question whether he was justified in not using the "splint" which had been practically tested, and was in common use in such cases, by the profession, and in adopting and using a sub-

stitute in the manner stated, or whether there was in this behalf a want of the requisite and proper skill and attention ordinarily bestowed in similar cases, held to be one of fact for the consideration of the jury.—Id.

8. An instruction to the jury that "the defendant was bound to possess and use all the knowledge, skill, and ability that was reasonably necessary to properly treat plaintiff, and, unless the evidence showed to the satisfaction of the jury that defendant, in the treatment of plaintiff, did use such knowledge, skill, and ability, they should find for the plaintiff, if they further found that the injuries complained of were the result of defendant's so failing to use such knowledge, skill, and ability," was erroneous, as being open to the construction that the burden of proof was upon the defendant to show these facts to the jury.—Id.

MANDAMUS.

Against treasurer to make payment in money, see *Taxation*, 18.

For issuance of certificate of election, see *Office and Officers*, 2.

In general—When writ lies.

1. In all cases where full and ample relief may be had either by appeal, writ of error, or otherwise, from the judgment, decree, or order of a subordinate court, *mandamus* will not lie against a road overseer to compel him to remove obstructions from a public road; and the fact that the person aggrieved or complaining has, by neglecting to appeal when he might have done so, placed himself in such a position that he can no longer avail himself of its benefits, constitutes no ground for interference by the writ.—*State v. Buhler*, (Mo.) 68, 72.

To courts and judicial officers.

2. The Kentucky statute relative to the condemnation of lands for railroad purposes (1 Acts 1881, p. 88) provides that, on the filing of exceptions to the commissioners' report on the value of the land, the county court "shall forthwith cause a jury to be impaneled to try the issues of fact made thereby." *Held*, that the action of a county court in dismissing condemnation proceedings, on the land-owner's plea that the company had no right to maintain the proceedings, as its road had, by decree of a federal court, been placed in the hands of a receiver, is not ministerial, but judicial, in its nature, and *mandamus* will not lie to compel the impaneling of a jury to try the issues.—*Shine v. Kentucky Cent. R. Co.*, (Ky.) 18.

3. Under the Kentucky act of April 11, 1883, § 6, a right of appeal is provided from

the decision of the county court in proceedings for condemnation for railroad purposes; and, where the county court has dismissed the proceedings on the ground that the company has no right to maintain them, *mandamus* will not lie to compel the court to impanel a jury.—Id.

To state boards and officers.

4. The duties imposed upon the Missouri commissioners of public printing by Rev. St. Mo. 1879, § 6594, in letting contracts for such printing, are not purely ministerial, but involve the exercise of such a degree of discretion as to place them beyond the control of a court by *mandamus* issued at the instance of a party claiming to be the lowest responsible bidder for such work.—*State v. McGrath*, (Mo.) 846.

Manslaughter.

See *Homicide*, 81-88.

MASTER AND SERVANT.

Contributory negligence of servant, see *Negligence*, 18.

Liability of master—Contract of release.

1. An agreement entered into by one with a railroad, upon being employed as brakeman, to take upon himself all risks incident to his position on the road, and not to hold the railroad company liable for any injury he may sustain by accident or collision on the trains of the road, or by defective machinery or carelessness or misconduct of himself or any other employee of the company, is not binding on him so as to relieve the company from liability for an accident caused by its failure to repair its road.—*Little Rock & Ft. S. Ry. Co. v. Eubanks*, (Ark.) 806.

Defective appliances.

2. It is the duty of the employer to use ordinary care in providing for the use of the servant safe machinery, and premises in safe condition, but he is not an insurer; and if the employee knows of the danger, and, without objection, continues to use them, and injury results to him, he cannot hold the employer liable.—*Needham v. Louisville & N. R. Co.*, (Ky.) 797.

3. In an action by an employee against his employer, to recover for an injury received from the dangerous condition of the premises where he was required to work, the employee must aver want of knowledge on his part of the defect.—*Bogenschutz v. Smith*, (Ky.) 800.*

4. The acceptance by a railroad company of a flat car loaded with lumber, which projects 18 inches from the end of the car, does not entitle a brakeman who is in-

jured thereby in coupling such car to a box car to an instruction that the company is, as matter of law, guilty of negligence. — *Louisville & N. R. Co. v. Gower*, (Tenn.) 824.*

5. In an action against a railroad company to recover for the death of an employe, the only evidence introduced by plaintiff to prove the alleged negligence in the construction of a "switch" or "frog" being that the switch rail was a little lower than the other rail, and his witnesses not stating that this was a defect that could be remedied, and defendants proving that it was necessary to have the switch rail lower than the main rail, *held*, that a finding for plaintiff must be set aside. — *Little Rock & Ft. S. Ry. Co. v. Eubanks*, (Ark.) 808.

Maxims.

Falsus in uno, see *Criminal Practice*, 42.

MECHANICS' LIENS.

Nature and acquisition of.

1. One who, having furnished material to a contractor engaged on work for a county, delivers his attested account to the county judge, and notifies the contractor that he has done so, does not thereby acquire a lien upon the money due the contractor for the work, and he will be postponed, in the distribution of the fund, to partial assignees of the contractor's claim, who took their respective assignments prior to the date of the delivery of his account. — *Campbell v. Hildebrandt*, (Tex.) 248.

2. If the principal contractor is liable to the owner in damages, for breach of contract in putting up the building, to an amount exceeding what is due on the contract price, a subcontractor, who by statute is entitled to have the owner, upon notice from him, retain enough to pay him from what is due to the contractor, provided the contractor himself has a lien, can claim nothing. — *Parrish v. Christopher*, (Ky.) 608.

Mines and Mining.

Dower in mines, see *Dower*, 2.

Misnomer.

In order of publication, see *Writs*, 7, 8.

MORTGAGES.

See, also, *Chattel Mortgages*.

Crops, mortgage of, see *Crops*.

Partition, mortgagee as party, see *Partition*, 2.

Payment of, see *Subrogation*, 1.

Redemption, see, also, *Judicial Sales*, 1.

What constitutes.

1. N. executed a writing, agreeing to deliver possession of certain town lots when H. should pay him a sum of money and interest on the money for two months, and that his receipt for the money should make the deed executed to him for the lots void. It appeared from parol evidence that H., having the right, at the time the writing was executed, to buy the lots from another within a certain limited time, applied to N. to pay the money and take title to the lots; agreeing that if he, H., did not repay the money within a specified time, the property should be N.'s; and, the obligor having paid the money, the writing was executed in pursuance of the agreement. *Held*, the writing constituted a conditional sale, and not a mortgage. — *Hubby v. Harris*, (Tex.) 558.

Deed absolute in form.

2. A deed made by a purchaser at an execution sale to a third party, at the request of the judgment debtor, to secure money borrowed by the judgment debtor from the third party in order to redeem from the execution sale, although absolute in form, will be treated in equity as a mortgage. — *Robinson v. Lincoln Sav. Bank*, (Tenn.) 656.*

3. Where one conveyed her interest in land to another by a deed absolute in form, but the grantee at the same time executed to her a written agreement binding himself to reconvey the land to her so soon as he might realize from the rents a sum sufficient to repay him what he had paid out in redeeming the land from an execution purchaser, *held*, the two instruments should be considered together, and, being so considered, constituted a mortgage. — *Frey v. Campbell*, (Ky.) 368.*

Validity.

4. Where A., having mortgaged his land to B., gets C. to execute a mortgage, with description blank, for the same amount, on 200 acres of his land, and then fills in a description which calls for 200 acres out of a tract of 900 acres, and gets B. to exchange it for his own mortgage, B. being ignorant of the mode in which the second mortgage was made, a court of equity will sustain the mortgage from C. to B. — *Brown v. Maury*, (Tenn.) 175.

Requisites.

5. A mortgage was acknowledged before a deputy-clerk, and the principal clerk, in writing out the certificate, failed to set forth the facts, and include the indorsement of acknowledgment made on the mortgage by the deputy. *Held*, that the mistake may be corrected, under the Ken-

tucky act of May 10, 1884, relative to the curing of such defects, although the act was passed subsequently to the bringing of the suit, and the lien under the mortgage is good.—*Edmunds v. Leavell's Adm'r*, (Ky.) 184.

Description.

6. A mortgage described the lands as "being 200 acres of a tract [described by metes and bounds] containing 600 acres, more or less. Said 200 acres lie west of the H. pike." There were in fact 900 acres belonging to the mortgagor lying west of the pike. *Held*, that the description was sufficient, and would convey two-ninths of the tract west of the pike. *TURNER, C. J.*, and *CALDWELL, J.*, dissenting.—*Brown v. Maury*, (Tenn.) 175.

Mortgagee in possession—Rent.

7. The grantee in an absolute deed that is shown to be a mortgage, being a mortgagee in possession, is to be held to the care that a provident owner would exercise in the management of the land; and, when he rents it out, he is to be charged with what appears from the evidence to be a reasonable rent, even though he may not have received so much, especially when he keeps no account showing his receipts.—*Frey v. Campbell*, (Ky.) 368.

Foreclosure—Defenses.

8. In a suit to foreclose a mortgage executed by defendants, husband and wife, the wife may aver in her answer that she did not execute the mortgage as charged, and that she never conveyed, nor intended to convey, the land described in the mortgage, and allege fraud and collusion on the part of her husband and complainant to procure her signature and acknowledgment, and she is not required to assert this defense by a cross-bill.—*Genthuer v. Fagan*, (Tenn.) 351.

9. In a suit to foreclose a mortgage against a husband and wife, in which the wife, by her answer, denies the execution by her of the mortgage as charged, and alleges collusion and fraud by her husband and complainant in obtaining her signature and acknowledgment, testimony of the wife and other witnesses is admissible to prove that complainant admitted to her, in their presence, that she never agreed to give the mortgage sought to be enforced; and such confession, if proved, is conclusive proof that there was no mortgage by her, notwithstanding her signature and acknowledgment.—*Id.*

—Bar by limitation.

10. In Kentucky the mortgage is a mere incident to the debt, or security for its payment; so that, when the right of recovery as to the debt itself is barred by limitation, the mortgage to secure it is barred also.—

First Nat. Bank of Cincinnati v. Thomas, (Ky.) 12.*

Power of sale.

11. The power to make a sale under a deed of trust given to secure the payment of a debt may be exercised although the right of action on the debt is barred, and although the rights of a third person as purchaser of the equity of redemption have intervened. Such purchaser, therefore, cannot, because the debtor has made a new promise sufficient to postpone the bar of the statute so far as he is concerned, and because a sale has been made under the power after the right of action on the debt, but for the new promise, would be barred, assert a right in the land paramount to the right of the purchaser at the sale under the power.—*Fievel v. Zuber*, (Tex.) 273.*

MUNICIPAL CORPORATIONS.

See, also, *Counties; Schools and School-Districts.*

License power, see *Licenses*, 1, 2.

Limitation of actions against, see *Limitation of Actions*, 5, 17.

Railroad, ordinance regulating moving of cars, see *Railroad Companies*, 8.

Street, establishment of, see *Highways*, 1, 2.

Taxation, for aid to railroads, see *Railroad Companies*, 20.

—special assessment, who liable for, see *Estates*.

—public improvements, sale for, see *Judicial Sales*, 10.

Powers of.

1. A license upon attorneys at law, or any other profession, calling, or trade, may be imposed by a municipal corporation acting under legislative authority; and it is no valid objection to the license that it is imposed upon one profession or trade, and upon no other.—*Bullitt v. City of Paducah*, (Ky.) 802.

2. In an action by a municipal corporation on the bond of a public weigher, conditioned for the payment of money by him for the exclusive privilege of weighing cotton on the public scales, the plea that the ordinance providing the scales, and the contract awarding the privilege of weighing, were *ultra vires*, is not available to the sureties; the contract being executed, and the weigher having got the benefit he contracted for.—*Town of Monticello v. Cohn*, (Ark.) 30.

Ordinances.

3. Section 18 of article 4 of the charter of St. Louis provides that the mayor shall state to the council, *when assembled* in special session, the objects for which they

have been convened, and their action shall be confined to such objects. *Held*, that the mayor could not enlarge the scope of legislation by stating in his message calling such session that "he was not averse to submitting any measure" during the session, if deemed of public interest, and that an ordinance passed at the submission of the mayor during the session was void.—*City of St. Louis v. Withaus*, (Mo.) 895.

Contracts of.

4. A city made a contract for the improvement of a street, by which the contractor was to look to the abutting owners for payment, except in the case of the intersections of crossing streets. In a suit against the property owners it was held that the city had no power to bind them, and, in another suit against the city, it was held that the contractor had no claim against it for the price. In an action by the contractor for authority to remove the improvements made, except at the street intersections and in front of the lots whose owners had paid, *held*, that the contractors could not succeed without tendering repayment for the amounts paid them for the intersections and by the property owners.—*Hahn v. Town of Bellevue*, (Ky.) 182.

Liability for negligence.

5. The owner of a town lot was engaged in blasting stone thereon in such manner that a piece of stone was thrown over into the street, so as to injure one who was passing by. *Held*, the person so injured could not recover of the city for the injury on the ground that it had permitted the owner to carry on his blasting operations.—*James' Adm'x v. Town of Harrodsburg*, (Ky.) 185.*

Defective streets.

6. A provision of a city charter that, in order to render the city liable for "gross negligence" in non-repair of a street, the non-repair must have continued for 10 days after notice in writing, given to certain officials, does not apply to a case where the city itself had an excavation dug by a contractor, discharged the contractor, and left the excavation as it was.—*City of Houston v. Isaacs*, (Tex.) 693.

Taxation.

7. Under 2 Rev. St. Mo. art. 6, § 5010, providing that the benefits arising from the opening of alley-ways in cities shall be assessed to the owners of property in the block where the alley is situated abutting on the proposed alley, "a lot abutting upon an alley to be intersected by the new alley" is not assessable.—*City of St. Louis v. Jupiter*, (Mo.) 401.

Murder.

See *Homicida*.

Mutual Benefit Societies.

Beneficiary, right to change, see *Insurance*, 10.

Execution upon life certificate, see *Insurance*, 9.

Navigable Waters.

Collection of tolls, see *Canals*.

Levee taxes, see *Constitutional Law*, 4.

NEGLIGENCE.

See, also, *Master and Servant*; *Railroad Companies*, 5-9, 17, 18.

Damage for personal injuries, see *Damages*, 12.

Municipalities, liability for negligent blasting, see *Municipal Corporations*, 5.

Master's negligence, see *Master and Servant*, 2-5.

Pleading and proof, see *Pleading*, 5.

Railroad, negligence of, see *Railroad Companies*, 7, 9.

— ringing bells, etc., see *Railroad Companies*, 8.

— running trains in cities, see *Railroad Companies*, 5.

— in stock-killing cases, see *Railroad Companies*, 18.

Ordinary and reasonable care.

1. Ordinary care is that degree which is exercised by ordinarily prudent persons under similar circumstances. — *Needham v. Louisville & N. R. Co.* (Ky.) 797.

2. Explaining to a jury the "care of a man of ordinary prudence" as "just such care as one of you, similarly employed, would have exercised under the circumstances," is erroneous.—*Louisville & N. R. Co. v. Gower*, (Tenn.) 824.

Proximate cause.

3. It is no defense to an action for damage done to plaintiff's land, abutting on a river, by the operation of a jetty built in the river by defendant, that defendant could not have foreseen the result.—*Armendaiz v. Stillman*, (Tex.) 678.

Province of court and jury.

4. In an action against a railroad company to recover for its willful neglect, resulting in the death of plaintiff's intestate, the question of willful neglect is not a question of law, but a mixed question of law and fact, which it is the peculiar province of the jury to determine, especially as to the degree of it.—*Needham v. Louisville & N. R. Co.*, (Ky.) 797.

Evidence.

5. Under Mansf. Dig. Ark. § 5226, giving a right of action to the next of kin to re-

cover damages for causing death of a relative through negligence, it is admissible for the plaintiff, the mother of deceased, to give evidence tending to show that she was dependent upon him for support.—*Little Rock, M. R. & T. Ry. Co. v. Leverett*, (Ark.) 60.

6. In an action against a railroad company for negligence causing an injury to a passenger, the burden of proof shifts to the defendant upon proof of an accident occurring to the train, and consequent injury to the passenger.—*Louisville & N. R. Co. v. Ritters' Adm'r*, (Ky.) 591.*

7. Evidence showing that plaintiff, a child 19 months old, somehow got in front of a street car, and was run over by it, but showing nothing beyond this as to the circumstances of the accident, is sufficient to sustain a verdict against the railway company, the company not calling the driver of the car to rebut by his testimony the presumption of negligence arising from the facts.—*Galveston City R. Co. v. Hewitt*, (Tex.) 705.

8. Evidence of the condition of a railroad track 21 months after the accident is inadmissible.—*Little Rock & Ft. S. Ry. Co. v. Eubanks*, (Ark.) 808.

9. Plaintiff, in an action to recover for personal injuries resulting from defendant's negligence, cannot show that he has a wife and children; and, where defendant objected to such evidence, stating, as the ground of the objection, that plaintiff must recover, if at all, for damage sustained by him individually, and not that sustained by his family, *held*, that the admission of it by the trial judge, with the remark that he did not take that view of it, was prejudicial.—*Louisville & N. R. Co. v. Gower*, (Tenn.) 824.

Contributory negligence.

10. A person is not guilty of contributory negligence in not being on the lookout for an excavation in a public street, especially if the street was in good condition when he passed over it last.—*City of Houston v. Isaacs*, (Tex.) 698.

—Railroad cases.

11. A railroad company is not liable for causing the death of one who goes upon its track at a point where there was no public crossing, and from which he might have seen an approaching train, and so near to the train that those in charge of it could not, by the exercise of the highest degree of care, have saved him from being run over.—*Texas & N. O. Ry. Co. v. Barfield*, (Tex.) 665.*

12. Where, in an action by a widow for damages for the death of her husband, caused by his being run over at a street crossing by defendant's train, the evidence shows that there were three tracks at the

crossing; that defendant did not and could not see the train till he was on the middle track, and when he saw it, his horse's feet being on the further track, he whipped him to get across; that defendant's train was going between 15 and 30 miles an hour, though by the city ordinances limited to 6 miles; that the engineer had a view for from one to three hundred yards of the perilous position of deceased; that deceased could not have heard whistle or bell if he had stopped, and none was sounded,—there is no such contributory negligence shown by it as will sustain defendant's demurrer to the evidence.—*Donohue v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 2 S. W. 424; rehearing denied, 3 S. W. 848.

13. Contributory negligence must be affirmatively proved, as it will be presumed that the injured party was in the exercise of due care until the contrary is made to appear. And it is not sufficient to establish contributory negligence on the part of a brakeman, who was afterwards injured, that he exchanged places with one of his fellow-brakemen without orders from the conductor, although it is probable he would not have been injured had he not done so.—*Little Rock & Ft. S. Ry. Co. v. Eubanks*, (Ark.) 808.

14. In an action for damages for causing the death of an employe, a switchman, brought against a railroad company, an instruction to the effect that, if the defects in the road where deceased was thrown down and mortally injured by defendant's cars were easily and readily seen, and deceased had been accustomed to working there, and in attempting to uncouple cars while in motion received the injuries which caused his death, plaintiff was not entitled to recover, is rightly refused, where there is no evidence that he knew of the condition of the track at the place where he was injured, and it also appears that he was injured on a dark and stormy night.—*Little Rock, M. R. & T. Ry. Co. v. Leverett*, (Ark.) 60.

15. In an action against a railroad for negligence resulting in the death of appellant's intestate, it appeared that a locomotive drew a box car to the head of a switch, and, after giving the car an impetus forward, the locomotive moved off, and the car continued at a rapid rate of speed, down grade, and without the control of any one, until it ran over and killed the intestate, who was walking on the track seeking employment in feeding and watering stock loaded in the cars. A portion of the track traversed by the car ran through a town, and persons were in the habit of passing over it by the tacit consent of the railroad. *Held*, that the evidence made out a *prima facie* case of negligence, and the lower court erred in directing a peremptory instruction for the railroad.—*Shelby's Adm'r*

v. Cincinnati, N. O. & T. P. Ry. Co., (Ky.) 157.*

16. It being customary for the owners of live-stock being shipped on railroads to employ others than the servants of the company to feed and water them at stations or stopping places, a person coming on the tracks at such a point, seeking employment of that kind, is not a trespasser.—Id.*

Degrees of negligence.

17. In an action against a street railway company to recover for running over a child 19 months old, it not appearing positively in evidence whether the driver saw the child on the track or not, but it appearing probable that he did not, *held*, that an instruction that the company should exercise the highest degree of diligence towards a child of tender years, and would be liable for slight negligence, was proper.—Galveston City R. Co. v. Hewitt, (Tex.) 705.

18. For the slightest negligence against which human prudence, diligence, or skill can guard, and by which a passenger is injured, the railroad is liable in damages. A railroad is bound to keep its track clear of obstructions, so that the engineers of locomotives may have a clear view ahead in running their trains.—Louisville & N. R. Co. v. Ritter's Adm'r, (Ky.) 591.*

NEGOTIABLE INSTRUMENTS.

See, also, *Orders*.

Alteration of check, see *Alteration of Instruments*, 1.

Married women, note of, see *Conflict of Laws; Husband and Wife*, 6, 8.

Parol evidence affecting, see *Evidence*, 22.

Interpretation and effect.

1. A promissory note providing that "we promise to pay," etc., and signed "HOUSTON FLOUR-MILLS Co., D. P. SHEPHERD, President," is the separate obligation of the corporation, and not the joint promise of it and the individual who signed as president.—Latham v. Houston Flour-Mills, (Tex.) 463.*

Delivery.

2. If one signs a note as surety, and delivers it to the maker upon the understanding that he is not to deliver it to the payee until he obtains the signature of another person as co-surety, he will nevertheless be bound if the maker delivers the note without obtaining such other signature, and if the payee has no knowledge, at the time of delivery, of the agreement between the maker and the surety.—Tabor v. Merchants' Nat. Bank, (Ark.) 805

Bona fide purchaser for value.

3. One who takes negotiable paper before maturity, and without notice of any

defect of title, in discharge of an antecedent debt, is a purchaser for value.—Tabor v. Merchants' Nat. Bank, (Ark.) 805.

4. Upon proof of such fraud, in the inception of a note, as to destroy the claim of the original holder, the presumption of *bona fide* purchase for value otherwise obtaining in favor of an indorsee before maturity is overcome, and the burden is shifted upon such indorsee to show that he paid value in good faith.—Id.

Negotiability.

5. Neither a certificate of indebtedness issued by a city to one of its creditors, nor an order on the city accepted by it, is a negotiable instrument.—Sonnenthiel v. Skinner, (Tex.) 686.

Indorsement.

6. Blank indorsers on a promissory note cannot, by a parol agreement between themselves and the maker, alter the liability of the latter as fixed by the language of the note.—Latham v. Houston Flour-Mills, (Tex.) 462.

7. The payment, by the maker of a negotiable promissory note, to the original payee, before its maturity, but after its indorsement and transfer as collateral security, constitutes no valid defense to a suit by the indorsee on the note, although the maker had no notice of such transfer at the time of making payment.—Gosling v. Griffin, (Tenn.) 642.

Demand and notice.

8. When it is sought to charge a partnership as indorsers of a note subsequently dishonored, the requirements of the law as to notice of its dishonor are fulfilled when such notice is left either at the place of business of such firm with some one in charge, or at the domicile or residence of one of the partners.—Fourth Nat. Bank v. Altheimer, (Mo.) 858.

NEW TRIAL.

See, also, *Criminal Practice*, 46-56.

Motion for, when to be made, see *Homicide*, 27.

Reference, on findings of referee, see *Reference*, 2.

Misconduct of jury.

The affidavits of jurors showing that the jury arrived at their verdict by lot are not admissible to impeach the verdict.—Ward v. Blackwood, (Ark.) 624.

Nonsuit.

For want of statutory affidavit, see *Executors and Administrators*, 18.

Voluntary, see *Appeal*, 1.

Notice.

Of judicial sale, see *Judicial Sales*, 5.
Of prior conveyance, see *Fraudulent Conveyances*.

Novation.

See *Orders*.

Oath.

Waiver, see *Arbitration and Award*, 1, 2.

OFFICE AND OFFICERS.

See, also, *Judge; Quo Warranto; States and State Officers*.

Appointment by judge, see *Judge*, 1.

Bond, alteration of signatures to, see *Alteration of Instruments*, 2.

— defalcations through various terms, see *Principal and Surety*, 8.

— equity, jurisdiction of suit for breach, see *Bonds*, 1, 2.

— governor, as surety on, see *Alteration of Instruments*, 8.

County judge, liability of, see *Counties*, 4.

De facto judge, acts of, see *Judge*, 2.

Elections, irregularities in, see *Elections*, 2, 8.

Quo warranto, filing of information for, see *Quo Warranto*, 8.

— pleading, see *Quo Warranto*, 1, 2.

Tenure.

1. The act allowing county treasurers to hold over until April 1st, after the election of their successors, in counties adopting township organization, (Acts Mo. 1885, p. 108, amending Rev. St. § 5862,) is not in conflict with Const. Mo. art. 14, § 8, providing that the term of office of no officer shall be extended to a longer period than that for which such officer was elected or appointed. —*State v. McGovney*, (Mo.) 867.

Qualification.

2. The aldermen of a city, in canvassing the election returns, determined that the relator had been elected mayor, but declined to direct the clerk to issue the certificate of election, basing their refusal upon the fact that relator was not an inhabitant of the city as required by law. *Held*, that the election of a person to an office who does not possess the requisite qualifications gives him no right to hold the office or to claim a certificate of election, and his application for a writ of *mandamus* against the aldermen must therefore be refused. —*State v. Aldermen of Pierce City*, (Mo.) 849.

Commission.

3. It is not absolutely essential that one who has been duly elected to office should be commissioned by the governor in order

to enable him to sue for and recover the office from a usurper. —*Toney v. Harris*, (Ky.) 614.

ORDERS.**Release of.**

A., owing B. a debt, gave him an order on C., who was indebted to A. for the delivery of an agreed number of goats, which C. refused to deliver till satisfied of the extent of his indebtedness to A. B., after notifying A. of C.'s refusal, entered into a written agreement with C. to extend the time for receiving the goats, upon C.'s agreeing to deliver them at the end of that time. C. removed the goats to Mexico. *Held*, that B. by his agreement released A. from all obligation on the order, and the debt it was given to satisfy. —*Garcia v. Gray*, (Tex.) 42.

PARENT AND CHILD.

Legitimation by marriage of parents, see *Bastardy*.

Negligence, compensation for loss of support, see *Negligence*, 5.

Custody of children.

If the parents have separated, the custody of the child will be given to the father, where it appears that no reasonable objection can be made to his character, and he is able to care for it properly, while the mother, though a good woman and devoted to her child, and willing to use her best endeavors to care for it, and raise it up in proper courses, has but little means of her own, and, to support herself and child, must rely upon her own labor, and such assistance as her father may be willing to give her. —*Bonney v. Bonney*, (Ky.) 171.

PARTIES.

See, also, *Partition*, 2.

Insurance, action on insurance policy, see *Insurance*, 7.

Waiver of defect in, see *Appeal*, 29.

Substitution, of widow of assignee for benefit of creditors, see *Assignment for Benefit of Creditors*, 6.

Necessary parties.

1. A dormant partner is not a necessary party to a suit concerning the partnership property. —*Boehm v. Calisch*, (Tex.) 293.

Misjoinder.

2. Where there is a misjoinder of causes of action and of parties, but the defect does not go to the jurisdiction of the court, the remedy is by motion to strike out the names of the parties, and the cause of action improperly joined, but the objection to such defect, unless made in the trial

court, will be considered as waived.—*Adams v. Edgerton*, (Ark.) 623.

PARTITION.

By judicial proceedings—Jurisdiction.

1. As a general rule, there can be no partition in an action to settle a disputed title to land; but, where the court of chancery has possession of the case on some clear ground of equity jurisdiction wholly distinct from partition, then the cause may be retained for partition.—*Hankins v. Layne*, (Ark.) 821.

Parties.

2. In an action for the partition and sale of the real estate of a decedent, and the distribution of the proceeds among his heirs, it appeared that one of the heirs had given a deed of trust upon his interest to secure a debt, and that the beneficiary under such deed had died. *Held*, that his administrator was a necessary party.—*Harrison v. Sanford*, (Mo.) 20.

Decree.

3. A decree in a partition suit, being erroneous as to one defendant, must be reversed as to all.—*Kremer v. Haynie*, (Tex.) 676.

PARTNERSHIP.

Accounting, see *Arbitration and Award*, 3.
Arbitration, sharing losses, see *Arbitration and Award*, 5.

Fraud, change in firm and assignment operating as, see *Assignment for Benefit of Creditors*, 1.

Notice of protest, see *Negotiable Instruments*, 8.

Parties, dormant partners as, see *Parties*, 1.

What constitutes.

1. Any declarations or conduct on the part of several that would induce others to consider them as partners will render them liable as such.—*Harris v. Sessler*, (Tex.) 316.

2. A secret partnership exists where one is really participating in the profits and loss of an enterprise carried on by another, and withholds a knowledge of the fact from the public. An ostensible partnership exists where one who has no actual interest in a firm says he is a partner, or knowingly permits the firm to use his name in any manner in order to obtain credit.—*Id.*

Evidence.

3. Evidence that A. was a partner in a certain company in September, and, as such, signed contracts reciting a contract made by the company in March, is not competent in order to charge him upon a v. 3s. w.—62

debt contracted by the company in July.—*Butler v. Henry*, (Ark.) 878.

4. Participation in the profits of a firm is *prima facie* evidence of partnership, and it becomes conclusive, as to third persons, when not rebutted by evidence showing such participation to be in place of compensation for services.—*Fourth Nat. Bank v. Altheimer*, (Mo.) 858.

Firm property.

5. Real estate sold at a judicial sale was knocked down to A. and B., partners, A. having bid it in in pursuance of an understanding between him and his partner to buy it for the firm. In order, however, to avoid the necessity of getting outsiders to go on the bonds for the purchase money, they had the sale entered in B.'s name, and he signed the bonds as principal, and A. as surety. *Held*, that the real estate was partnership property.—*Seller v. Brenner*, (Ky.) 796.

Rights of partners inter se.

6. One partner is not entitled to compensation from the partnership for his services in attending to the partnership affairs, unless there is a contract therefor express or implied.—*Gaston v. Kellogg*, (Mo.) 599.

Dissolution.

7. A partner who furnishes the money to purchase cattle for a partnership, which are to be owned in equal shares, and afterwards sells his undivided half interest in the cattle without making any sale of his interest in the partnership or of his claim against his partner, thereby dissolves the partnership, and loses his lien on the cattle owned by his partner, nor does the transfer by him of his share of the partnership property transfer any equity he might have against his partner.—*Moore v. Steele*, (Tex.) 448.

PAYMENT.

See, also, *Subrogation*.

In county scrip, see *Taxation*, 18.

Acceptance of negotiable paper.

1. Proof that a joint maker of a note gave, in payment thereof, his check on a bank where he had no funds, and that the holder surrendered the note for such check, will not sustain a plea of payment.—*Henry v. Conley*, (Ark.) 181.*

Application.

2. A payment will not be applied to usurious interest without the debtor's consent.—*Edwards v. Rumph*, (Ark.) 635.

Penalty.

Jurisdiction of justice, see *Justice of the Peace*, 1.

PERJURY.

What constitutes.

1. Perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of the witness. — *Washington v. State*, (Tex.) 228.

2. A county clerk having authority to administer oaths, but not being required, upon an application for a marriage license, to take an affidavit as to the age of the parties, the making of a false affidavit upon that subject will support an assignment for false swearing, but not for perjury. — *Davidson v. State*, (Tex.) 662.

3. Upon trial of an indictment against A. for falsely swearing, in applying for a marriage license, that his fiancé was 18 years of age, false testimony given by B. that the girl picked cotton with him 18 years before, and was then a big girl, is perjury. — *Id.*

Evidence.

4. In Texas, under Code Crim. Proc. art. 746, a conviction cannot be had unless upon the testimony of at least two credible witnesses, or one credible witness corroborated strongly by other evidence. — *Washington v. State*, (Tex.) 228.

5. A. was indicted and tried for illegally branding a calf alleged to belong to B. Upon the trial of B. for perjury, alleged to have been committed by him upon that trial, *held*, that a judgment in B.'s favor, in a civil suit brought against him by A. for the calf, was not admissible in evidence on behalf of B., when offered generally. — *Hill v. State*, (Tex.) 764.

6. If, upon trial for perjury, the judgment in the proceeding in which the perjury is alleged to have been committed is admitted on behalf of the prosecution, the court should give instructions limiting the effect of the evidence. — *Davidson v. State*, (Tex.) 662.

7. Upon trial for perjury, the state may show by the attorney in the case in which the perjury is alleged to have been committed why he called defendant as a witness in such case, in order to show, if possible, that the false statement was made with premeditation; Pen. Code Tex. art. 189, making it a defense if the false statement was made by mistake, through inadvertence, or under agitation. — *Id.*

PLEADING.

See, also, *Damages*, 4, 5; *Ejectment*, 4; *Garntishment*; *Indictment and Information*; *Justices of the Peace*, 5; *Quo Warranto*, 1, 2.

Service of process after amendment, see *Writs*, 5.

Bankruptcy, discharge in, see *Bankruptcy*, 8.

Covenant, action on, see *Covenant*.

Judgment, under prayer for general relief, see *Fraudulent Conveyances*, 14.

Justice's court, pleadings in, see *Justices of the Peace*, 5.

Motion to strike out, when proper, see *Parties*, 2.

Pleading and proof, see *Eminent Domain*, 8.

Railroads, stock-killing cases, see *Railroad Companies*, 12-14.

Suretyship, action on bond, see *Principal and Surety*, 1.

General principles.

1. Under the rule that, where a party fails to aver a fact, which, if true, is important to a recovery on his part, such fact will be taken in the light most adverse to the pleader, in an action against an insolvent and his assignee for the benefit of creditors, it will be assumed that the assignment contained a provision exacting releases from accepting creditors where the contrary view is important to the plaintiff's right of recovery, and he has made no averments thereon in his pleadings. — *Mills v. Swearingen*, (Tex.) 268.

Complaint.

2. In an action to recover the value of a draft intrusted to defendant, an attorney, for collection, a complaint as follows: Plaintiff states "that in the spring of 1876 he delivered defendant a check or draft upon S. & M. for \$125, and directed him to send the same to P. Bros., Watson, Ark., for collection, and, before the same had been sent by defendant, plaintiff called upon defendant, and gave him some directions, but the defendant wholly disregarded the requests and directions of the plaintiff, and sent said draft to one M., in Arkansas; that, by reason of the conduct of the defendant in disobeying the orders and directions of the plaintiff, the plaintiff is damaged in the sum of fifty dollars, for which he asks judgment," — is sufficient to apprise defendant of the nature of plaintiff's claim, and the extent of the damages, and to support a judgment, and bar another action. — *Butts v. Phelps*, (Mo.) 218.

8. In an action to recover for breach of a contract, it is sufficient for plaintiff to allege a general compliance with the contract on his part, without alleging specifically and in detail the performance of every act required to be done by him. — *Long v. McCauley*, (Tex.) 699.

Amendment—Notice of filing.

4. Where a party has pleaded or demurred in an action, the only notice to him of the filing of an amendment by the opposite party that is necessary is the order of court granting leave to file the amendment. — *Rabb v. Rogers*, (Tex.) 808.

Pleading and proof—Variance.

5. Under an allegation of negligence on the part of a railroad company in failing to prepare, fix, and keep in repair a good, safe, and substantial crossing at a certain place, and the further allegation that the crossing is defective, rotten, and insufficient, it is admissible to show that it is defective by reason of the planks being laid too far apart.—*East Line & Red River R. Co. v. Brinker*, (Tex.) 99.

6. Under the issues as made by the pleadings, the inquiry was as to the damages, if any, sustained by the defendant by reason of the taking of his land by the plaintiff railroad company for the right of way of its road; and upon the trial plaintiff offered to prove an arbitration. *Held*, that the offer was properly rejected, the arbitration being new matter in bar, and, as such, should have been set up by appropriate pleading.—*Springfield & B. Ry. Co. v. Calkins*, (Mo.) 82.

Waiver of objection.

7. In an action to recover the purchase price of land sold, the plaintiff should allege that he had a good title to the land, and should set it out. But the error is cured by defendant's answer admitting plaintiff had good title, and taking issue only on the question of the number of acres contained in the tract.—*Barnes v. Jackson*, (Ky.) 601.

Powers.

Mortgage, power of sale, see *Mortgages*, 11.
Trusts, powers implied under trust, see *Trusts*, 6, 7.

Restraint on alienation, see *Will*, 3.

PRACTICE IN CIVIL CASES.

See *Appeal*; *Courts*; *Equity*; *Judgment*; *Jury*; *New Trial*; *Removal of Causes*; *Trial*.

Transfer from equity to law docket.

Bringing a suit in equity, when the proper remedy is ejectment, is not cause for dismissal of the suit, but only for transferring it to the law docket; and, if no motion is made to correct the error, the court may transfer the cause of its own motion, or proceed to trial upon the merits.—*Catchings v. Harcrow*, (Ark.) 884.

Prescription.

See *Limitation of Actions*.

PRINCIPAL AND AGENT.

Evidence, parol, to explain agent's contract, see *Evidence*, 21.

Infancy, appointment of agent by infant, see *Infancy*, 4.

Insurance agent, authority of, see *Insurance*, 3, 4.

Insurance agent exceeding his authority, see *Insurance*, 2.

Negotiable instruments, signing by agent, see *Negotiable Instruments*, 1.

Ratification.

1. If a bank appropriates certain bonds purchased by its cashier to its own use, it cannot thereafter repudiate the authority of the cashier to make the purchase, in a suit by the vendor of the bonds on the contract.—*Logan Co. Nat. Bank v. Townsend*, (Ky.) 122.*

2. Where a railroad company allows a person to hold himself out and act as its general freight agent for a year or more, it will be bound by his contract to furnish cars for transportation of the live-stock of a party who deals with him as the agent of the company.—*Baker v. Kansas City, S. J. & C. B. R. Co.*, (Mo.) 486.

3. Where an agent borrows money in order to redeem the principal's property from an execution sale, and procures conveyances of the property to the lender as security, in an action by the principal to have the deeds declared a mortgage and to redeem, the lender cannot complain that there was no privity between the agent and plaintiff, when the deeds show upon their face the plaintiff's ownership.—*Robinson v. Lincoln Sav. Bank*, (Tenn.) 656.

Liability of principal to third persons.

4. In an action for services, brought by a station agent against a railroad company, the defendant pleaded as a counter-claim an amount of missing funds of the company collected at plaintiff's station, and not accounted for. *Held*, that plaintiff could not show that the misappropriation was the act of the clerk and telegraph operator at the station, who were his agents, but that he was liable for their default.—*St. Louis, I. M. & S. Ry. v. Smith*, (Ark.) 864.

PRINCIPAL AND SURETY.

See *Bonds*.

Alteration of signatures, see *Alteration of Instruments*, 2.

Administrator's bond, discharge of principal in insolvency, see *Executors and Administrators*, 4.

—Liability of surety, see *Executors and Administrators*, 10.

Evidence, documentary, conversion of funds by principal, see *Evidence*, 15.

Evidence of principal's default, see *Evidence*, 15.

Execution, liability of surety on stay-bond, see *Execution*, 2.

Judgment on bond, amendment of, see *Judgment*, 5.

Official bond, governor as surety, see *Alteration of Instruments*, 8.

Promissory note delivered contrary to agreement, liability of surety, see *Negotiable Instruments*, 2.

Liability of surety.

1. Sureties on the bond of a treasurer of a benevolent association are not liable for any conversion of funds by their principal, made prior to the execution of the bond; and when the bond was executed on January 24, 1885, and suit was instituted to recover for the conversion of moneys which came into the treasurer's hands January 1, 1885, a complaint alleging only that the conversion occurred at and before July 24, 1885, is demurrable.—*Barry v. Screwmen's Benev. Ass'n*, (Tex.) 261.

2. When the conditional nature of the signature of a surety to a bond is apparent from the face of the bond itself, or is brought to the knowledge of the obligor by extraneous evidence before its acceptance, the plea of conditional execution is a good defense to an action on the bond; other wise not.—*State v. Churchill*, (Ark.) 362.

3. A state treasurer during his first term of office misappropriated \$159,000 of state bonds belonging to a certain "bond account," and, during his second term, the sum of \$45,000 of bonds belonging to the same account. Afterwards, but during his second term, he caused a certain amount of state scrip to be canceled, and of this amount of canceled scrip he, with the consent of the proper state committee, caused \$145,000 to be transferred generally to his "bond account." *Held*, in a suit against the sureties on his bonds for the first and second terms, that there was no appropriation in settlement of the "bond account" of either term, but that a court of equity would apply the \$145,000 in settlement ratably between the terms.—*Id.*

Discharge and release of surety.

4. A bond given to secure a municipal corporation the amount of money to be paid by one appointed public weigher is a bond single for the payment of money, within the meaning of *Mansf. Dig. Ark. § 6400*, limiting the application of sections 6398, 6399, and a surety on such an obligation will be free from his liability, as provided in *Mansf. Dig. §§ 6398, 6399*, on the failure of the obligee to begin action against the principal for the amount within 80 days after the service on him of notice so to do.—*Town of Monticello v. Cohn*, (Ark.) 80.

5. A state treasurer was delinquent in his accounts at the end of his second term

of office, and, upon entering on his third term, instead of paying up the deficit, he merely charged it against himself. *Held*, this did not have the effect to release the sureties on his bond for the second term from liability for such deficit, and impose the liability on the sureties for his third term.—*State v. Churchill*, (Ark.) 880.

Remedies of surety.

6. In an action between an attaching creditor and one claiming property as a *bona fide* purchaser from the debtor, the issue being as to whether the transfer was made in good faith, although the claimant abandons the issue, the sureties on his claim-bond may intervene and defend his rights, and judgment may in such case be rendered in behalf of the sureties, although it inures to the benefit of the claimant, who had not presented his claim.—*Boehm v. Calisch*, (Tex.) 293.

Privileged Communications.

See *Witness*, 6, 9.

Promissory Notes.

See *Negotiable Instruments*.

PUBLIC LANDS.

See *Grants*.

Limitation, when statute commences to run, see *Limitation of Actions*, 7.

Sales.

A contract by which one party agrees to furnish half the government price of land, and of improving the same, in consideration of the other party pre-empting and conveying half the land to him after title acquired, is in contravention of *Rev. St. U. S. § 2262*, prohibiting the sale of pre-emption claims, and void.—*Marshall v. Cowies*, (Ark.) 183.

Public Policy.

"Option deals," see *Contracts*, 5.

Qui Tam and Penal Actions.

Intoxicating liquors, sale of, without license, see *Intoxicating Liquors*, 6.

QUO WARRANTO.

Corporation, forfeiture of franchise, see *Corporations*, 2.

Turnpike company, effect of forfeiture of franchise, see *Turnpikes*, 9.

Pleading.

1. In an information asking for proceedings in *quo warranto* to place relator in the

office of county treasurer, and to oust defendant therefrom, an allegation that such relator was a citizen of the county, and entitled to the office of county treasurer, is a sufficient averment, as to his being qualified to hold the office, against a general demurrer.—*Fowler v. State*, (Tex.) 255.

2. In such proceedings an allegation that the relator received a majority of the ballots of the qualified voters of the county is sufficient, without setting forth the facts which constituted their qualifications.—*Id.*

Procedure.

3. An attorney who is appointed by the court, under Code Crim. Proc. Tex. art. 89, during the absence of the district attorney, is the proper person to file an information for a *quo warranto*, and the authority of an attorney so appointed cannot be collaterally attacked.—*Fowler v. State*, (Tex.) 255.

RAILROAD COMPANIES.

See *Carriers*; *Negligence*, 11, 14-16, 18.

Carrier, refusal to transport freight, see *Carriers*, 2.

Contract of agent, liability of company, see *Principal and Agent*, 2.

Eminent domain, *mandamus* to enforce right, see *Mandamus*, 2, 3.

— measure of damages, see *Eminent Domain*, 3, 4.

— variance in proceedings, see *Pleading*, 6.

Evidence in stock-killing cases, see *Evidence*, 1.

Master and servant, contract relieving company of liability for accident, see *Master and Servant*, 1.

Negligence, contributory, see *Negligence*, 14, 16.

— for what liable, see *Negligence*, 18.

— to employes, see *Master and Servant*, 5.

Service of process on, see *Writs*, 4.

Charter franchises.

1. A railroad company cannot transfer or lease the right to operate its road so as to absolve itself from its duties to the public, without legislative authority; nor will a lease duly authorized by law release the company from liability for a failure to discharge its charter obligations, unless the law giving the power to lease contains also a proviso to that effect.—*Central & M. R. Co. v. Morris*, (Tex.) 457.

2. Const. Tex. art. 10, § 5, providing that no railroad, nor the lessees thereof, shall consolidate with any other having a parallel or competing line, is a restriction upon the power of railroads, and is not to be construed as an implied grant of the right of a railroad to lease its line to another road.—*Id.*

Eminent domain.

3. Where judgment of condemnation in proceedings by a railroad company under its charter was reversed on appeal to the supreme court, and remanded, because of a failure to comply with conditions precedent to the exercise of the right of eminent domain, the company obtained no vested interest in the land by the judgment; and a general railroad act having been enacted, which operated as a repeal of the powers granted by the charter, proceedings under the remand should be taken under the general statute, and if taken under the special charter are void.—*Treacy v. Elizabethtown, L. & B. S. R. Co.*, (Ky.) 168.

Regulation of charges.

4. Under Rev. St. Tex. arts. 4257, 4258, and the acts of April 19, 1879, and April 10, 1888, amendatory thereof, limiting freight rates to be charged by railroads to 50 cents per 100 pounds per 100 miles, and giving the right to recover a penalty of \$500 from railroad companies for willful discrimination in freight charges after refusal for 20 days, upon notice, to refund the overcharge, a notice and refusal to refund are only required where a charge exceeding the 50-cent rate is made.—*Woodhouse v. Rio Grande R. Co.*, (Tex.) 823.

Negligence.

5. It is the duty of the engineer in charge of a train to use increased vigilance while the train is moving through a town or city or other place, where pedestrians have, by license or custom, a right to be; and such duty is violated by sending a car forward, through a town or other such place, of its own impetus, without any one in charge to control it.—*Shelby's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co.*, (Ky.) 157.*

6. A railroad is under no obligation to keep the whole right of way within the view of employes managing trains; and, in an action against a railroad company for injury to a mule by a moving train, the fact that a clump of bushes was allowed to grow on the defendant's right of way, behind which the mule was standing till frightened onto the track by the approach of the engine, does not constitute negligence.—*Kansas City, S. & M. Ry. Co. v. Kirksey*, (Ark.) 190.

7. A railroad is liable for the insufficiency of its culverts, in case of an overflow, if, although the overflow was extraordinary, it might reasonably have been anticipated and provided against.—*Gulf, C. & S. F. Ry. Co. v. Pomeroy*, (Tex.) 722.

8. In an action to recover statutory damages against a railroad for negligence, held, that an ordinance of the city of St. Louis, which requires that, when moving within the city limits, the bells of locomotives shall be constantly sounded, and, if

cars or locomotives are backing, a man shall be stationed on the top of the car furthest from the engine, and no freight train shall be moved within said limits without it be well manned, with experienced brakemen at their posts," did not apply where the employees are simply engaged in setting cars in a car-yard over which there are no street crossings.—*Rafferty v. Missouri Pac. Ry. Co.*, (Mo.) 898.

9. It appearing that there were in 1833, 1843, and 1852 similar overflows to the one which caused the damages complained of in this case, in 1835, this was sufficient evidence to warrant the jury in finding that the one in question ought reasonably to have been anticipated.—*Gulf, C. & S. F. Ry. Co. v. Pomeroy*, (Tex.) 722.

Stock-killing cases.

10. Plaintiff's cattle were seen upon the defendant's railroad track in the forenoon, and in the afternoon of the same day blood was seen on the track, with the trace of it leading to a gap in the fence, and the heifer was found dead not more than a quarter of a mile off, with a broken leg. *Held*, that there was evidence from which to find the fact that the heifer was injured by the defendant's cars, and that she died from the effects of that injury.—*Mayfield v. St. Louis & S. F. R. Co.*, (Mo.) 201.

Counter-claim of company.

11. Where stock trespassing on a railroad track are killed by a passing train, which is also wrecked, the railroad company cannot recover of the owner of the stock damages sustained by the wrecking of the train, as a counter-claim, in an action by the owner of the stock to recover damages.—*Louisville & N. R. Co. v. Simmon*, (Ky.) 10.

Pleading under fencing laws.

12. In a suit for damages against a railroad company under section 809, Rev. St. Mo. 1879, for killing a heifer, when the complaint states facts which show that the animal got upon the track of defendant at a point where the defendant is required to fence its road, it is sufficient, and it is not necessary to state that the animal did not get upon the track at a crossing of a highway.—*Mayfield v. St. Louis & S. F. R. Co.*, (Mo.) 201.*

13. In an action against a railroad company under the Missouri double damage act for the killing of cattle, a statement of plaintiff's cause of action that fails to allege that the cattle got on the track at a point where the company was by law required to fence, or where the track passed through or along or adjoining inclosed or cultivated fields or uninclosed lands, where by law it was required to fence, is fatally defective.—*Ward v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 431.*

14. In an action against a railroad company brought under Rev. St. Mo. § 809, requiring railroads to erect and maintain fences on the sides of their tracks, with openings and gates having latches or hooks, at all necessary farm crossings, and also to maintain cattle-guards, a complaint alleging the railroad's failure to maintain lawful fences, cattle-guards, gates, and openings is sufficient, and defendant's motion to compel plaintiff to elect is properly overruled.—*Duncan v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 835.

Evidence in suits under fencing laws.

15. In an action for double damages for the killing of stock, brought against a railroad company, the fact that the injury occurred in the township in which the action is brought, or in the adjoining township, as required by Rev. St. Mo. § 2389, must be proved, and in the absence of such proof the defendant is entitled to an instruction in the nature of a demurrer to the evidence.—*King v. Chicago, R. I. & P. Ry. Co.*, (Mo.) 217.

16. The evidence showed that a railroad fence had been down for a month or more at a place where the railroad passed along cultivated fields, that defendant had notice of the condition of the fence, and that plaintiff's cattle grazed at that place. *Held*, that these circumstances were sufficient to justify the conclusion that the animal got upon the track at a place where the defendant was required to fence, and that the animal got upon the track because of the failure to repair the fence after ample notice.—*Mayfield v. St. Louis & S. F. R. Co.*, (Mo.) 201.

17. Gen. St. Ky c. 57, § 4, makes railroads liable for stock killed by negligence of passing trains. *Held*, that if stock were killed by such negligence, it is immaterial that the railroad track was inclosed by a lawful fence, which the stock broke through; the railroad is liable unless it show that the killing was the result of an accident which could not have been avoided by the exercise of ordinary care and diligence.—*Louisville & N. R. Co. v. Simmon*, (Ky.) 10.

18. In an action under the Missouri statute requiring a railroad to maintain a fence along its track, and, for failure to do so, making it liable for double damages for killing stock, it is unnecessary to prove negligence on the part of the railroad.—*Smith v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 836.

19. The statute requiring the railroad to provide gates with latches or hooks, and it appearing in this case that the gate was fastened only by a rail or stick laid over the top, and, some one opening it during the night, plaintiff's mare escaped onto the

track, and was killed, it was not necessary for plaintiff to show, in order to recover, that sufficient time had elapsed after the gate was opened, and before the mare escaped, for the railroad to have discovered and closed it.—*Duncan v. St. Louis, L. M. & S. Ry. Co.*, (Mo.) 885.

Taxation of.

20. While a railroad cannot be taxed by a county to pay the subscription of the same county to aid in its construction, yet, when its franchises have been purchased by a new company, the property of the new company in the county, except such as it acquired by its purchase from the old company, is subject to taxation for the payment of its part of the county's subscription to aid in the construction of the old road.—*Owensboro & N. Ry. Co. v. County of Daviess*, (Ky.) 164.

— In Kentucky.

21. The Kentucky act of April 8, 1878, (Gen. St. Ky. 1883, p. 1019,) requiring the chief officer of each railroad company in that state to make a return to the auditor of public accounts of the length of his road within the state, and providing for the ascertaining of the value of the property and the adjustment of the assessment thereon by a board of equalization appointed under the act, and for the collection of the taxes assessed by action against the officers for the penalties incurred by a failure to pay the taxes levied, or for the recovery of the taxes themselves by action in the courts, is not in contravention of the fourteenth amendment of the federal constitution, as taking the property of the railroad companies without due process of law, because it does not require notice to be given nor an opportunity to be heard before the making of the levy.—*Id.*

22. Nor is the act repugnant to the provisions of that amendment guarantying to all persons the equal protection of the laws, by reason of the fact that in Kentucky railroad property, though called "real estate," is classed by itself, as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining their value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as street-railway, manufacturing, water, etc., companies.—*Id.*

23. Gen. St. Ky. c. 92, art. 5, §§ 20-26, provides for the compulsory assessment by the county court of the property of persons failing to list it with the assessor, but act of March 17, 1876, (Acts 1876, p. 78,) provides for equal and uniform taxation by counties of railroads, and falls to include the provision about compulsory taxation. *Held*, that this cannot be considered

an intentional *casus omisus* by the legislature, as the effect would be to relieve all railroads from taxation unless they voluntarily submitted to it.—*Louisville & N. R. Co. v. Commonwealth*, (Ky.) 139.

24. Since the enactment of the statute of March 17, 1876, (1 Acts Ky. 1876, p. 78,) entitled "An act to make taxation equal and uniform in counties where an *ad valorem* tax is levied by the county court," there can be no question that railroads are liable for county taxes. But the act contains no provision authorizing the county court to make the assessment; the assessor only is authorized to make it. The county court is, however, given such power under Gen. St. Ky. c. 92, art. 5, § 28.—*Id.*

RAPE.

Instructions applied to evidence, see *Criminal Practice*, 28.

Indictment.

1. An indictment is sufficient to charge rape if it alleges, in general terms, that the rape was accomplished by force or by threats or by fraud, or by all those means together, and it is not essential that it should allege the character of the force, or specify the threats used.—*Cooper v. State*, (Tex.) 384.

Assault with intent.

2. While it would ordinarily appear exceedingly improbable that a man should attempt to ravish a married woman in bed with her husband, such a crime is by no means impossible, and it is for the jury to decide the question upon the evidence adduced.—*Stout v. State*, (Tex.) 231.

Evidence.

3. The common-law rule obtains in this state that in rape cases neither the particulars of the injured female's complaint, nor the name of the person she mentioned as the offender, can be proved as original evidence, though they may be brought out by the defendant, if he chooses, upon cross-examination.—*Holst v. State*, (Tex.) 757.

4. On the trial of an indictment for rape, testimony of physicians who examined the person of the prosecuting witness about five weeks after the offense was alleged to have been committed, though rather remote in point of time, is admissible evidence.—*Pless v. State*, (Tex.) 576.

Instructions.

5. An instruction, occurring in the course of a charge, that "penetration only is necessary to be found upon a trial for rape," *held*, misleading.—*Serio v. State*, (Tex.) 784.

6. The rule requiring the court to instruct as to the law relating to a lesser degree of the crime charged, where the evidence is not conclusive as to defendant's

guilt of the higher degree, (*State v. Branstetter*, 65 Mo. 149,) does not apply in a case of rape, of which crime there are no degrees.—*State v. Johnson*, (Mo.) 868.

7. Where a girl 17 years old did not disclose the rape to her parents, and took no steps against the defendant, though he continued in her father's employ for several days, and lived in the neighborhood for five months after the alleged outrage, defendant is entitled to have the jury instructed that the facts that the girl "made no complaint at the time, or within a reasonable time thereafter, and that pregnancy followed a single sexual connection, are legitimate subjects of inquiry in determining the question of force or consent;" and the addition, "in connection with the other testimony," was calculated to mislead the jury.—*State v. Wilson*, (Mo.) 870.

8. Article 581 of the Texas Penal Code, declaring carnal intercourse with a woman obtained by means of fraud to be rape, was enacted for the protection of married women, applies to them only, and provides that the fraud must consist in the use of some stratagem by which the woman is induced to believe that the offender is her husband. A charge, therefore, which announces, in effect, that an attempt to have carnal intercourse with a woman when she is asleep constitutes fraud within the meaning of the statute, is erroneous.—*King v. State*, (Tex.) 942.

Real Action.

See *Champertry; Ejectment; Forcible Entry and Detainer; Trespass*.

RECEIVING STOLEN GOODS.

Indictment.

1. To charge the receiving of stolen property knowing it to be stolen, the indictment need not allege the facts going to constitute theft against the original taker, from whom it has been received.—*Brothers v. State*, (Tex.) 787.*

Evidence—Burden of proof.

2. When a party in possession of recently stolen property gives an exculpatory explanation of his possession which is reasonable or probable, then the burden devolves upon the state to prove its falsity.—*Brothers v. State*, (Tex.) 787.*

RECORD.

Conditional sale unrecorded, rights of vendee's creditor, see *Sale*, 8.

Lost record.

An execution for costs issued from the clerk's office of the court of appeals, but the return upon it of the sheriff to whom

it was addressed was never received there. The sheriff claiming that, after levying upon and selling land under it, he inclosed his return to the clerk's office, the court of appeals was asked to appoint a commissioner under Gen. St. Ky. c. 72, § 4, providing that, if the records or papers of any court shall be destroyed, lost, or obliterated, the court may appoint a commissioner to supply them. *Held*, that the statute does not apply, as the application is not to supply a lost record, but to make a record that never existed in that court.—*Harlan's Heirs v. Arthur*, (Ky.) 151.

Redemption.

Of land from judicial sale, see *Judicial Sales*, 8.

REFERENCE.

Exceptions to master's report, see *Equity*, 13.

Findings of referee—Review of.

1. In Missouri, the court has no right to review the findings of a referee upon the evidence reported by him in an action at law not arising under Rev. St. § 3606, but the findings of the referee stand as a special verdict, and must be treated as such.—*Caruth-Byrnes Hardware Co. v. Wolter*, (Mo.) 865.

2. The rule that the trial court is invested with a large discretion in awarding a new trial, where the verdict is against the weight of the evidence, applies also to the finding of a referee in an action at law. The action of the trial court in this respect cannot be reviewed on appeal.—*Id.*

—Form of.

3. If the parties to a reference desire special findings, they should so stipulate in the order of reference. In the absence of any statute requiring specific findings, a general finding will be sufficient, unless the order of reference directs otherwise.—*Id.*

Release and Discharge.

See *Accord and Satisfaction; Orders; Payment*.

Consideration for, see *Contracts*, 4.
Of damages by returning engagement ring, see *Breach of Marriage Promiss.*
Of sureties, see *Principal and Surety*, 4.

Religious Societies.

Embezzlement by collecting agent, see *Embezzlement*, 2.

REPLEVIN.

Judgment.

In an action of replevin of a sewing-machine which had been sold to defendant by plaintiffs by a conditional sale, promissory notes being given for part of purchase money, which notes were conditioned that the right of property in the machine should remain in the plaintiffs until the notes were paid, the right of plaintiff to recover was admitted by the answer of defendant, the only effect of which was to protect the defendant against damages and costs. *Held*, that the judgment awarding to defendant a return of the machine or its value was bad, because defendant had not claimed a return thereof.—*Kirby v. Tompkins*, (Ark.) 368.

Sabbath.

See *Sunday*.

SALE.

See, also, *Execution*, 6-8; *Executors and Administrators*, 10-12; *Judicial Sales*; *Taxation*, 11-18; *Vendor and Vendee*.

Warranty.

1. Where a manufacturer undertakes to supply goods manufactured by himself, to be used for a particular purpose, and the vendee has not had the opportunity to inspect the goods, and trusts, as he must necessarily do in such a case, to the judgment and skill of the manufacturer, it is an implied term in the contract of sale that he shall furnish a merchantable article, reasonably fit for the purpose for which it was intended; and, in an action to recover damages for breach of such warranty, an express warranty need not be proved.—*Curtis & Co. Manufg Co. v. Williams*, (Ark.) 517.*

Vendor's lien.

2. Appellee having agreed to sell a herd of cattle, reserving a lien on 1,000 head in that and other herds of the purchaser in part payment of the purchase money, the purchaser raised the money which he was to pay in cash by borrowing of appellants, and agreeing to sell them 800 head of the herd bought by appellee, and other herds, at a certain price per head. Appellants had notice, at the time, of the contemplated sale between appellee and the purchaser, by which appellee was to retain a lien on 1,000 head, but did not disclose to appellee their contract for the 800 head, but allowed appellee to go ahead and consummate the sale by delivering the cattle subject to the lien on 1,000 of them. *Held*, appellee's lien right under his agreement is superior to the right of appellants to the cattle, though appellee's agreement was not consummated until after appellants' had been carried into effect.—*Coleman v. Dunman*, (Tex.) 319.

3. A writing executed by A., purporting "to bargain, sell, and confirm" certain personal property to B., upon condition that if B. pays a certain sum of money, the conveyance shall remain in full force, but, in case of default, A. may take the goods and dispose of the same as to him may seem proper, and the conveyance shall be from that time null and void, constitutes a sale, and title passes to B., subject to a lien in favor of A. for his purchase money, coupled with a power of sale; and, the instrument not having been recorded as a chattel mortgage, as required by statute, the vendor can assert no lien as against creditors of the vendee.—*Key v. Braun*, (Tex.) 443.

Buyer's remedies.

4. A purchaser can maintain an action for false representation or breach of warranty in the sale, although, after discovering it, he paid the agreed price.—*Nauman v. Overlee*, (Mo.) 380.

Conditional sales.

5. A contract for the purchase of personal property, providing that the purchaser shall have the possession of the property, but the title is to remain with the vendor until all of the purchase money is paid, constitutes an executory contract, and the property is not subject to be seized in the hands of the purchaser, under process to satisfy his creditors, until they have paid or tendered to the original seller the amount due on such property.—*Tufts v. Cleveland*, (Tex.) 283.*

6. In an action of replevin of a sewing-machine, which had been sold by plaintiffs to defendant by conditional sale, where the evidence showed that plaintiffs were the owners and entitled to the possession of the machine, and there was nothing in the agreement between the parties requiring the plaintiffs to give up the notes which had been given for part of the purchase money before they could resume possession of the property, *held*, that an instruction by the court to the jury that plaintiffs could not maintain the action without first surrendering, or offering to surrender, the notes, was erroneous.—*Kirby v. Tompkins*, (Ark.) 363.*

SCHOOLS AND SCHOOL-DISTRICTS.

Warrant, proof of allowance of, see *Judgment*, 4.

Taxes.

In a proceeding for an injunction to restrain the collection of a school tax for a school-district, in which it appears that plaintiff bases his objection to pay taxes on an irregularity in the proceedings for

the formation of the school-district four years previously, the court will refuse the relief on the ground of the laches of the plaintiff in delaying so long his proceedings for relief.—*Stamper v. Roberts*, (Mo.) 214.

Seal.

See *Acknowledgment*.

Self-Defense.

See *Assault and Battery*, 4, 5; *Homicide*, 39-41.

SET-OFF AND COUNTER-CLAIM.

Railroads, in stock-killing case, see *Railroad Companies*, 11.

Claim not arising out of transaction.

The keeper of a prison having assaulted one of the guards, upon the occasion of the escape of a prisoner, for his negligence in permitting the escape, *held* that, in an action against the keeper for such assault, the latter cannot set off damages for the plaintiff's negligence as a matter "arising out of the transaction set forth in the complaint," or "connected with the subject of the action."—*Ward v. Blackwood*, (Ark.) 624.

Settlement.

See *Accord and Satisfaction*; *Payment*; *Release and Discharge*.

Sheriff.

Execution, failure to record return, see *Execution*, 8.

Jury, summoning by special sheriff, see *Jury*, 10.

SIGNATURE.

Acknowledgment of seal to certificate, see *Acknowledgment*.

By mark—Attestation.

A petition was presented to the county court, containing some signatures by mark, *not attested by any witness*. The petitioners tendered evidence that these signatures were genuine, and that the persons who wrote the names of the signers by mark were authorized to do so. *Held* that, under *Mansf. Dig. Ark. § 6344*, which defines a signature or subscription, the evidence was competent; the statute intending a signature by mark not to be taken as *prima facie* genuine without other proof of signing, and not that such proof should be excluded.—*Ex parte Miller*, (Ark.) 883.

SPECIFIC PERFORMANCE.

Verbal contract—Evidence.

In an action by the vendee for the specific performance of a verbal contract for the sale of land, he cannot recover upon the loose declarations and admissions of the vendor as to the existence of the contract, unless corroborated by evidence of a character so cogent as to leave no room for doubt.—*Berry v. Hartzell*, (Mo.) 582.

Stare Decisis.

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Treasurers' accounts.

In settling a state treasurer's accounts, there being nothing before the court to show to which of two terms a particular credit should be applied, or in what proportion it should be divided between them, the amount will be equitably distributed between them.—*State v. Churchill*, (Ark.) 880.

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1. An issue on the constitutionality of an act of the Arkansas legislature cannot be raised in the courts on the ground that, in passing the act (Const. Ark. 1874, art. 5, § 23) requiring evidence of publication of notice of the intention to introduce the bill to be exhibited in the general assembly before it becomes a law, has been disregarded.—*Davies v. Gaines*, (Ark.) 184.

2. Const. Tex. art. 3, § 88, which provides that "the presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislature, after their titles have been publicly read before signing; and the fact of signing shall be entered on the journals,"—expressly

and imperatively requires the presiding officer of each house to sign every enactment in the presence of the body over which he presides, and after it has been read by caption, and that the fact of signing shall be entered upon the journals; and, in order to determine whether such requirements of the constitution were complied with, the courts are authorized to go behind the statute itself, and ascertain the facts from the journals.—*Hunt v. State*, (Tex.) 283.

3. The act of March 19, 1885, (Gen. Laws 19th Leg. 84,) amendatory of article 358 of the Penal Code, which prescribes the penalty for the offense of keeping and exhibiting a gaming bank, is unconstitutional, because the journals of the senate fail to disclose its proper signing, in open session, by the presiding officer of that body.—*Id.*

Construction.

4. The Arkansas act of February 27, 1879, providing that "*hereafter*" counties should prosecute their suits in the name of the state, does not apply to suits pending at the time of the passage of the act; it being plainly the intention of the legislature by the use of the word "*hereafter*" to make the act purely prospective.—*State v. Hicks*, (Ark.) 524.

Revision.

5. Where the legislature revises the statutes of the state after a particular statute has been construed, without changing that statute, the presumption is that the legislature intends that the same construction should be continued on that statute.—*Gulf, C. & S. F. Ry. Co. v. Fort Worth & N. O. Ry. Co.*, (Tex.) 584.

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Streets.

See *Highways; Municipal Corporations*, 5, 6.

SUBROGATION.

When it can be made.

1. Where, in the absence of an agreement or understanding, a stranger to the title to land, conveyed by deed of trust to secure a note, discharges the debt, it is deemed extinguished, and the doctrine of subrogation has no application; and the trustee in the deed of trust is a stranger to the title. It is otherwise, however, where the debt is discharged under an agreement with the debtor, or under circumstances from which an agreement may be implied, that the note shall be held until the money is repaid; and this, although the creditor is not a party to the agreement.—*Fievel v. Zuber*, (Tex.) 273.

2. In Kentucky, the sureties on the note of a married man, given by him for money with which he repaid a loan to him by his wife out of her general estate, which money was applied by the wife to extinguish a vendor's lien on her homestead, worth less than \$1,000, are not entitled to be subrogated to the rights of the vendor under his lien, upon default of the husband, and payment of the note by them.—*Flannery v. Utley*, (Ky.) 412.

3. A holder of a promissory note who recovers judgment thereon against the maker and his surety, upon which judgment an execution is returned *nulla bona*, is not entitled to be subrogated to the rights of the surety, under a mortgage given him by the principal, to secure him in a debt due him by the principal, and to indemnify him against prospective loss under contracts of suretyship, where the mortgage has been assigned by the surety to a *bona fide* purchaser. *LUTKIN and CALDWELL, JJ.*, dissent.—*Waller v. Ogleby*, (Tenn.) 504.

Subscription.

To corporate stock, see *Corporations*, 3.

SUNDAY.

Deed acknowledged on.

A deed acknowledged in Tennessee on Sunday is not, for that reason, void.—*Lucas v. Larkin*, (Tenn.) 647.

Suretyship.

See *Principal and Surety*.

SURVEYS AND SURVEYORS.

1. Where a marked line is called for in a league grant, and that line can be identi-

fied, it will control a call for course and distance; but where the grant calls for no line, but the field notes in the title call for a width of 2,000 varas, and, one line being well established, an old line with marks corresponding in age with the date of the grant is found at such a distance from it as will make the grant 2,560 varas wide, the mere fact of such a line being found will not compel the extension of the grant to such line, instead of the 2,000 vara line.—*Fagan v. Stoner*, (Tex.) 44.

2. A surveyor, in running a division line where it strikes the bend of a river, may go around the bend, and continue his line at a point on the river directly in the course of the line he was running, so as to give to the tract on each side of the line its proper quantity of land.—*Tucker v. Smith*, (Tex.) 671.

TAXATION.

See *Municipal Corporations*, 7; *Railroad Companies*, 20-24; *Schools and School-Districts*.

Constitutionality, equal taxation, see *Constitutional Law*, 7, 8.

— exemptions, see *Constitutional Law*, 7.

— formation of "levee districts," see *Constitutional Law*, 4.

License, power of municipalities, see *Licenses*, 1, 2.

Limitation of suit for taxes, see *Limitation of Actions*, 17, 18.

Liquor dealer, levy of occupation tax on, see *Intoxicating Liquors*, 4.

Special assessments, property liable to, see *Municipal Corporations*, 7.

Turnpike company accounting for taxes, see *Turnpikes*, 2.

— validity of tax in aid of, see *Turnpikes*, 4, 5.

Taxable property.

1. Shares of stock in a cattle-raising company whose property consists of cattle and land located in another state, such stock being owned by a resident of a city, is liable to taxation by the city under Rev. St. Mo. § 4701, providing that the owner of stock in any corporation (except a bank or insurance company) shall list the stock for taxation; and section 4700 providing that all the property of corporations is liable to taxation except a corporation whose stockholders pay a tax on their shares, the property of this corporation being outside the city, and therefore not assessable by it, shares of stock held by a resident of the city should be assessed.—*Ogden v. City of St. Joseph*, (Mo.) 25.

2. Rev. St. Mo. §§ 4694, 4696, making property, real and personal, "in the city," or "within the city," liable to taxation, in-
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cludes intangible personal property, such as shares of stock owned by a resident of the city, as the *situs* of such property is the residence of the owner, when the contrary is not declared by statute.—*Id.*

Exemption.

3. The Arkansas act of 1869 (Manuf. Dig. §§ 5489, 5490) provides that, where the owner of lands which have been sold to the state for taxes shall donate them to aid in the construction of a railroad, the auditor shall issue a certificate for the lands to the railroad, and thereupon all claim for taxes shall be remitted and discharged. *Held*, that this act applies only to lands sold under the general revenue law, and not to those sold under the subsequent act of 1881; this latter act providing that lands sold under it shall be redeemable only upon the payment of the amount due the state, with certain costs.—*Files v. State*, (Ark.) 817.

4. Arkansas act of 1869, so far as it provides that lands sold to the state for taxes, and afterwards donated to a railroad, "shall not be listed nor subject to taxation until conveyed to actual purchasers," by the company, is unconstitutional, because in conflict with Const. Ark. art. 16, § 6, which declares void all laws exempting property from taxation.—*Id.*

Assessment and levy.

5. If a county court in Missouri, in levying and collecting a tax to pay a judgment obtained against the county, does not proceed in the manner in which it is, by Rev. St. Mo. § 6799, required to do in such cases, the judges may be enjoined. The fact that the levy is being made in pursuance of a mandate of a federal court, in which the judgment was obtained directing it, is immaterial.—*State v. County Court*, (Mo.) 844.

Listing property.

6. Article 118 of the Texas Penal Code, which requires the tax-payer to render his property for assessment, applies, not only to the property actually owned by him, but to all property held by him in a fiduciary capacity, and includes national bank officials with respect to the shares, stocks, etc., owned by the individuals of the corporation.—*Downes v. State*, (Tex.) 242.

Failure to list property.

7. Gen. St. Ky. c. 92, art. 5, § 23, authorizes the county court, in a proceeding against a tax-payer for failing to list his property, to direct its clerk to assess the property. *Held*, that the tax-payer cannot rely on lapse of time as a bar to the proceeding.—*Louisville & N. R. Co. v. Commonwealth*, (Ky.) 189.

8. Gen. St. Ky. c. 92, art. 5, § 25, provides that the sheriff shall report to the

county court any one who fails to list his property for taxation in any year. *Held*, that the summons issued on the information need only state the failure to list, and not the other facts required, where the *assessor* gives the information under sections 21 and 22. But the sheriff, in reporting delinquents, is not confined to those becoming such during his term of office.—*Id.*

9. In a statutory proceeding in the county court against a railroad, to compel it to list its property for taxation, the court directed its clerk to make the assessment, and the railroad appealed to the circuit court, where the evidence was heard anew, and the appeal dismissed. *Held*, that this was a virtual affirmance of the county court judgment, and the railroad could not complain that the circuit court had not disposed of the case on its merits.—*Id.*

Penalties.

10. Where a railroad fails to list its property for county taxation, and the sheriff reports it to the county court as delinquent, that court has power, under Gen. St. Ky. c. 92, art. 5, §§ 20-26, to direct its clerk to assess the road; but, more than five years having elapsed since the year for which the tax is claimed, the court has no right to impose the fine and triple tax, under section 20. That, being a penalty, is barred after five years, under Gen. St. Ky. c. 71, art. 3, § 2, barring an action for a penalty after the lapse of five years.—*Louisville & N. R. Co. v. Commonwealth*, (Ky.) 189.

Sale—Notice.

11. Under the provisions of Rev. St. Mo. §§ 3494, 6387, regulating the service of notices and process in tax suits, an allegation in a petition to foreclose a tax lien that the owner of the land is a non-resident of the state, authorizes the clerk to issue an order of publication, which, when issued, published, and proved, gives the court jurisdiction to proceed to judgment; and a sale made under it is valid and binding, as against the apparent owner and his grantees, although he was not in fact a non-resident, when the purchaser had no notice that he was a resident, or that he had conveyed his title to another prior to the institution of the suit.—*Payne v. Lott*, (Mo.) 402.

Evidence of ownership of land.

12. The plat-book of the lands of a county on file in the county clerk's office, duly certified to by the register of the United States land-office, may be resorted to by a collector charged with the duty of suing the owner of land for delinquent taxes thereon, and a sale of land, in a suit to enforce a tax against a party who ap-

pears on such book as the owner, is valid, in the absence of notice of the fact that such party is not the true owner, but has parted with his title by conveying it to another.—*Payne v. Lott*, (Mo.) 402.

Redemption.

13. Under the provisions of Mansf. Dig. Ark. § 5775, the money paid to the county treasurer for redemption of lands sold for taxes must be in coin or treasury notes of the United States, made a legal tender by the acts of congress; and, where a county treasurer refuses to pay over to the purchaser the full amount in such money, but tenders instead the amount partly in money and partly in county scrip or warrants, he may, by *mandamus*, be compelled to make full payment in money.—*Murphy v. Smith*, (Ark.) 891.

TELEGRAPH COMPANIES.

Liability of.

1. A contract by a telegraph company limiting its liability for sending unrepeat messages at night, for delivery next day, at half the usual day rates, on condition that they shall not be responsible for damages for a sum in excess of 10 times the cost of transmission, is invalid, so far as the damage is the result of the negligence of the company or its servants.—*Marr v. Western Union Tel. Co.*, (Tenn.) 496.*

2. Plaintiff delivered to defendant, a telegraph company, a message, to be transmitted to a broker, to buy for him 1,000 shares of certain stock, but the message as sent was for 100 shares. Plaintiff knew of the error the day after the 100 shares had been purchased, but did not renew his order until several days after the stock had advanced. *Held*, that for the advance occurring after the plaintiff could have remedied the mistake the defendant was not responsible.—*Id.*

TENANCY IN COMMON.

See, also, *Partition*.

Partition—Rights against third parties.

If, by agreement between tenants in common, one is permitted to have the exclusive use and possession of a tract of the land which they together own, while the other has such use and possession of other lands so owned, then each may recover for any injury done to that tract which he has the right exclusively to use or possess.—*Gulf, C. & S. F. Ry. Co. v. Wheat*, (Tex.) 455.*

Tender.

Of repayment of sums paid on account of improvements, see *Municipal Corporations*, 4.

Threats and Threatening Letters.

Evidence of threats, see *Homicide*, 6.

TRADE-MARKS.

Laches in suit for infringement, see *Laches*.

Infringement—Accounting.

1. In a suit for an injunction to restrain the infringement of plaintiffs' trade-mark on certain plows, and for damages, the evidence showed that, although defendant had not actually appropriated plaintiffs' trade-mark, he had simulated it. *Held*, that defendant might be compelled to produce his books to show the number of plows thus simulated and sold by him, and the measure of plaintiffs' damages was the entire net profits made by defendant upon such sales. Plaintiffs are not confined to the recovery of the profits on such of the simulated plows as could be shown to have been actually represented and sold as the plows of plaintiffs.—*Avery v. Meikle*, (Ky.) 609.

2. The fact that plaintiffs claimed damages, *held* not to preclude them from electing to have an account of profits, as such an account constitutes in equity the true measure of damages in such a case.—*Id.*

TRESPASS.

Tenants in common, separate action by, see *Tenancy in Common*.

Title to support action, see *Vendor and Vendee*, 8.

To try title, parties to action, see *Ejectment*, 3.

Who liable for.

1. Appellant sold land which he had purchased at a tax sale, but, the title proving defective, the original owner subsequently recovered the land back of the vendee. *Held*, appellant was not liable to the original owner for the value of timber which the vendee had cut while he was in possession. The proximate cause of the injury to the owner was the act of the vendee, over which appellant had no control.—*McClanahan v. Stephens*, (Tex.) 312.

To try title.

2. In an action of trespass to try title to land in Texas, where the jury in the body of the verdict say nothing about ground-rent against one of the defendants, but find ground-rent against another defendant, and in the recapitulation charge the amount so found to the former, and charge a different amount to the latter, such verdict is so inconsistent and uncertain that it will not support a judgment.—*Van Valkenberg v. Ruby*, (Tex.) 746.

TRIAL.

See, also, *Continuance; Judgment; Jury; New Trial; Reference; Witness*.

Instructions, see *Criminal Practice*, 27-48.

—limiting effect of evidence, see *Perjury*, 6.

—as to ordinary care, see *Negligence*, 2.

Jury, demand of trial by, see *Jury*, 12.

Verdict, see *Criminal Practice*, 44, 45; *Trespass*, 2.

Witness, examination of papers in evidence, see *Criminal Practice*, 14.

Conduct of trial.

1. During the progress of a trial, and after the witnesses had been placed under the "rule," a person present in the courtroom informed counsel that he knew some facts material to the case. He was therefore offered as a witness, but rejected by the court, and, after a time, having remained in the room meanwhile, was offered again, but again rejected. *Held*, that the latter rejection was proper.—*Rummel v. State*, (Tex.) 768.

Reception of evidence.

2. In an action of trespass to try title to land, plaintiff, having filed a judicial survey and plat of the land, both of which had been recorded together, was permitted by the court to disconnect the two documents, and put the survey in evidence without introducing the plat. *Held*, that this was not error.—*Tucker v. Smith*, (Tex.) 671.

Instructions.

3. In an action to set aside a deed on the ground of want of sufficient mental capacity to make a contract, the failure of the court to charge the jury on the subject, when no special instruction on the point was requested by counsel, is not error.—*Berryman v. Schumacher*, (Tex.) 46.

4. Instructions are properly refused, though containing correct declarations of law, if covered by those already given, or if antagonistic to those given.—*Fourth Nat. Bank v. Althelmer*, (Mo.) 858.

5. In an action for work and labor in refusing to accept performance by plaintiff, there being a conflict of evidence as to whether plaintiff failed to comply with the contract before defendant discharged him, *held*, that defendant was entitled to an instruction that such failure in any essential particular would justify defendant in discharging him, and was not obliged to be satisfied with a general instruction that plaintiff could not recover unless he complied with the contract.—*Long v. McCauley*, (Tex.) 689.

6. A special charge based upon a single expression selected from a conversation as related by a witness, *held*, not required to be given upon a matter already covered by a general charge.—*Id.*

7. The court should construe a written instrument, and not leave the construction to the jury. If parol evidence has been admitted to explain the instrument, the court should give a construction applicable to each phase of the case developed by the evidence.—*Id.*

Objections and exceptions.

8. A party is not deprived of the benefit of an objection to evidence of a certain fact by afterwards permitting another witness to testify to the same fact without objecting.—*Louisville & N. R. Co. v. Gower*, (Tenn.) 824.

Verdict.

9. Civil Code Ky. § 329, which provides that a general verdict, that either party is entitled to recover money of the adverse party, must assess the amount of recovery, does not apply where the amount is not made an issue of fact or left to the jury, but involves simply an arithmetical calculation according to the uncontroverted allegations and figures appearing in the pleadings.—*Logan Co. Nat. Bank v. Townsend*, (Ky.) 122.

10. Plaintiff claimed one-half of a tract of land as assignee of a widow's interest in the land, and the other one-half as creditor of the deceased husband. Defendant claimed the whole tract under a deed from the husband, which plaintiff charged was fraudulent. The jury found specially for defendant for one-half of the land, and thereupon the court entered judgment for defendant for one-half of the land. *Held*, a special verdict must determine all the issues made by the pleadings, and in language not to be misunderstood, and a verdict finding only part of the issues is fatally defective. Therefore the verdict in this case did not authorize the judgment in favor of defendant for one-half of the land, nor any other judgment.—*Moore v. Moore*, (Tex.) 284.

Trover and Conversion.

Justice's jurisdiction, see *Justice of the Peace*, 4.

Wife's separate estate, conversion of, see *Husband and Wife*, 1, 2.

TRUSTS.

Assignment, personal nature of trust, see *Assignment for Benefit of Creditors*, 6.

Coverture of *cestui que trust*, see *Limitation of Actions*, 11.

Fraud of trustee, see *Limitation of Actions*, 12.

Express trusts—Evidence.

1. A trust on which land was conveyed was not evidenced by the deed, nor by any other writing, nor declared at the time the conveyance was made to the trustee. *Held*, that evidence of the declarations made by the grantor to one of the *cestuis que trustent* on the day before the deed was executed, but after the grantor had determined to do so, and had made all the necessary arrangements therefor, was properly admitted to establish the trust.—*Smith v. McElyea*, (Tex.) 258.

2. Declarations made by a grantor of a trust, many years after the conveyance in trust, as to the conditions of the trust, are not admissible in evidence.—*Id.*

3. To determine the question for whose benefit a trust is created, all the declarations made by the grantor of the trust before the deed was executed, and the subsequent acts and declarations of the trustee and his grantees, and the acts of all the parties who participated in the transactions which led to the making of the deed, ought to be considered; and a request to so charge the jury as to make the declarations made by the grantor to the trustee before the execution of the trust deed conclusive of the question was properly denied.—*Id.*

Resulting trust—Evidence.

4. In order to establish a resulting trust by parol evidence, the evidence must be so clear, definite, and positive as to leave no reasonable ground for doubt.—*Philpot v. Penn*, (Mo.) 896.

5. In a suit to establish a trust in favor of the grantees of B., in land which was located and entered in 1857, in the name of A., under a land-warrant running to S., and assigned by S. to A., it appeared that the patent was issued in 1860 in A.'s name; that B. and his grantees knew this, and did not controvert his title until 1838, long after A.'s death, which occurred in 1876. B., who was A.'s brother, testified that he entered the land with a land-warrant which he owned; that he entered it in A.'s name, instead of his own, in order to avoid a certain regulation of the land-office, (but he did not explain how the warrant happened to be assigned to A. instead of to him;) and that A. assigned the certificate to him, and he assigned it and made a deed to C., to whom he sold the land at two dollars per acre. C. testified to obtaining the land from B. by a trade for another land-warrant. Deeds from B. to C., and from C. to the plaintiff, dated, respectively, in 1857 and 1859, but not recorded until 1876, were produced, but no assignment of A.'s certificate. It was shown that plaintiff had paid the taxes since 1873, except for one

year. *Held*, that the evidence was not sufficient to establish a resulting trust.—*Id.*

Powers and liabilities of trustees.

6. A trustee appointed to sell lands cannot, by deed of gift or deed made upon a merely nominal consideration, pass any title.—*De Everett v. Texas-Mexican Ry. Co.*, (Tex.) 678.

7. Under a trust to permit the beneficiary "to use and enjoy the said property, and take the rents, issues, and profits thereof as long as he shall live," the trustee has an implied power to sell perishable property, and to convert into money transient securities, for the purpose of making permanent investments; and a bank purchasing a promissory note from the trustee, in good faith, acquires a valid title.—*Mason v. Bank of Commerce*, (Mo.) 206.

8. A claim against a trustee for mismanagement, resulting in loss of the trust funds, stands no differently from any other debt as regards its discharge by an assignment containing a provision for the discharge of accepting creditors' claims.—*Mills v. Swearingen*, (Tex.) 268.

9. A trustee, with power to sell, who sells the trust-estate to himself, has the burden of showing that he is a *bona fide* purchaser; and, as between a purchaser from such trustee under a recorded trust, and the beneficiary charging fraud in the sale on the part of the trustee, where nothing is made to appear but the sale and the purchase with notice, such sale and subsequent purchase are void.—*De Everett v. Henry*, (Tex.) 566.

Investments.

10. If a trustee deposits the trust funds in a private bank in which he is a partner, where the funds will draw interest, upon the request of one beneficiary and by the consent of the other, he will not be liable for their loss merely because the bank afterwards fails, the investment being a safe one when made, and there being no evidence that he, at any time, knew the money was unsafe.—*Mills v. Swearingen*, (Tex.) 268.

11. If trust money is, for the purpose of investment, loaned to or deposited in a bank to the credit of the trustee as such, it is held, as all other money of the bank, upon the relation of debtor and creditor, is not charged with the trust in the bank's hands, and, upon the failure of the bank, no preferred claim on account of it arises in favor of the *cestui que trust*.—*Id.*

TURNPIKES.

Turnpike companies—Taxation.

1. The charter of a turnpike company authorized the company to levy a tax upon adjoining property owners to aid in con-

structing the road. *Held*, that the company had no right, in the absence of an express charter provision authorizing them to do so, to borrow money in order to complete the road at an earlier date, and charge the interest paid on the loan to the tax-payers, and include it in the tax levied.—*Lewis & Mason Co. Turnpike Road Co. v. Thomas*, (Ky.) 907.

2. The tax-payers were entitled to have in equity a statement of the cost of constructing the road, and of the amount of taxes collected; and, if they had paid more than was due, the company should be compelled to refund. In such an action it was not necessary to allege mistake or fraud.—*Id.*

3. The question as to how the income of the road should be applied, whether to the repair of the old part or to the completion of the new, should be left to the discretion of the directors of the company, without any attempt, on the part of the chancellor, to control them.—*Id.*

4. In view of the fact that, under Gen. St. Ky. c. 56, a corporation is allowed to commence business as soon as its articles are filed in the county clerk's office, that the legality of the incorporation is required to be presumed, that neither the incorporators themselves, nor those sued by the corporation, are allowed to deny it, and that the franchise can only be annulled by direct proceedings, *held*, that the failure of a turnpike company to file articles in the office of the secretary of state within three months after filing them in the county clerk's office, as required, would not invalidate his organization, so as to affect the validity of a tax voted for building a turnpike, although section 6 of the act provides that the acts of corporations shall be valid if the required copy of the articles is filed in the office of the secretary of state within three months.—*Walton v. Riley*, (Ky.) 605.

5. The election, upon the question of the tax, having occurred in March, 1888, *held*, that a levy of it in December, 1888, was soon enough, although the act of April 26, 1880, required the levy to be made "immediately" after the election; and that a list made from the assessor's return for 1888 was, within the meaning of the statute, made from "the last annual assessment."—*Id.*

Toll-gates.

6. A turnpike company has the right to abandon a toll-gate established at a particular point on its road, and erect a new gate at a different point; and although the new gate is set up between appellee's entrance to his farm and the neighboring town, so that he must now pay toll both in going to and coming from the town, or open a new entrance to his farm, he cannot recover

damages of the turnpike company on this account.—*Maysville & Mt. Sterling Turnpike Road Co. v. Ratliff*, (Ky.) 148.

7. A turnpike company was authorized by its charter to acquire land for its road 45 feet wide, 16 feet of which was to be covered with stone, and used for travel. *Held*, it may erect a toll-gate within the 45 feet without rendering itself liable for obstructing the highway, provided it leaves 16 feet covered with stone free for travel.—*Id*.

8. The charter of a turnpike company authorized it to erect a toll-gate upon the completion of five miles of road, with the proviso that no one should be erected nearer than one mile from any town on said road. *Held*, that there was nothing requiring the gates to be precisely five miles apart.—*Id*.

Revocation of charter.

9. Where it was the intention of the charter of a turnpike company to establish a ferry merely as an incident to the turnpike, in order to render travel over it feasible, the privilege of maintaining the ferry falls in that event with the revocation of the turnpike franchise.—*Darnell v. State*, (Ark.) 865.

Undue Influence.

See *Fraud*, 2, 3.

USURY.

National banks, right of action against, see *Banks and Banking*, 4.

Payment, application of, to usurious interest, see *Payment*, 2.

What amounts to.

An agreement by which a party lends United States bonds, and the borrower agrees to pay over to the owner the interest paid by the government, and 6 per cent. in addition, is not a contract for the loan of money, and is not usurious, under the Tennessee usury law. (Code Tenn. §§ 1948, 1944.) declaring that any excess of interest for the use of money over 6 per cent. per annum is usury.—*Marshall v. Rice*, (Tenn.) 177.

Variance.

Larceny, in indictment for, see *Larceny*, 5.

VENDOR AND VENDEE.

See, also, *Execution*, 6-8; *Executors and Administrators*, 10; *Judicial Sales; Limitation of Actions*, 7; *Lis Pendens*; *Specific Performance*; *Taxation*, 11-18.

Adverse possession, see *Limitation of Actions*, 1, 2.

Bona fide purchasers, see *Executors and Administrators*, 11; *Taxation*, 11, 12; *Trusts*, 9.

— under quitclaim deed, see *Deed*, 4.

— who is, see *Fraudulent Conveyances*, 1.

Damages for breach of contract to convey, see *Damages*, 1, 2.

Decree quieting title inures to benefit of vendee, see *Judgment*, 6.

Judicial sale, reversal of judgment, effect on vendee's rights, see *Judicial Sales*, 4.

— right of vendee, see *Judicial Sales*, 10.

Pleading in action for purchase price, see *Pleading*, 7.

Construction.

1. Where the vendor contracts to give a warranty deed, he cannot, if the vendee is willing to accept it, refuse to execute and deliver such a deed, on the ground that, his title having been disputed, he could not in good faith do so. A refusal to make such deed will constitute a breach of contract.—*Hartzell v. Crumb*, (Mo.) 59.

Vendor's lien.

2. In order to facilitate a division of land between heirs, one heir, A., sold her share to another heir, B., but, in making the necessary conveyances, instead of the land designed for B. under this arrangement being all conveyed to him directly, half of it was conveyed to A., and through A. to B. The half thus conveyed through A. was comparatively worthless. The parties were illiterate. *Held*, that a reformation of the deeds would be ordered so as to allow A. to enforce a vendor's lien upon an undivided half of the whole tract allotted to B., instead of upon the worthless half.—*Felton v. Leigh*, (Ark.) 688.

Bond for title.

3. The owner of land gave a bond for title. The obligee in the bond made an assignment for the benefit of creditors, and the owner of the land undertook to cancel the transfer by receiving back the bond, and releasing the purchase money. *Held*, that he did not thereby reinvest himself with title, and he could not recover of a trespasser for cutting and carrying off timber from the land.—*Jones v. Langdon*, (Ky.) 129.

Bona fide purchasers.

4. Where the defendants' title was derived through the widow of a former owner of the land, who was proved to have taken it in exchange for separate property, it appeared that the exchange was effected by ancient deeds executed and recorded on the same day, and expressing the same consideration, but not otherwise evidencing the fact that they were made for the purpose of effecting the exchange. *Held*, that the purchaser from the husband's executor and the widow was not affected

with notice that the land was separate property of the husband by such deeds, and, if he had actual notice, it would not affect the right of the defendants, if they, or any of those persons through whom they derived title, were purchasers for value without notice of facts which would make the land the separate property of the husband of the widow through whom they derived title.—*Word v. Box*, (Tex.) 98.

— Unrecorded deed.

5. Where a person purchased land with actual knowledge of a prior, though unrecorded, conveyance thereof by his grantor to a third person, his claim of title is without merit.—*Brown v. Hanauer*, (Ark.) 27.

Remedies.

6. It is no defense to an action by a vendee of land, under a parol contract of sale, which he has disaffirmed, to recover personal property delivered by him to the vendor on account of the purchase price, that at the time of disaffirmance he agreed to give the defendant the property sued for in consideration of being released from his contract to buy the land. The contract to buy became a nullity immediately on disaffirmance, and there was no consideration to support the agreement to surrender the property in return for the release.—*Shuder v. Newby*, (Tenn.) 498.

VENUE IN CIVIL CASES.

Local actions.

An action to recover three different tracts of land located in three different counties cannot be brought in one of the counties merely because the plaintiff relies on the same state of facts to recover each of the tracts, unless the defendants who claim land in the counties other than that in which the suit is brought waive their right to be sued only in the county in which the land they claim is situated.—*Martin v. Robinson*, (Tex.) 550.

Verdict.

See *Trial*, 9, 10.

Facts presumed after, see *Appeal*, 30.

Indictment for different offenses, general verdict, see *Criminal Practice*, 45.

Referee, special findings by, see *Reference*, 1.

Waters and Water-Courses.

See, also, *Canals*.

Negligence, damage to riparian proprietor from jetty, see *Negligence*, 3.

River improvement company, see *Corporations*, 4.

Taxes for levee improvement, see *Constitutional Law*, 4.

Ways.

See *Highways*; *Turnpikes*.

WILL.

See, also, *Executors and Administrators*.

Assignment of expectancy, see *Assignment*, 1.

Contest, compromise of, see *Limitation of Actions*, 9.

Election between devise and dower, see *Dower*, 5.

Homestead, devise in lieu of, see *Homestead*, 1.

Interest on advancement, see *Interest*, 2.

Capacity to make.

1. Husband and wife brought suit to recover land alleged to belong to the wife as *general estate*. The wife dying during the pendency of the action, the husband claimed the land as devisee under her will. *Held*, that the wife had no power to devise the land, under Gen. St. Ky. c. 118, § 4, providing that a married woman may by will dispose of her *separate estate*, and that the action was therefore properly dismissed.—*Perkins v. Towery*, (Ky.) 604.

Widow's election.

2. Where a testator devises all his estate, real and personal, to his widow, and she fails to renounce the provisions of the will, she must be presumed to claim under it, and consequently to have waived her right to homestead in his estate.—*Taylor v. Loller's Ex'rs*, (Ky.) 165.

3. A husband disposed by will of a tract of land owned by himself and wife as community property, allotting to his wife a portion, including the homestead, which she would not have been entitled to except under the will. *Held*, that a conveyance by her of such portion was an election to take under the will.—*Rogers v. Trevathan*, (Tex.) 8 S. W. 569.

Devise and legacy.

4. A devise to A. for life, and, after A.'s death, to B., and, if B. should die without children, then to four other named kinsmen, or to their children, if the parents should be dead, and, if no children, to the survivors of the four devisees, is not a perpetuity, such as is prohibited by Gen. St. Ky. c. 63, art. 1, § 27, providing, "the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, 21 years and 10 months thereafter."—*Davis v. Buford's Ex'rs*, (Ky.) 4.

5. A., in his will, *inter alia*, gave B. a legacy of \$10,000, in cash, stocks, notes, or

bonds that he might leave at his death. At A.'s death there was on hand a few hundred dollars in cash, \$2,200 in good notes, \$7,040 worth of railroad stocks, and \$3,000 in worthless notes. *Held*, that the legacy to B. was not a specific legacy, either as to the money or stock, notes, etc., but a general legacy, and the deficiency was payable out of the assets of the estate.—*Martin v. Osborne*, (Tenn.) 647.

6. When a testator devises land to two daughters "during their natural life, and to their children respectively at their death," the children of one of the remainder-men, who dies before the falling in of the life-estate, take an interest in the land, especially when a preceding clause in the will, by devising land to another daughter, "to her and to her children living at the time of her death," shows that it was the testator's intention that his grandchildren should take as tenants in common.—*Elkins v. Carsey*, (Tenn.) 828.

7. A testator provided that, "in case of the death of either of my children, I will that their said interest shall go to their children, in case they have any; if not, it is to go equally to my four living children, or the heirs of their body, or such as may be living." *Held* that, all of the children having survived the testator, each was entitled to his respective share in *fee-simple*, and not as a defeasible fee, subject to be divested upon any one of them, *subsequently* to testator's death, dying without issue.—*Wills v. Wills*, (Ky.) 900.

Construction.

8. The courts of this country will so construe a will, when not inconsistent with the intention of the testator, as to prevent the title to real estate from remaining contingent; and, unless there are plain indications of a contrary intent, will consider the entire title as vested in those claiming under the will, rather than in abeyance.—*Wills v. Wills*, (Ky.) 900.*

9. Domestic animals housed on the home lot, but sometimes worked or pastured on an adjoining tract, are included in a devise of the homestead, "with all the personal property and effects in the house and on the lot."—*Martin v. Osborne*, (Tenn.) 647.

Advancement.

10. Where a father pays a debt for his son without taking a note or obligation from the son, and there is no other circumstance indicating an intent that the amount should become a debt, it will be considered as an advancement.—*Steele v. Friarson*, (Tenn.) 649.

11. Where a father, having paid out money for his son, refused to accept a receipt which called the payment an "advancement," but had the person receiving the money execute a receipt with that ex-

pression omitted, and kept such receipt among his papers until his death, *held*, that the payment was not an advancement, but created a debt.—*Id.*

WITNESSES.

See, also, *Evidence*.

Absence of, see *Continuance*, 1, 2.

Competency of wife to show fraud in obtaining her signature, see *Mortgages*, 9.

Credibility, evidence affecting, see *Malicious Prosecution*, 5.

Exclusion from court-room, see *Trial*, 1.

Sequestering, see *Criminal Practice*, 18.

Verdict, impeachment of, by affidavits of jurors, see *New Trial*.

Competency.

1. Where one of two jointly indicted defendants pleads guilty, or is separately tried and convicted, or acquitted, in either case he becomes a competent witness for the other.—*State v. Hunt*, (Mo.) 868.

2. A state's witness having disqualified herself upon her *voir dire* with regard to her knowledge of the nature and obligation of an oath, the state was permitted to take her to a private office, and instruct her thereupon. She was thereupon returned into court, and, replying that she then understood the test, was held competent as a witness. *Held*, that the proceeding was erroneous.—*Taylor v. State*, (Tex.) 753.

3. The provisions of article 2248, Rev. St. Tex., rendering the testimony of parties as to transactions with wards incompetent as witnesses in actions by and against guardians, apply to actions between the guardian as guardian and third persons, and not to suits in which the guardian and ward are opposing parties.—*Jones v. Parker*, (Tex.) 222.

4. A child seven years old, called as a witness, said that she did not know what was done when she held up her hand, and that she did not know what would be done with her if she told a story. *Held*, judging from this, and from the manner in which she gave her testimony afterwards, and notwithstanding the trial judge attempted to instruct her as to the nature of an oath, that she was incompetent.—*Holst v. State*, (Tex.) 757.

5. Parties charged as principals, accomplices, or accessories, whether in the same or different indictments, are competent as witnesses *against* each other, although a statute makes them incompetent as witnesses *for* one another.—*Rangel v. State*, (Tex.) 788.

Privilege.

6. Communications made to a physician professionally are not privileged, in the absence of a statutory provision making them so.—*Steagald v. State*, (Tex.) 771.

7. In order to be available, a witness must, at the time he is examined, claim his exemption upon the ground that his answer would criminate himself. Where only a general objection is made, and the witness is not shown to have answered only because he was compelled, his answer cannot afterwards be suppressed.—*State v. Wharton*, (Tenn.) 490.

8. In a suit by the state against a druggist to collect a tax imposed by law upon retail liquor dealers, the sale of liquors without a license being a misdemeanor, the defendant cannot refuse to testify as to the sales made by him on the ground that he would criminate himself, when the prosecution for the misdemeanor involved in such sale is barred by the statute of limitations.—*Id.*

9. Privileged communications in criminal cases are subject to two rules: (1) To be privileged, they must pass between the client and his attorney in professional confidence, and in the legitimate course of the latter's legitimate employment. (2) If the communications are made by the client to the attorney before the commission of the crime, and for the purpose of being guided or helped in the commission, they are not privileged, and this second rule is not affected by the fact that the attorney is wholly without blame.—*Orman v. State*, (Tex.) 468.*

Transactions with deceased persons.

10. Rev. St. Tex. art. 2248, making incompetent the testimony of a party to an action to which the representative of a decedent is either plaintiff or defendant, in so far as the testimony relates to any conversation or transaction with the decedent, does not exclude the testimony of one not a party to the suit, and not bound by the judgment, although such party may be interested in the issue.—*Gilder v. City of Brenham*, (Tex.) 809.*

11. In an action by a creditor to subject land inherited by the debtor from his deceased father, evidence of the debtor that he knew of his own knowledge that his father had purchased the land with his wife's means, *held* not incompetent under Rev. St. Tex. § 2248, providing that, "in actions by or against executors in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statement by the decedent, unless called to testify by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transactions with such decedent." This section does not apply, as this action is not by or against an executor, nor does it arise out

of any transaction with the decedent. The testimony offered was not as to a declaration of the deceased father, but as to a fact within witness' own knowledge, that the separate means of his mother paid for the land.—*Harris v. Seinsheimer*, (Tex.) 807.*

12. Under Civil Code Ky. § 606, subsec. 2, providing that no person shall testify for himself concerning any transaction with a deceased person, the individual liability assumed by one partner in permitting judgment by default to go against him on appeal does not render him a competent witness, at the next trial of the action, to testify for the other partners, with reference to the same transaction, as to what transpired between the witness and the dead man as to the payment of the partnership debt sued on.—*Worthington v. Miller's Adm'r*, (Ky.) 532.

Credibility.

13. Where, in a criminal case, the defendant offers to prove by another witness that a witness who had been examined by the state had said that he and another witness would leave, and not be witnesses against defendant, for \$100, the defendant is entitled, in cross-examination, to ask such state witness whether he made the statement alleged.—*State v. Downs*, (Mo.) 219.

Examination.

14. Under the practice in Texas, leading questions are permissible when the witness shows clearly an unwillingness to testify.—*Taylor v. State*, (Tex.) 753.

15. A question asked a witness on a trial for theft of a branded animal, "Is this the brand that was on the animal killed?" at the same time showing the witness a representation of a brand, is leading, and it is error to permit it to be answered.—*Rangel v. State*, (Tex.) 788.

WRITS.

See, also, *Habeas Corpus*; *Mandamus*; *Quo Warranto*.

Return, construction of, see *Execution*, 5; *Judicial Sales*, 6.

Validity.

1. Process issued against a railway company, when the petition is filed against a railroad company, is not on that account defective.—*Central & M. R. Co. v. Morris*, (Tex.) 457.

2. Where a statute provides that one citation shall issue for all the defendants living in the same county, if a plaintiff issues more than one citation, he becomes responsible for the additional costs, but such issuance does not render the service of the citations void.—*Id.*

Service of process.

8. Under Rev. St. Tex. art. 1220, providing that the officer serving process on a defendant outside the county where suit is pending shall deliver to him a certified copy of the petition, the officer must deliver the certified copy, whether the citation so commands or not.—*Crawford v. Wilcox*, (Tex.) 695.

4. Where a railroad has passed into the control and management of the bondholders, they and their agents represent the railroad company for the purpose of being served with notices directed by law to be served on the railroad company.—*Woodhouse v. Rio Grande R. Co.*, (Tex.) 823.

5. Where a suit is filed in the name of a minor by his guardian, and, a demurrer to the petition being sustained, an amended petition is filed substituting the guardian as plaintiff for the minor, *held* no service of process is necessary on the amended petition, and it is error in the lower court to dismiss the action on plaintiff's refusing to issue such process; especially as the defendants were in court, and were not demanding the process, and the dismissal

was made by the court of its own motion.—*Rabb v. Rogers*, (Tex.) 808.

Return.

6. Where two separate citations are issued against one person as the agent of two different corporations, and the return of the officer upon each citation is that he delivered a copy of "this writ," it is to be presumed, the writs being different in wording, that one was delivered for each of the corporations.—*Central & M. R. Co. v. Morris*, (Tex.) 457.

Publication.

7. An order of publication of summons which gave the party's name as "Q. Noland," instead of "Quinces R. Noland," conferred no jurisdiction on the court.—*Skelton v. Sacket*, (Mo.) 874.

8. When a party is sued by a wrong name, and service of summons is actually made on the person intended, and he does not appear and plead in abatement, the judgment rendered in such case is not void; the use of a wrong name in the order of publication against a non-resident gives him no notice, and the judgment is void, unless he enters his appearance.—*Id.*

TABLES OF SOUTHWESTERN CASES

IN

STATE REPORTS.

We herewith furnish tables of all those cases which, originally published in the SOUTHWESTERN REPORTER, have since appeared in the various State Reports. Reference is made in each case to the volume and page of both the State Report and the SOUTHWESTERN REPORTER. Similar tables will be made and issued hereafter. The advantage of such tables, both for purposes of reference and citation, are obvious,—much increasing the permanent value of the series.

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